

PhD Thesis

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Social Welfare Rights of EU Citizens in Ireland Ireland's non-compliance with EU law

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Declaration

I, Derek Shortall, certify that this thesis is all my own work and that I have not obtained a degree in this University or elsewhere on the basis of this work.

Signed _____

Dated _____

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Introduction

There was once a dream that was Europe, a place without borders or frontiers, where economic migrants and their families could move freely between Member States. Such a vision, of course, demanded that migrant workers and their families would be protected not just in the context of the right to engage in employment and self-employment, but equally in the realm of social security. This was recognised in the very first European Treaty in 1951 and considerably strengthened by the Treaty Establishing the Economic Community in 1957. Regulations and Directives were adopted on the basis of this Treaty and later Treaties.

Precisely what those Treaty provisions, Regulations and Directives grant in the form of social welfare entitlements has been the subject-matter of considerable controversy since the late 1960's to the present day. There remains considerable controversy between Member States and the Union¹ in this area. Member States preferring a more conservative and narrow reading of EU law in respect of social welfare entitlements, whilst the European Commission and Court of Justice² lean towards a more expansive interpretation, ostensibly, to protect free movement rights. The economic downturn has brought the old controversies, once again –if they ever really went away– into sharp relief, with Member States once again attempting to protect their depleted financial resources from the demands of EU nationals present in Member States.

It is timely now that the precise nature of the social welfare rights granted by EU law be assessed, determined and set out in as clear a manner as

¹ The term 'Union' or 'EU' is referred to throughout the text. The European Union was created by the Treaty of Maastricht in 1993. The term European Economic Community (EEC), extant since 1958, was renamed the European Community (EC). When the Treaty of Lisbon entered into force on 1 December 2009, the European Union (EU) replaced the European Community (EC).

² Prior to the Lisbon Treaty (2009), the Community Courts were comprised of the Court of Justice (ECJ), the Court of First Instance (CFI) and judicial panels. Post Lisbon Treaty, the term 'Court of Justice of the European Union' includes the ECJ, the General Court (formerly the CFI) and specialized courts (formerly judicial panels). See Paul Craig and Grainne de Burca, *EU Law, Text, Cases and Materials*, (5th Edn, Oxford, 2011) at 58.

possible in order to bring some degree of certainty to this somewhat neglected area of EU law. This has brought this thesis into the realm of not alone EU law, but also Irish national law and its interaction with EU law. It has also required an in-depth analysis of the law as it pertains to the A2 accession countries, Romanian and Bulgarian, whose nationals were –until the dramatic and unexpected lifting of restriction in July 2012– subject to transitional measures which impacted enormously on social welfare entitlements.³ Given the significant disadvantages endured by A2 nationals, denying them direct and immediate access to Ireland and other Member States labour markets, compliance with EU law by host Member States was crucial.

The Court of Justice has consistently interpreted Treaty⁴ provisions governing free movement, Regulations and Directives in a manner which grants an extraordinary degree of protection, in respect of social welfare rights, to EU citizens moving within the Union, thus elevating the principle of equality and the status of Union citizenship.

However, fundamental to the question of Treaty and secondary law rights is the question of compliance by Member States. Membership of the Union places significant demands upon all Member States both new and old. There are important principles at play –equality,⁵ sincere co-operation⁶ and solidarity⁷– which may be regarded as the foundation stones of the Union. The principle of co-operation in good faith as between Member States is of particular relevance and importance in social welfare matters and may be

³ The latest Member State in the Union, Croatia (2013), has not been subjected to any labour market restrictions in Ireland. However, Member States retain an option to introduce restrictions against Croatia and restrictions may be applied to future Member States.

⁴ Treaty provisions have been re-numbered on several occasions. The primary Treaty provision on ‘workers’ rights was Art 48 (pre-Amsterdam), Art 39 TEC and is now Art 45 TFEU. The primary Treaty provision on the rights of the self-employed was Art 52 (pre-Amsterdam), Art 43 TEC and is now Art 49 TFEU. The Treaty provision governing social security was Art 51 (pre-Amsterdam), Art 42 TEC and now Art 48 TFEU. The case law of the Court of Justice, depending upon the year of judgment, uses the aforementioned numbering.

⁵ Both in terms of Member States pursuant to the Treaty on European Union, art 4 (as amended by Lisbon Treaty) and individual citizens pursuant to the Treaty on European Union, art 9 (as amended by Lisbon Treaty) and TFEU, art 18.

⁶ Treaty on European Union, arts 4(3) and 13(2) (as amended by the Lisbon Treaty).

⁷ Treaty on European Union, arts 2, 3, 21(1) (as amended by the Lisbon Treaty).

found in Court of Justice case law and secondary law instruments, most specifically Regulation 987/2009,⁸ the implementing regulation for Regulation 883/2004.⁹

Denial of a right offends not just the right itself but these fundamental principles. Ireland's non-compliance in a number of important areas of the law, identified in this thesis, is an affront not alone to Union citizens affected, but to the Union itself. This is particularly so in respect of the treatment of A2 Member State nationals in this State, by virtue of a deliberate denial of important rights through non-compliance and unlawful derogation. This raises serious questions for Ireland and the broader Union and will, hopefully, serve as a salutary lesson for Ireland and the Union going forward, in respect of the treatment of future EU entrants. The potential accession of Turkey to the Union, with the prospect of 80 million new EU citizens, raises the same, if not greater, pre-accession concerns than did the accession of the A2 countries.

Many of the rights identified in this thesis require greater clarity from both the Union and the Court of Justice, such as the question of the rights of the self-employed. Does Article 48 TFEU elevate the self-employed to 'worker' status on the basis of historic assimilation? Doubts regarding the precise rights of those formerly self-employed, or temporarily without work, continue to arise before the national courts in both Ireland and the UK, with a conservative and narrow interpretation being given to both Treaty and secondary law rights in both jurisdictions. The Court of Justice, on the other hand, has always taken an expansive and progressive view of Treaty and secondary rights and has narrowly interpreted restrictive provisions in the name of free movement. The 'right to reside' test, which affects the formerly self-employed and those who do not have or no longer retain worker status –applied by a number of Member States in different forms,

⁸ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1–42.

⁹ Regulation 883/2004 on the Co-ordination of Social Security Systems OJ L 166/1 of 2004.

including Ireland and the UK– remains controversial and difficult in application, its legal basis dubious at best. Battle lines, as between the European Commission and the UK have already been drawn up.

Ireland's non-compliance with EU law, in a number of key areas governing social welfare entitlements, demanded an assessment of the decision-making process in Ireland and the domestic remedies available to those individual EU citizens affected. Rights must be enforceable and national, statutory remedies have proved problematic for social welfare claimants seeking prompt redress, with significant and unacceptable delay in the Social Welfare Appeals system combined with a failure on the part of successive Ministers for Social Protection to enact regulations providing for interim social welfare payments for those in the appeals system. The shortcomings in the appeals system force many dissatisfied social welfare claimants into the national court system, where special rules, governing the circumstances in which a social welfare claimant may step outside the appeals process, must be considered.

The author is a practitioner in social welfare law and judicial review. This has given rise to numerous opportunities to test areas of the law before the Courts, where there is uncertainty in the law in respect of social welfare entitlements. Those cases are referred to and discussed throughout the text and include many cases which challenged the Ireland's transposition of the transitional measures.

Chapter 1

**SOURCES OF SOCIAL WELFARE LAW, THE RIGHTS GRANTED
AND THE BENEFICIARIES**

1. Introduction

Social welfare law has always been highly technical, extremely complex and controversial. This is borne out by the growing body of Court of Justice case law dealing with social welfare –up to 1980, one fifth of all preliminary references to the Court of Justice raised questions regarding social security.¹ By 2009 this figure was halved, only because of the extension of the Union’s powers with the Single European Act and the Maastricht Treaty.² At national level, up to recently, relatively few social welfare cases troubled the courts in Ireland –just four in 2004.³ This, however, has changed dramatically, with forty one cases in the High Court⁴ in 2012 and, at the time of writing, already forty cases in the first half of 2013. There was one putative preliminary reference from Irish Courts on social security in 2012⁵ and one, so far, in 2013.⁶

The enlargement of the Union in 2004⁷ and 2007,⁸ combined with the economic boom in Ireland –the peak of which fell between those years– led to a large influx of nationals from these new Member States, eager to exercise their new found freedom of movement and benefit from the economic boom. When the economic down-turn took effect, many EU nationals –who had spent several years working and residing in this State and whose families were living here with them– lost their employment and became reliant upon social welfare. Entitlement to social welfare in most cases was relatively straightforward. However, many cases gave rise to complex legal questions, such as the rights of the formerly self-employed, which have troubled the Courts for years in both Ireland and the UK. If

¹ Sean Van Raepenbusch, *The Role of the Court of Justice in the Development of Social Security Law of Persons Moving Within the European Union*, in *Fifty Years of Social Security Co-ordination*, Ed. Prof. dr. Yves Jorens (European Commission, 2009) at 30.

² *ibid.*

³ Available on: <<http://highcourtsearch.courts.ie/hcslive/case>> accessed on 9 June 2013.

⁴ *ibid.* accessed on 14 January 2013.

⁵ *Hrisca v Minister for Social Protection*, unreported, High Court, White J. 16 February 2012. The reference did not proceed as the case was settled. This case is discussed in Chapter 3, section 2.10 and Chapter 2, section 4.4.

⁶ *Kelly v The Minister for Social Protection* [2013] IEHC 260 (Case C-403/13 *Kelly*).

⁷ Treaty of Accession 2003: Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia.

⁸ Treaty of Accession 2005: Romania and Bulgaria.

social welfare entitlements were not already difficult enough to determine, particularly complex questions arose in relation to the social welfare rights of Romanian and Bulgarian nationals, whose free movement rights were circumscribed by transitional arrangements.⁹ Further, the interaction between secondary law instruments –such as Directive 2004/38¹⁰ and Regulation 883/2004¹¹ –which replaces Regulation 1408/71¹²– has, in recent years, been thrown into sharp focus. As a consequence, many EU nationals, previously economically active in Ireland, have struggled to establish an entitlement to social security, primarily because the decision-maker misunderstood or miss-applied the law or because the law was ambivalent and requires clarity. Whilst social security protection was envisaged in the earliest days of the Union, featuring in the first Treaty, it remains difficult both in practice and politically, with claimants routinely being denied their lawful entitlements.

The purpose of this chapter is three-fold: (1) to identify sources of social welfare law at both EU and national law level (2) to define the beneficiaries and (3) to address the complex interaction between EU law and national law. Particular areas, such as the right to reside, the interaction of Directive 2004/38 and Regulation 883/2004 and the rights of post-active or formerly self-employed persons, warrant, and are given, detailed consideration.

2. European Union Law

2.1. Categorisation of social welfare payments

⁹ For a comprehensive discussion on transitional measures see Chapter 2.

¹⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158, 30.4.2004, p. 77–123.

¹¹ Regulation 883/2004 on the Co-ordination of Social Security Systems OJ L 166/1 of 2004.

¹² Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community OJ L 149, 05/07/1971 P. 0002 – 0050.

Under European Union law –which is supreme¹³ and automatically overrides conflicting provisions of national law¹⁴– social welfare may be categorised under three headings: social security; social assistance and; special non-contributory cash benefits,¹⁵ the latter which has characteristics of both social security and assistance. A further term, ‘social advantages’, found in Regulation 1612/68,¹⁶ has been applied to both social security and social assistance.¹⁷

The distinction between social security and social assistance is, as noted by Pennings, difficult to determine.¹⁸ Martinsen avers that the general characteristics of social security benefits are that claimants are compulsorily or voluntary insured against defined social risks financed by collectively paid contributions, the benefits mirroring the individual contributions made,¹⁹ thus creating a legally defined entitlement. Regulation 883/2004 is, however, broader in scope.²⁰ Further, the Court of Justice in *Hughes*²¹ held

¹³ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585. *Meagher v Minister for Agriculture* [1994] I IR 329.

¹⁴ Case 106/77 *Simmmenthal* [1978] ECR 629 at para 17:

‘Furthermore, in accordance with the principle of the precedence of community law, the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but... and take precedence in, the legal order applicable in the territory of each of the member states - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions.’

¹⁵ Regulation 883/2004 on the Co-ordination of Social Security Systems OJ L 166/1 of 2004, art 70.

¹⁶ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community OJ L 257, 19.10.1968, p. 2–12, art 7(2). Now repealed and replaced, on 16 June 2011, by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union OJ L 141, 27.5.2011, art 7(2).

¹⁷ In Case C-310/91 *Schmid* [1993] ECR I-3011, Disability Allowance was deemed to be covered by both Regulation 1408/71 and Article 7(2) of Regulation 1612/68, at para 17:

‘Since Regulation No 1612/68 applies in general to freedom of movement for workers, it may apply to the social advantages which, at the same time, come under the specific scope of Regulation No 1408/71...’

In Case C-249/83 *Hoeckx* [1985] ECR 982 a benefit guaranteeing a minimum means of subsistence was deemed to constitute a social advantage, such a payment is also social assistance.

¹⁸ See Frans Pennings, *European Social Security Law*, (5th Ed., Intersentia, 2010) at 58.

¹⁹ Dorte Sindberg Martinsen, *The De-Territorialization of Welfare*, in *EU Law and the Welfare State, In Search of Solidarity* (Oxford University Press, 2005) at 91-92.

²⁰ Regulation 883/2004, art 3(2):

‘Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.’

that the absence of a contribution requirement is not determinative for the purpose of classification²² and that:

‘a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71...’²³

Though not defined in Regulation 883/2004,²⁴ social assistance is non-contributory and involves an individual assessment of the claimant’s personal needs.²⁵ The Court of Justice has held that classification of social assistance under national law is not determinative.²⁶ The assessment of personal needs might appear to be the defining point, however, the meaning of ‘personal needs’ has been given a very narrow interpretation by the Court of Justice. Thus, even though a social welfare payment may be non-contributory and involve a means test, it may, nonetheless, fall outside of the ambit of social assistance where national legislation provides objective, legally defined criteria which, if met, confer entitlement to the benefit and

²¹ Case C-78/91 *Hughes*, [1992] ECR I-4839 at para 21:

‘Contrary to the view expressed by the United Kingdom and German Governments, the fact that the grant of the benefit is not subject to any contribution requirement does not affect its classification as a social security benefit. The method by which a benefit is financed is immaterial for the purposes of its classification as a social security benefit, as is clear from the fact that under Article 4(2) of Regulation No 1408/71 non-contributory benefits are not excluded from the scope of the regulation.’

²² *ibid.* at para 21:

‘Contrary to the view expressed by the United Kingdom and German Governments, the fact that the grant of the benefit is not subject to any contribution requirement does not affect its classification as a social security benefit. The method by which a benefit is financed is immaterial for the purposes of its classification as a social security benefit, as is clear from the fact that under Article 4(2) of Regulation No 1408/71 non-contributory benefits are not excluded from the scope of the regulation.’

²³ *Hughes* (n 21) at para 15.

²⁴ Case C-140/12 *Brey*, Opinion of Advocate General Wahl, at 50:

‘Social assistance, however, is not defined by the Regulation.’

²⁵ Case C-78/91 *Hughes* [1992] ECR I-4839, at para 17:

‘...an individual assessment of the claimant’s personal needs... is a characteristic feature of social assistance...’

See further: Case 187/73 *Callemeyn* [1974] ECR 553, paras 7 and 8.

²⁶ *ibid.* at para 14:

‘The Court has repeatedly held that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation.’

the competent authority has no power to take account of *other* personal circumstances²⁷ and, of course, provided the payment in question is linked to one of the social security risks set out in Article 3 of Regulation 883/2004. It is difficult to see what the Court of Justice means by *other* personal circumstances if it does not refer to personal means and a means test. The application of this test is undoubtedly deliberate on the part of the Court of Justice in order to ensure sufficient flexibility for future cases. The application of Article 3 of Regulation 883/2003, however, renders the delineation between social security and social assistance more readily discernible. If a payment is not linked to one of the risks in Article 3 it will be deemed to be social assistance²⁸ and thus excluded from the scope of the Regulation.²⁹

The distinction between social security and social assistance is important for a number of reasons: social assistance, though not defined in Regulation 883/2004, is, it is submitted, governed by Directive 2004/38, and is excluded from the remit of Regulation 883/2004³⁰ –persons covered by social assistance only are outside the personal scope of the Regulation– and thus not exportable; equally, special non-contributory cash benefits, which are discussed below, are not exportable,³¹ though, as noted by Martinsen,³²

²⁷ *ibid.* at para 17:

‘Whilst it is true that a benefit such as family credit is granted or refused solely on the basis of the claimant's assets, income, and the number and age of his dependent children, it does not follow that the grant of the benefit is dependent on an individual assessment of the claimant's personal needs, which is a characteristic feature of social assistance... The criteria applied are objective, legally defined criteria which, if met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances.’

²⁸ Case 249/83 *Hoecx* [1985] ECR 973, at para 14:

‘... a general social benefit, cannot be classified under one of the branches of social security listed in article 4(1) of Regulation no. 1408/71 and therefore does not constitute a social security benefit within the specific meaning of the Regulation.’

²⁹ *ibid.* at para 15:

‘...a social benefit guaranteeing a minimum means of subsistence in a general manner such as that provided for by the Belgian law of 7 august 1974 does not fall within the material scope of Regulation no. 1408/71...’

³⁰ Regulation 883/2004, art 3(5):

‘This Regulation shall not apply to: (a) social... assistance.’

See further, Case C-25/95 *Otte* [1996] I-3745, at para 18:

‘...Regulation No 1408/71 applies to all legislation of the Member States concerning the branches of social security listed in subparagraphs (a) to (h) of Article 4(1)..."social... assistance" are matters not covered by it.’

³¹ Regulation 883/2004, art (70)(4):

expansive interpretation by the Court of Justice has seen some special non-contributory cash benefits reclassified as exportable benefits.³³ Qualification for social assistance is contingent upon having a *right to reside* pursuant to Directive 2004/38, whereas under Regulation 883/2004, qualification for payment of a social security benefit is contingent upon habitual residence. The Directive expressly permits derogation from the principle of equal treatment,³⁴ whereas the Regulation does not.³⁵ The question of which test is applicable to special non-contributory cash benefits was addressed by the Court of Justice in *Brey*,³⁶ where it was held that:

‘...the concept of ‘social assistance system’ as used in Article 7(1)(b) of Directive 2004/38 cannot, contrary to the Commission’s assertions, be confined to those social assistance benefits which, pursuant to Article 3(5)(a) of Regulation No 883/2004, do not fall within the scope of that regulation.’³⁷

The difficulties in categorisation illustrate the fact that social welfare rights, though defined in separate Treaty provisions, regulations and directives and, at national level, in statute, regulation and administrative rules, cannot be treated as isolated rights. The judgment in *Brey* clearly shows that there is a complex interaction between regulations and directives and national law. On

‘The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.’

³² Martinsen (n 19) at 108.

³³ Case C-215/99 *Jauch* [2001] ECR I-1901, at paras 22 and 37:

‘The Court must therefore examine whether the benefit at issue in the main proceedings, which is listed in Annex IIa to Regulation No 1408/71, is special and non-contributory...Care allowance does not therefore meet the conditions in Article 10a of Regulation No 1408/71, which reserves the benefit of the special non-contributory benefits referred to in Article 4(2a) of that regulation to persons resident in the Member State in which they are paid.’

³⁴ Directive 2004/38, art 24(2):

‘By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b)...’

³⁵ Regulation 883/2004, art 3:

‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’

The circumstances in which this principle may be departed from are discussed below in this Chapter in section 2.10.

³⁶ Case C-140/12 *Brey* [2013] (not yet reported in the ECR).

³⁷ *ibid.* at para 58.

the plus side, however, it may be said with some degree of certainty that the Court of Justice rigorously applies secondary law to protect the social security and social assistance rights of EU citizens residing in other Member States and, in the absence of secondary law or where it does not provide adequate protection, applies substantive Treaty provisions.

2.2. Social Security

It has been argued that the Union was never formally given competence in the area of social security. Martinsen avers that:

‘Although the European Union has not formally been assigned welfare policy competence, it has for decades regulated social benefits between the member states. The social rights and obligations of the European migrant have for long been safeguarded by the EU, and the mutual welfare responsibility undertaken by the member states of the Union constitutes an extraordinary piece of social Europe.’³⁸

However, the Union’s competence in the area of social security³⁹ has its historic foundation in Article 69(4) of the Treaty establishing the European Coal and Steel Community, 1951, which provided that:

‘They [Member States] shall prohibit any discrimination in remuneration and working conditions between nationals and migrant workers, without prejudice to special measures concerning frontier workers; in particular, they shall endeavour to settle among themselves any matters remaining to be dealt with in order to ensure that social security arrangements do not inhibit labour mobility.’

Coordination and co-operation –later to become the norm in respect of social security matters– was foreshadowed by Article 69(4), with its

³⁸ Dorte Sindbjerg Martinsen, *The Social Policy Clash – EU Cross-Border Welfare, Union Citizenship and National Residence Clauses Paper* May 17-19, 2007 <<http://aei.pitt.edu/7964/1/martinsen-d-05i.pdf>> accessed 12 January 2013.

³⁹ See generally Simon Roberts, *A Short History of Social Security Co-ordination*, in *Fifty Years of Social Security Co-ordination*, Ed. Prof. dr. Yves Jorens (European Commission, 2009) at 8-28.

overarching prohibition on discrimination and an underlying acceptance that social security was, ostensibly, a matter for individual Member States. The social security provision of Article 69(4) was significantly strengthened, just six years later, in 1957, by Article 51⁴⁰ of the Treaty establishing the Economic Community, which expressly provided for measures to be adopted by the Council in respect of aggregation of social insurance contributions from different Member States, thereby permitting EU citizens to work in one Member State and, when moving to another Member State, to add together contributions paid, for the purpose of obtaining social security benefits. As with Article 69(4), Article 51 was concerned with adopting measures ‘necessary to effect the free movement of workers’ –thus excluding the self-employed– so the overarching premise was economic in nature. Further, Article 118 envisaged closer collaboration between Member States in matters relating to *inter alia* social security and Article 121 gave the Council an imprimatur to assign the Commission functions relating to the implementation of common measures in respect of social security, the result of which was Regulation 3/58 and implementing legislation Regulation 4/58 –the forerunner of Regulation 1408/71⁴¹– with its 88 Articles and multiple annexes, which, as noted by Roberts:

‘achieved coordination through the principles developed in bilateral agreements... namely, equal treatment: discrimination on grounds of nationality is prohibited to guarantee that a person residing on the territory of a Member State is subject to the same obligations and benefits from the same rights as the citizens of that Member State; rules are laid down to determine which member country’s legislation the person is subject to; rights in the course of acquisition are

⁴⁰ Art 51:

The Council, acting by means of a unanimous vote on a proposal of the Commission, shall, in the field of social security, adopt the measures necessary to effect the free movement of workers, in particular, by introducing a system which permits an assurance to be given to migrant workers and their beneficiaries: (a) that, for the purposes of qualifying for and retaining the right to benefits and of the calculation of these benefits, all periods taken into consideration by the respective municipal law of the countries concerned, shall be added together; and (b) that these benefits will be paid to persons resident in the territories of Member States

⁴¹ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community OJ L 149 , 05/07/1971 P. 0002 – 0050.

protected through aggregation of periods of insurance, residence or employment spent in each of the respective countries to establish a right in another Member State; and rights already acquired are protected by allowing certain benefits to be exported.⁴²

In 1971,⁴³ utilising ‘in particular’, Article 2, 7 and 51 of the Treaty establishing the European Community, Regulation 1408/71 was enacted in furtherance of the Council’s obligations under Article 51,⁴⁴ the purpose of which was, as with Regulation 3/58, to protect free movement by way of *coordination* as opposed to *harmonisation* of national social security systems –thus as noted by Pennings,⁴⁵ a cross-border element was a requirement to engage the provision of the Regulation.⁴⁶ There would not be a ‘top-down’ unified system of social security rights –something ‘almost impossible’ in what is now a Union of 28 countries, as noted by Cornelissen⁴⁷ – as the Regulation respected the ‘considerable differences existing between national social security legislations’⁴⁸ –including the right of Member States to set their own rules in respect of contributions:⁴⁹

⁴² Roberts (n 39) at 17.

⁴³ Effective on 1 October 1972. Holloway, J., *Social policy harmonisation in the European Community*, Farnborough, (Gower, 1981).

⁴⁴ Case C-443/93 *Vougioukas* [1995] ECR I-04033 at para 30:

‘It should be observed that, in order to safeguard the effective exercise of the right to freedom of movement enshrined in Article 48 of the Treaty, the Council is required, under Article 51 thereof, to set up a system to enable workers to overcome obstacles with which they might be confronted in national social security rules. In principle, the Council carried out that duty by introducing Regulation No 1408/71.’

⁴⁵ Frans Pennings, *European Social Security Law*, (5th Ed., Intersentia, 2010), at 26, citing Case C-153/91 *Petit* [1992] ECR I-4973, where it was held, at para 10:

‘Accordingly, the reply to be given to the national court is that Articles 48(1) and 51 of the EEC Treaty and Regulation No 1408/71, in particular Articles 3 and 84(4) thereof, do not apply to situations which are confined in all respects within a single Member State.’

⁴⁶ Case C-90/97 *Swaddling* [1999] ECR I-1075, at para 22:

‘It should be noted that Mr Swaddling is a person covered by Regulation No 1408/71 since it is common ground that, as an employed person, he has been subject to both the British and the French social security schemes.’

⁴⁷ Rob Cornelissen, *Achievements of 50 years of European Social Security Co-ordination*, in *Fifty Years of Social Security Co-ordination*, Ed. Prof. dr. Yves Jorens (European Commission, 2009) at 55.

⁴⁸ Regulation 1408/71, preamble. See further Case C-3/08 *Leyman* [2009] ECR I-09086, at para 40:

‘As regards freedom of movement for workers, Article 42 EC leaves in being differences between the Member States’ social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States are unaffected by Article 42 EC...’

⁴⁹ Case C-493/04 *Piatkowski* [2006] ECR I-2369, at para 32:

‘Since Community law does not detract from the power of the Member States to organise their own social security systems (Case C 385/99 *Müller-Fauré and Van Riet* [2003] ECR I-

Instead there would be a guarantee of ‘equality of treatment for all nationals of Member States under the various national legislations and... social security benefits for workers and their dependents regardless of their place of employment or of residence’⁵⁰ and, as noted by the court of Justice in *Van Munster*,⁵¹ ‘a unified career, for social security purposes, for the migrant worker’.⁵² This was, and remains, achievable by aggregation⁵³ of social security contributions paid in one⁵⁴ or more Member States. The aggregation is carried out by the Member State competent at any given time to pay social security benefits, though aggregation could not be used to diminish social security rights already accrued in one Member State on the basis of contributions paid solely in that Member State, provided there was no overlapping or doubling-up of benefit entitlements.⁵⁵

4509, paragraph 100), in the absence of harmonisation at Community level it is for the legislation of the Member State concerned to determine the conditions governing the right or duty to be insured with a social security scheme, the level of contributions payable by insured persons...’

⁵⁰ Regulation 1408/71, preamble.

⁵¹ Case C-165/91 *Van Munster* [1994] ECR I-4686.

⁵² *ibid.* at para 29:

‘The only difference between them is that the non-migrant worker acquires the entirety of his pension entitlements under a single body of legislation, whereas the migrant worker acquires them in sections corresponding to successive periods of work completed in different Member States under different legislative systems. In such situations, Article 51 of the Treaty aims to create, by coordination rather than by harmonization, a unified career, for social security purposes, for the migrant worker.’

⁵³ Regulation 1408/71, art 18, now replaced by Regulation 883/2004, art 6, which provides that:

‘Member State... shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.’

⁵⁴ Case C-257/10 *Försäkringskassan v Elisabeth Bergström* (not yet reported in ECR) at para 39-41:

‘... some of the interested parties who have submitted observations to the Court claim that, logically, that concept requires the existence of at least two periods of employment, completed in more than one Member State... That interpretation cannot be upheld... The wording both of Article 8(c) of the Agreement and of Article 72 of Regulation No 1408/71 is completely unambiguous. Under Article 8(c) of the Agreement, aggregation includes ‘all periods’ taken into consideration by the national legislation of the countries concerned, while Article 72 of Regulation No 1408/71 requires ‘periods of insurance, employment or self-employment completed in any other Member State’ to be taken into account in the course of aggregation, as if they were periods completed under the legislation of the competent institution.’

⁵⁵ Case C-24/75 *Petroni* [1975] ECR 1149, at paras 13 and 16:

‘The aim of Article 48-51 would not be attained if, as a consequence of the exercise of their rights to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the laws of a single Member State... The aggregation and apportionment cannot therefore be carried out if their effect is to diminish the benefits which the person concerned may claim by virtue of the laws of a single Member State on the basis solely of the insurance periods completed under those laws, always provided that this method cannot lead to a duplication of benefits for one and the same period.’

Article 51 of the Treaty establishing the Economic Community, taken alone, only granted the Union competence⁵⁶ to make secondary law in respect of ‘migrant workers and their beneficiaries’. Article 51 was latterly amended by Article 42 EC –which granted the Council a ‘wide discretion’⁵⁷ in respect of appropriate measures to give the Article effect– to extend the provisions to the dependants of migrant workers.⁵⁸ However, utilising the controversial Article 308 TEC, the scope of Regulation 1408/71 was extended to the self-employed⁵⁹ in 1981, students⁶⁰ in 1999, to ensure the free movement of ‘persons’⁶¹ as opposed to workers or the self-employed. Craig and De Burca refer to Article 308 as a ‘valuable legislative tool’.⁶² Martinsen, however, regards its use as controversial, raising question about Union competency.⁶³ Stateless persons and refugees were included within the scope of the

⁵⁶ Case C-137/11 *Partena ASBL* (not yet published in ECR), at para 46:

‘It should also be borne in mind that the provisions of Regulation No 1408/71 must be interpreted in the light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers...’

⁵⁷ Case C-208/07 *Petra von Chamier -Glisczinski* [2009] ECR I-6095 at para 64:

‘Moreover, the Court has held that, by adopting Regulation No 1408/71, the Council, bearing in mind the wide discretion that it enjoys with regard to the choice of the most appropriate measures for achieving the result envisaged in Article 42 EC...’

⁵⁸ Art 42 provides that:

‘The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants...’

⁵⁹ Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community OJ L 143, 29/05/1981 P. 0001-0032, recital 17:

‘With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his/her activity as an employed or self-employed person.’

Art 42 EC was subsequently amended in the Treaty on the Functioning of the European Union to include self-employed persons:

‘The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants...’

⁶⁰ Regulation (EC) No 307/1999, recital 5 of the preamble which provided that:

‘(Whereas, in the social security field, the application of national legislation alone does not afford sufficient protection for students moving within the Community; whereas, in order to make the free movement of persons fully effective, the social security schemes applicable to them should be coordinated...’

⁶¹ Regulation (EC) No 307/1999, recital 1 of the preamble, which was undoubtedly influenced by the advent of citizenship in 1992.

⁶² Article 308 (ex-Art 235 and now Art 352 TFEU) provided a ‘valuable legislative power... when the community did not possess specific legislative authority in certain areas,’ Paul Craig & Grainne De Burca, *EU Law, Text, Cases and Materials* (5th Edn., Oxford, 2011) at 90.

⁶³ Martinsen (n 19) avers that the use of Art 308 to develop the regulation has: ‘been controversial, raising questions about the scope and limits of Community competence.’

Regulation from the outset by virtue of Article 2(1) and though the use of Article 51 (now Art 48 TFEU) as a legal basis for this has been tacitly accepted by the Court of Justice in *Khalil*,⁶⁴ the Court of Justice nonetheless, as noted by Cornelissen, appears equally to have implicitly accepted that Article 51 did not provide a legal basis for extending the regulation to refugee or stateless third-country nationals.⁶⁵ The Regulation was extended to third country nationals⁶⁶ in 2003, utilising Article 63 TEC,⁶⁷ though it did not create any free-standing right to enter, stay or reside in a Member State or to have access to Member State labour Markets⁶⁸ and applied only to those legally resident in a Member State.⁶⁹ A cross-border element was also required for third country nationals to engage the provisions of the regulation.⁷⁰ In respect of the competence issue, Article 21(3) of the Treaty on the Functioning of the European Union provides that:

‘...the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.’

⁶⁴ Joined Cases (C-95/99) *Mervett Khalil, Issa Chaaban (C-96/99), Hassan Osseili (C-97/99), Mohamad Nasser (C-98/99)* [2001] ECR I-7413, at paras 56 and 58:

‘The Council cannot be criticised for having, in the exercise of the powers which have been conferred on it under Article 51 of the EEC Treaty, also included stateless persons and refugees resident on the territory of the Member States in order to take into account the abovementioned international obligations of those States... As the Advocate General pointed out in paragraph 59 of his Opinion, coordination excluding stateless persons and refugees would have meant that the Member States, in order to ensure compliance with their international obligations, had to establish a second coordination regime designed solely for that very restricted category of persons.’

⁶⁵ *Cornelissen* (n 47) at 60.

⁶⁶ Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality OJ L 124, 20.5.2003, p. 1–3.

⁶⁷ Now, the Treaty on the Functioning of the European Union, art 78(1)-(2).

⁶⁸ Regulation 859/2003, recital 10:

‘The application of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to these persons does not give them any entitlement to enter, to stay or to reside in a Member State or to have access to its labour market.’

⁶⁹ Regulation 859/2003, recital 11:

‘The provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 are, by virtue of this Regulation, applicable only in so far as the person concerned is already legally resident in the territory of a Member State. Being legally resident is therefore a prerequisite for the application of these provisions.’

⁷⁰ Regulation 859/2003, recital 12:

‘The provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 are not applicable in a situation which is confined in all respects within a single Member State. This concerns, inter alia, the situation of a third country national who has links only with a third country and a single Member State.’

This brings social security and social protection within the scope of Union citizenship and grants the Council competence to legislate for a *social* Europe, based upon citizenship of the Union.

Now covered in their own right⁷¹ –though the extent to which remains to be determined– family members originally could only claim derived rights, acquired by membership of a workers family.⁷² This resulted in situations, such as arose in *Schmid*,⁷³ where benefits which were, under national law, ‘rights in person’, meaning intended for the worker, could be denied to family members on the basis of Regulation 1408/71,⁷⁴ though the Court of Justice would allow the use of another secondary law instrument to protect the interests of the family member.⁷⁵ The Court of Justice in *Humer*⁷⁶ allowed a family member, the child of a worker, with whom the child was no longer residing, to assert independent rights to family benefits on the basis that the conditions for those benefits were met.⁷⁷ *Schmid* and *Humer* serve as useful examples of coordination over harmonisation, insofar far as the Court of Justice, in both cases, deferred to national legislation.

⁷¹ Pennings (n 18) 42, suggests that family membership remains relevant, particularly in the case of those family members who are third country nationals.

⁷² Case C-40/76 *Kermaschek v Bundesanstalt fuer Arbeit* [1976] ECR 1669, at para 7

‘It is evident from the juxtaposition indicated by the use of the words ‘as also’ that this provision refers to two clearly distinct categories: workers on the one hand, and the members of their family and their survivors on the other. Only the nationals of one of the Member States, stateless persons and refugees who are or have been subject to the social security scheme of one or more member states are covered in their capacity as workers. Whereas the persons belonging to the first category can claim the rights to benefits covered by the regulation as rights of their own, the persons belonging to the second category can only claim derived rights, acquired through their status as a member of the family or a survivor of a worker, that is to say of a person belonging to the first category.’

See further, Case C-310/91 *Schmid* [1993] ECR I-3011.

⁷³ Case C-310/91 *Schmid* [1993] ECR I-3011.

⁷⁴ *ibid.* at para 13:

‘It follows that the dependent offspring of a migrant worker is not entitled, under Regulation No 1408/71, to a disability allowance provided for by national legislation as a right in person.’

⁷⁵ In *Schmid* (n 73), the Court of Justice used Regulation 1612/68 as a fall-back. This is discussed below.

⁷⁶ Case C-255/99 *Humer* [2002] ECR I-1205.

⁷⁷ *ibid.* at para 52:

‘It follows from all of the foregoing that a member of the family of a worker, including a minor child such as the applicant, may directly invoke Articles 73 and 74 of Regulation No 1408/71 in order to apply, without the intervention of the worker himself, for the grant of a family benefit in circumstances where the conditions governing application of those articles are otherwise satisfied.’

The guiding principles of Regulation 1408/71 –which have proven to be highly technical and difficult to apply, creating a burgeoning body of case law– were that persons would be covered by the social security scheme of only one single Member State⁷⁸ and that there would be no overlapping⁷⁹ of benefits, except where expressly provided for,⁸⁰ or doubling up. A system of priority was developed to determine the Member State legislation applicable. If a worker⁸¹ of self-employed⁸² persons resided in one Member State but was employed in another Member State he or she was governed by the Member State of employment.⁸³ These provisions were regarded as a ‘complete system of conflict rules,’⁸⁴ in order to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue.⁸⁵ This, however, did not exempt a worker or self-employed person who was employed in two Member States from having to pay the necessary contributions in each of those member States⁸⁶

⁷⁸ Art 13(1):

‘Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State.’

cf Case C-352/06 *Bosman* [2008] ECR I-3827, where the Member State of *residence* could not be deprived of its right to grant Child Benefit, though it was not the *competent* Member State (see Cornelissen (n 47) at 56).

⁷⁹ Art 12(1):

‘This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance.’

⁸⁰ Art 12(1):

‘However, this provision shall not apply to benefits in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States, in accordance with the provisions of Articles 41, 43 2. and (3), 46, 50 and 51 or Article 60 (1) (b).’

⁸¹ Regulation 1408/71, art 13(1)(a).

⁸² Regulation 1407/71, art 13(1)(b).

⁸³ Article 13(2) provides that:

‘(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State; (b) a person who is self-employed in the territory of one Member State shall be subjected to the legislation of that State even if he resides in the territory of another Member State...’

⁸⁴ Case C-2/89 *Bestuur van de Sociale Verzekeringsbank / Kits van Heijningen* [1990] ECR 1755, at para 12:

‘As the Court has pointed out on a number of occasions, the provisions of Title II of Regulation No 1408/71, which include Article 13, constitute a complete system of conflict rules...’

⁸⁵ *ibid.*

⁸⁶ Case C-493/04 *Piatkowski*, [2006] ECR I-2369, at para 22:

‘According to Article 14c(b) of Regulation No 1408/71, in the cases mentioned in Annex VII thereto, a person who is employed in one Member State and self-employed in another Member State is subject simultaneously to the legislation of each of those States. He is therefore required to pay such contributions as may be required of him by the legislation of each State (*De Jaeck*, paragraph 39).’

provided that there is no double taxation.⁸⁷ There was another important principle, being that a person could not be left without any social security legislation applicable to them.⁸⁸ The Regulation was, and continues to be, moulded and shaped by the Court of Justice⁸⁹—with some provisions of Regulation 883/2004,⁹⁰ which replaces⁹¹ Regulation 1408/71, expressly amended to give effect to decisions of the Court of Justice.⁹²

Although in an earlier case the Court of Justice appears to have countenanced aggregation outside of the Regulation by directly utilising Articles 45-48,⁹³ the parent Treaty provision, now Article 48 TFEU,⁹⁴ perhaps a reflection of the competence issue,⁹⁵ is weaker than Treaty provisions such as Treaty Articles protecting the free movement of workers and is not directly effective, as it does not lay down a legal rule which is operative, but constitutes a legal basis for the Union to adopt measures. In *Casteels*,⁹⁶ the Court of Justice held that:

⁸⁷ *ibid.* at para 27:

‘To interpret Article 14c(b) of Regulation No 1408/71 as permitting double contributions to be levied in respect of the same income would penalise workers who exercise their right to free movement and thus would clearly run counter to the objective of that regulation. As the Court has held in relation to Article 14d(2) of Regulation No 1408/71, that provision requires Member States to treat workers subject to the provisions of Article 14c(b) thereof without discrimination as compared with workers pursuing all their activities in a single Member State...’

⁸⁸ Case C-227/03 *A.J. van Pommeren-Bourgon diën* [2005] ECR I-6101 at para 34:

‘Furthermore, the provisions of Title II of Regulation No 1408/71, of which Article 13 forms part, are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them...’

⁸⁹ Philippa Watson, *The Regime Established by Regulation 1408/71*, in *Irish Social Security Law in a European Union Context*, Ed. A. Collins (ICEL, 2000) at 18.

⁹⁰ See generally, Frans Pennings, *European Social Security Law*, (5th Edn., Intersentia, 2010).

⁹¹ Effective from 1 May 2012.

⁹² Regulation 883/2004, preamble, recital 24:

‘It is necessary to establish specific provisions regulating the non-overlapping of sickness benefits in kind and sickness benefits in cash which are of the same nature as those which were the subject of the judgments... in Case C- 215/99 *Jauch* and C-160/96 *Molenaar*, provided that those benefits cover the same risk.’

⁹³ Case C-443/93 *Vougioukas* [1995] ECR I-04033 at para 36:

‘That said, the validity as circumscribed above of Article 4(4) does not entail that a request for aggregation is to be refused when it may be satisfied, in direct application of Articles 48 to 51 of the Treaty, without recourse to the coordination rules adopted by the Council.’

⁹⁴ Formerly art 51 (pre-Amsterdam) and art 42 TEC.

⁹⁵ Martinssen avers that ‘the European Union has not formally been assigned welfare policy competence...’ Dorte Sindbjerg Martinsen, *EU Cross-Border Welfare, Union Citizenship and National Residence Clauses* (EUSA Tenth Biennial International Conference, Montreal, Canada, May 17-19, 2007).

⁹⁶ Case C-379/09 *Casteels* [2011] I-01379, at para 16:

‘That provision thus requires action by the European Union legislature and is for that reason subject in its effects to the adoption of a measure by the institutions of the European Union. It cannot therefore, as such, confer rights on individuals which those individuals might be able to rely on before their national courts.’⁹⁷

This is consistent with the case law considered below, where the Court of Justice utilised Treaty provisions governing free movement of workers and freedom of establishment⁹⁸ –and even EU citizenship⁹⁹– when interpreting Article 48 TFEU and Regulation 1408/71.

2.3. The Applicable legislation

Given the broad range of variables that might arise in an open Union, it is no surprise that determining the applicable legislation of the competent Member State that might apply to a citizen,¹⁰⁰ in any given circumstance, has proven difficult and contentious, giving rise to a considerable body of case law. In *Ten Holder*¹⁰¹ –where the claimant, a ‘frontier’¹⁰² worker, obtained sickness benefit from the country of employment and then sought to obtain the payment in the country of residence– the applicable legislation was held to mean that the Member State in which he was last employed¹⁰³

‘...Article 48 TFEU does not have any direct effect capable of being relied on by an individual against his private-sector employer in a dispute before national courts.’

⁹⁷ *ibid.* at para 14.

⁹⁸ Case C 215/99 *Jauch* [2001] ECR I-1901 at para 20:

‘As the Court has consistently held (see, for example, Case 284/84 *Spruyt* [1986] ECR 685, paragraphs 18 and 19), the provisions of Regulation No 1408/71 adopted to give effect to Article 51 of the EC Treaty (now, after amendment, Article 42 EC) must be interpreted in the light of the objective of that article, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers.’

⁹⁹ Case C-522/10 *Doris Reichal* (not yet published in ECR) at para 42:

‘National legislation which places some of its nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State thereby gives rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen’s freedom to move (Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 22).’

¹⁰⁰ Be it found within Article 13(2)(a)-(e) or within Article 14-17 of Regulation 1408/71.

¹⁰¹ Case 302/84 *Ten Holder* [1986] ECR 1821, at para 14:

‘If the worker has not taken up employment in another member state, he continues to be subject to the legislation of the member state in which he was last employed.’

¹⁰² Regulation 883/2004, art 1(f):

‘‘frontier worker’ means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a rule daily or at least once a week...’

¹⁰³ In *Ten Holder*, it was held, at para 14, that:

unless the cessation of employment was definitive.¹⁰⁴ *Ten Holder* prompted an amendment to Article 13(2) of Regulation 1408/71 which inserted a new provision to fill the lacuna¹⁰⁵ left by the ruling, ostensibly providing that where no other provision¹⁰⁶ of the regulation applied to a claimant, the applicable legislation was that of the Member State of residence,¹⁰⁷ regardless of whether or not the cessation of occupational activity was temporary or definitive.¹⁰⁸ When Regulation 883/2004 replaced Regulation 1408/71 the provisions of Article 13(2)(f) of Regulation 1408/71 were incorporated into Regulation 883/2004 in a simplified version.¹⁰⁹ The

‘If the worker has not taken up employment in another member state, he continues to be subject to the legislation of the member state in which he was last employed.’

¹⁰⁴ Case C-302/02 *Laurin Effing* [2005] ECR I-553 at para 42:

‘prior to the insertion of Article 13(2)(f) of that regulation, that provision was interpreted as meaning that an employed person who ceases carrying on his activities in the territory of one Member State and moves to another Member State without working there remains subject to the legislation of the Member State where he was last employed, regardless of how much time has elapsed since the end of the activities in question and the end of the employment relationship... unless the cessation was definitive.’

¹⁰⁵ Case C-275/96 *Kuusijarvi* [1998] ECR I-3419, at para 46:

‘As Advocate General Jacobs pointed out at paragraph 56 of his Opinion, this is, moreover, borne out by the explanatory memorandum on the Commission’s proposal for an amendment which led to the adoption of Article 13(2)(f). According to that explanatory memorandum, the intention was to fill in the ‘gap’ in Title II of Regulation No 1408/71 which the judgment in *Ten Holder*, cited above, had revealed and which was attributable to the fact that ‘[t]here [was] ... no specific provision legislation is applicable to persons who have ceased to engage in any occupational activity under the legislation of one Member State and who reside in the territory of another Member State determining what legislation is applicable to persons who have ceased to engage in any occupational activity under the legislation of one Member State and who reside in the territory of another Member State’..

¹⁰⁶ Case C-227/03 *A.J. van Pommeren-Bourgon diën* [2005] ECR I-6101, para 35:

‘It follows from Article 13(2)(f) of Regulation No 1408/71, however, that the legislation of the Member State of residence applies only if no other legislation is applicable and, in particular, only if the legislation to which the person concerned had previously been subject ceases to be applicable to him (Case C-347/98 *Commission v Belgium* [2001] ECR I-3327, paragraphs 28 and 29). Accordingly, if compulsory social security ceases in a Member State, the provision cited above provides for insurance in the Member State of residence.’

See further: Case C-345/09 *Delft* [2011] (not yet reported in ECR).

¹⁰⁷ Article 13(2)(f), as inserted by Regulation 2195/91, provides that:

‘a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the a foregoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.’

¹⁰⁸ Case C-275/96 *Kuusijarvi* [1998] ECR I-3419, at paras 39-40:

‘On this point it should first be stated that there is nothing in the wording of Article 13(2)(f) of Regulation No 1408/71 to suggest that that provision applies only to workers who have definitively ceased all occupational activity and not to persons who have merely ceased their occupational activity in a given Member State. On the contrary, that provision is couched in general terms so as to cover any situation in which the legislation of a Member State ceases to be applicable to a person, for whatever reason, and not only because the person concerned has ceased his occupational activity, be it definitively or temporarily, in a given Member State.

¹⁰⁹ Article 11(3):

application of Regulation 1408/71 had become highly technical¹¹⁰ – particularly in cases involving Child Benefit– requiring multiple amendments prior to its replacement¹¹¹ by Regulation 883/2004, which became effective on 1 May 2010. Given that the new regulation is still in its infancy, there is, at the time of writing, limited case law¹¹² on the new Regulation and thus the older case law remains relevant, as does Regulation 1408/71 to factual situations which pre-date the entry into force of Regulation 883/2004.¹¹³ Difficulties in respect of the determination of the applicable national legislation or which Member State is the *competent* authority, continue to arise in national courts¹¹⁴ and before the Court of Justice, perhaps reflecting not just the complex nature of the regulation but, moreover, Member States continued and unabated unease at having to fund the social welfare entitlements of EU nations residing in their states. This is particularly so in the UK where the political classes appear to be acting upon a ground-swell of anti-EU sentiment partially premised upon a perception that nationals of other Member State have unfair access to UK social welfare, with the UK Government publicly vowing to fight the

‘(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.’

¹¹⁰ Van Raepenbusch refers to the ‘complexity’ and ‘even esoterism of the applicable texts’. Sean Van Raepenbusch, *The Role of the Court of Justice in the Development of Social Security Law of Persons Moving Within the European Union*, in *Fifty Years of Social Security Co-ordination*, Ed. Prof. dr. Yves Jorens (European Commission, 2009) at 29.

¹¹¹ Regulation 1408/71 has not been repealed as reliance is still placed upon reciprocal agreements contained therein.

¹¹² There are four Preliminary References and an infringement procedure case, which was deemed inadmissible.

¹¹³ Case C-522/10 *Doris Reichal* (not yet published in ECR), at paras 5 and 26:

‘...the principle of legal certainty precludes a European Union measure from taking effect from a point in time before that measure was published, although it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected and, in so far as it follows clearly from the terms, objectives or general scheme of the rules of law concerned, that such effect must be given to them... By Article 97 of Regulation No 987/2009, the European Union legislature fixed the entry into force of that regulation at 1 May 2010 and there is nothing in the recitals in the preamble thereto or any other provision of that regulation which can be construed as meaning that Article 44 thereof is to take effect from a point in time before that measure was published. On the contrary, it is apparent from Article 87(1) of Regulation No 883/2004, which applies to situations governed by Regulation No 987/2009 pursuant to Article 93 of that regulation, that it does not give rise to any entitlement for the period prior to the date of its application, namely 1 May 2010.’

¹¹⁴ Sean Van Raepenbusch, *The Role of the Court of Justice in the Development of Social Security Law of Persons Moving Within the European Union*, in *Fifty Years of Social Security Co-ordination*, Ed. Prof. dr. Yves Jorens (European Commission, 2009) at 30.

European Commission on its efforts to ensure compliance with Union law in the area of social welfare:¹¹⁵

2.4. Does the application of the Regulation give rise to disadvantages?

The Court of Justice has said on many occasions that the regulation does not detract the power of Member States¹¹⁶ to organise their own social security systems and, equally, that Member States may apply broader social protection than that which is afforded by the application of the Regulation.¹¹⁷ This appears to countenance the possibility that some disadvantages¹¹⁸ could arise for those exercising free movement rights and from the application of exclusive applicability of the legislation of one Member State. However, those potential disadvantages, alluded to in *Piatkowski*,¹¹⁹ could not, it is submitted, give rise to a situation where the exercise of free movement resulted in an outcome whereby a person would

¹¹⁵ The Guardian, 25 March 2013, Patrick Wintour, *EU nationals may be banned from benefits in UK under new proposals*:

‘All three main party leaders have been offering varied packages to address voters’ concerns about migrants, and the perception that they are taking jobs or have privileged access to public services.’

The Wall Street Journal, 30 May 2013, Nicholas Winning and Frances Robinson, *U.K. Plans to Fight EU Over Access to Benefits*:

‘The U.K. government said Thursday it would fight “every step of the way” legal action proposed by the European Commission to ensure access by nationals of other European Union members to the U.K.’s social-security system, a confrontation that is likely to inflame the debate over whether Britons would be better off outside the bloc.’

¹¹⁶ Case C-262/97 *Englebrecht* [2000] ECR I-3721, at para 35:

‘The Court has consistently held that Community law does not detract from the powers of the Member States to organise their social security systems...’

¹¹⁷ Joined cases C-611/10 and C-612/10 *Hudziński* and *Wawrzyniak* (not yet reported in ECR), at para 43:

‘In that context, the Court has held that it would both go beyond the objective of Regulation No 1408/71 and exceed the purpose and scope of Article 48 TFEU to interpret that regulation as prohibiting a Member State from granting workers and members of their family broader social protection than that arising from the application of that regulation...’

See further: Case 69/79 *Jordens Vosters* [1980] ECR 75, paragraph 11; Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 24; and Case C 352/06 *Bosmann* [2008] ECR I 3827, paragraphs 27 to 29 and 33.

¹¹⁸ Case C-493/04 *Piatkowski* [2006] ECR I-02369 at para 34:

‘The Court has held, in this respect, that the EC Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker’s advantage in terms of social security or not, according to circumstance.

It follows that, even where its application is less favourable, such legislation is still compatible with Articles 48 and 52 of the Treaty if it does not place the worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return...’

¹¹⁹ *ibid.*

be covered by the social security legislation of no Member State or be covered by the legislation of a Member State but be entitled to no social welfare in that or any another Member State, as was asserted by the respondent in *Kelly v Minister for Social Protection*¹²⁰ –*Kelly* has now been referred to the Court of Justice on this very point.¹²¹

In *Kelly* the applicant had worked in Ireland for a number of years before taking up employment in Northern Ireland, as frontier worker, while remaining resident in Ireland. The applicant did not qualify in Northern Ireland for Illness Benefit either on the basis of her employment there or through aggregation of contributions paid in Ireland and Northern Ireland. However, she did qualify in Ireland based on her contributions. The respondent contended that because Northern Ireland was the last place of employment, it was the competent state, notwithstanding the fact that the applicant would then be left with no entitlement in either jurisdiction. The applicant contended that this was contrary to Regulation 883/2004 and interfered with her free movement rights.

Pennings argues that when a particular legislation of a Member State is determined applicable it is not possible to escape the legislation by arguing that one has no advantages from being insured under the system.¹²² There are a number of reasons why this cannot be so: (1) the nature of the ‘disadvantages’ referred to in *Piatkowski* was clarified by the Court of Justice recently in *Hudziński*¹²³ and *Commission v Germany*¹²⁴ to mean a potential *reduction* in the amount of benefit paid as between one Member State and another.¹²⁵ Similarly, whilst the Court of Justice, in

¹²⁰ Unreported, High Court, Hogan J, 13 June 2013.

¹²¹ Case C-403/13 *Kelly* (not yet reported in ECR).

¹²² *cf.* Pennings (n 18) at 81, citing Case C-160/96 *Moelnaar* [1998] ECR I-880.

¹²³ Joined cases C-611/10 and C-612/10 *Hudziński* and *Wawrzyniak* (not yet reported in ECR).

¹²⁴ Case C-562/10 *Commission v Germany* (not yet published in the ECR), at para 57:

‘In view of the disparities existing between the schemes and legislation of the Member States in this field, such a move may, in financial terms and depending on the case, be more or less advantageous for the person concerned...’

¹²⁵ *ibid.* at paras 43-44:

‘In that context, the primary law of the European Union cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security... national legislation that is less favourable as regards social security benefits may in

Englebrecht,¹²⁶ held that free movement might not be ‘neutral’ in terms of social security entitlements, it was in the context of ‘less favourable’ entitlements,¹²⁷ as opposed to none at all, as noted by the Court of Justice in *Walsh* where it was held that:

‘...giving Article 8 a wider application might indeed, in cases such as the present, result in persons concerned receiving no allowance at all. It would be contrary to the objective of the Regulation were a rule against overlapping of benefits to produce such a result.’¹²⁸

In the only case, to date, determined by the Court of Justice concerning Regulation 883/2004, the question of the nature of disadvantages was once again clarified in these terms.¹²⁹ Secondly, as noted in *Van Munster*¹³⁰ the aim of substantive free movement Treaty rights would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State. Such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom.¹³¹ Thirdly, the preamble of

principle be compatible with the requirements of primary EU law on freedom of movement for persons... It follows from those principles that the appellants in the main proceedings, who moved from one Member State to another, in this case to the Federal Republic of Germany, in order to work there, are, in principle, entitled only to the family benefits provided for by the legislation of the first Member State, which is the only legislation applicable pursuant to Regulation No 1408/71, even if, as is the position in the present cases, those benefits are less favourable than the benefits of the same kind provided for by German legislation.’

¹²⁶ Case C-262/97 *Englebrecht* [2000] ECR I-3721.

¹²⁷ *ibid.* at para 34:

‘It follows that, even where its application is less favourable, such legislation is still compatible with Articles 48 and 52 of the Treaty if it does not place the worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return...’

¹²⁸ Case C-143/79 *Walsh* [1980] ECR 01639 at para 17.

¹²⁹ Case C-443/11 *Jeltes* (not yet reported in ECR), at para 44 :

‘In those circumstances, the Treaty rules on freedom of movement cannot guarantee to an insured person that a move to another Member State will be neutral as regards social security. In view of the disparities existing between the schemes and legislation of the Member States in this field, such a move may, depending on the case, be more or less financially advantageous or disadvantageous for the person concerned...’

¹³⁰ Case C-165/91 *Van Munster* [1994] ECR I-4686.

¹³¹ *ibid.* at para 27:

‘...Article 51 of the Treaty leaves in being differences between the Member States' social security systems and hence in the rights of persons working in the Member States, it is not, however, in dispute that the aim of Articles 48 to 51 of the Treaty would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social

Regulation 883/2004 provides for derogation from the general rules where it is justified¹³² and the application of a proportionality rule to prevent objectively unjustified results.¹³³ All of these points were raised in *Kelly*. Further, the Court of Justice, in a number of cases, did not preclude a Member State which is not the ‘competent’ State granting benefits covered by Regulation 883/2004, particularly where the legislation of that Member State¹³⁴ provides for such payments. The Court of Justice stopped short in *Hudziński* of saying that the non-competent Member State was obligated to pay –ostensibly because the applicant had not suffered any legal disadvantage having retained entitlement in the competent Member State– ruling that the payment was ‘not precluded’.¹³⁵

2.5. Dispute Resolution

Legal certainty in respect of the principle of exclusive applicability of a single Member State is important in terms of the predictability and effectiveness of the application of the coordination rules of the Regulation.¹³⁶ However, as noted by Cornelissen, a 28 Member State Union

security advantages guaranteed to them by the laws of a Member State. Such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom...’

¹³² Regulation 883/2004, recital 18:

‘In specific situations which justify other criteria of applicability, it is necessary to derogate from that general rule.’

¹³³ Regulation 883/2004, recital 12, provides that:

‘In the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.’

¹³⁴ Joined cases C-611/10 and C-612/10 *Hudziński* and *Wawrzyniak* (not yet reported in ECR), at para 49:

‘...the principle of the exclusive applicability of the legislation designated... cannot serve as a basis for precluding a Member State, which is not the competent State but which does not subject the right to child benefit to conditions of employment or insurance, from being able to grant such a benefit to one of its residents since the possibility of such a grant arises, in actual fact, from its legislation.’

¹³⁵ *ibid.* at para 68:

‘...Regulation No 1408/71 must be interpreted as not precluding a Member State, which is not designated under those provisions as being the competent State, from granting child benefits in accordance with its national law to a migrant worker who is working temporarily within its territory...’

¹³⁶ *Hudziński* (n 134), at para 67:

‘...it does not appear that... the grant of that benefit is liable to affect disproportionately the predictability and effectiveness of the application of the coordination rules of Regulation No 1408/71, requirements relating to legal certainty which also protect the interests of migrant workers and to which the principle... consisting in the exclusive applicability in principle of the legislation of the Member State designated under those rules as the competent State also contributes.’

renders it impossible to address all of the potential problems that might arise and the application of national law may give rise to unforeseen consequences which are incompatible with the provisions of the TFEU.¹³⁷ Where such circumstances arise, the principle of co-operation in good faith requires that Member States take whatever steps are necessary to ensure that the aims of Article 45 TFEU¹³⁸ and other substantive Treaty rights are complied with. This important principle, which places considerable demands upon Member States and the Union, is set out in Article 4(3) TEU¹³⁹ and requires that:

‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.’

Usefully, in the context of social security, the Treaty provision dealing with cooperation is fleshed out in considerable detail in Regulation 987/2009, which lays down the procedure for implementing Regulation 883/2004. Article 11 lays down the rules for determining residence, which are a re-affirmation of the habitual residence rules:

‘(a) the duration and continuity of presence on the territory of the Member States concerned; (b) the person’s situation, including: (i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the

¹³⁷ *Cornelissen* (n 47) at 57.

¹³⁸ Case C-165/91 *Van Munster* [1994] ECR-4686, at para 32:

‘Where such a difference in legislation exists, the principle of cooperation in good faith laid down in Article 5 of the EEC Treaty requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 48 of the Treaty.’

See further, Case C-262/97 *Englebrecht* [2000] ECR I-3721.

¹³⁹ Treaty on European Union, art 4(3) (as amended by the Lisbon Treaty):

stability of the activity, and the duration of any work contract; (ii) his family status and family ties; (iii) the exercise of any non-remunerated activity; (iv) in the case of students, the source of their income; (v) his housing situation, in particular how permanent it is; (vi) the Member State in which the person is deemed to reside for taxation purposes.¹⁴⁰

Article 6 provides important rules for determining the provisional application of legislation and the order of priority, being determined as follows:

‘(a) the legislation of the Member State where the person actually pursues his employment or self-employment, if the employment or self-employment is pursued in only one Member State; (b) the legislation of the Member State of residence where the person concerned performs part of his activity/activities or where the person is not employed or self-employed; (c) the legislation of the Member State the application of which was first requested where the person pursues an activity or activities in two or more Member States.’¹⁴¹

Article 6 also creates rules governing the provisional granting of benefits where there is a difference of view between two or more Member States.¹⁴² The implementing Regulation also provides for dispute resolution, where the Member States are unable to resolve a dispute concerning which legislation is applicable, involving the referring of the disputed matter to the Administrative Commission for the Coordination of Social Security

¹⁴⁰ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1–42, art 11.

¹⁴¹ Regulation 987/2009, art 6(1).

¹⁴² Regulation 987/2009, art 6(2):

‘Where there is a difference of views between the institutions or authorities of two or more Member States about which institution should provide the benefits in cash or in kind, the person concerned who could claim benefits if there was no dispute shall be entitled, on a provisional basis, to the benefits provided for by the legislation applied by the institution of his place of residence or, if that person does not reside on the territory of one of the Member States concerned, to the benefits provided for by the legislation applied by the institution to which the request was first submitted.’

Systems¹⁴³—which derives its authority from Article 71 of Regulation 883/2004 and operates under its own rules¹⁴⁴— who will give a decision¹⁴⁵ on the matter within 6 months. Access to the Administrative Commission, which is tasked with addressing administrative questions and questions of interpretation arising from the provisions of Regulation 883/2004 or those of the Implementing Regulation,¹⁴⁶ appears to be restricted to the competent authorities¹⁴⁷ of Member States—in Ireland, the Department of Social Protection—but its operation is without prejudice to the right of the authorities, institutions and persons concerned to seek recourse to national and European Courts.¹⁴⁸ The decisions must, pursuant to the Administrative Commission’s own rules, be ‘implemented’¹⁴⁹ by Member States, though they are not binding¹⁵⁰—the Administrative Commission relies upon the

¹⁴³ Formerly known as Administrative Commission on Social Security for Migrant Workers.

¹⁴⁴ The Administrative Commission operates under rules set out in: *Administrative Commission for the Coordination of Social Security Systems, Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission* of 16 June 2010 (2010/C 213/11). Formerly, *Rules of the Administrative Commission on social security for migrant workers attached to the Commission of the European Communities* (Adopted by the Administrative Commission at its meeting of 13 and 14 October 2004), (2005/C 119/04).’

¹⁴⁵ A list of decisions in force, in respect of Regulation 1408/71, may be found on [ec.europa.eu/social/ BlobServlet?docId=2156&langId=en](http://ec.europa.eu/social/BlobServlet?docId=2156&langId=en) accessed on 16 March 2013. The publication of decisions is not obligatory (n 142), art 12. A list of Decisions and Recommendations in force, of the Administrative Commission for the Coordination of Social Security Systems in respect of Regulation 883/2004, may be found on <http://ec.europa.eu/social/main.jsp?catId=867&langId=en> accessed on 16 March 2013.

¹⁴⁶ Regulation 883/2004, art 71(a).

¹⁴⁷ Regulation 987/2009, art 6(3):

‘Where no agreement is reached between the institutions or authorities concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month after the date on which the difference of views, as referred to in paragraph 1 or 2 arose. The Administrative Commission shall seek to reconcile the points of view within six months of the date on which the matter was brought before it.’

¹⁴⁸ Regulation 883/2004, art 72(a):

‘...without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of the Member States, by this Regulation or by the Treaty.’

¹⁴⁹ (n 142), art 12(3):

‘The members of the Administrative Commission shall see to it that appropriate instructions are given at national level to ensure that the published and unpublished decisions of the Administrative Commission are duly implemented.’

¹⁵⁰ Case C-98/80 *Romano* [1981] ECR 1241, at para 20:

‘...a body such as the administrative commission may not be empowered by the council to adopt acts having the force of law. Whilst a decision of the administrative commission may provide an aid to social security institutions responsible for applying community law in this field, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply the community rules. Decision no 101 of the administrative commission does not therefore bind the tribunal du travail.’

principle of cooperation¹⁵¹ – and may be challenged or subsequently overturned or re-interpreted¹⁵² in proceedings before the Court of Justice, which considers such decisions as being ‘capable of providing guidance’¹⁵³ to competent institutions of Member States. Article 76 of Regulation 883/2004 also provides for enhanced cooperation between Member States.

2.6. Payments covered by the Regulation

Regulation 883/2004 applies to all Member States’ legislation concerning the following branches of social security:¹⁵⁴ sickness benefits;¹⁵⁵ maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; family benefits.¹⁵⁶ Whilst this list is exhaustive,¹⁵⁷ the Court of justice will examine benefits in the context of the purposes and the conditions for its

This may explain the fact that there have been relatively few decisions taken by the Administrative Committee since its inception, just 200 Decisions and Recommendations up to 2009.

¹⁵¹ Administrative Commission for the Coordination of Social Security Systems (AC), publication A, 23/11/2009, available on <<http://www.mlsp.government.bg/bg/integration/agreements/Administrative%20Commission.pdf>> accessed 17 March 2013, at page 4:

‘...decisions are taken by all MS which are bound by the principles of cooperation in good faith it is generally acknowledged that AC decisions have an authoritative effect and represent an important aid to the interpretation and practical common application of the Regulations which should be taken into account by the competent authorities of the MS, institutions and stakeholders...’

¹⁵² Case 236/87 *Anna Bergemann v Bundesanstalt für Arbeit* [1988] ECR 5125, at para 17:

‘Accordingly, in reply to the first point raised by the national court it should be stated that Article 71 (1)(b)(ii) of the aforesaid regulation is not applicable exclusively to the categories of workers referred to in Decision No 94 of the Administrative Commission on Social Security for Migrant Workers.’

¹⁵³ C-202/97 *Fitzwilliam Executive Search Ltd* [2000] ECR I-00883, at para 32:

‘...such a decision, whilst capable of providing guidance to social security institutions responsible for applying Community law in this sphere...’

¹⁵⁴ Regulation 883/2004, art 3.

¹⁵⁵ Regulation 883/2004, art 3(a), defined in recital 24 of the Preamble as ‘...sickness benefits in kind and sickness benefits in cash...’ Benefits in kind refer to medical treatment.’

¹⁵⁶ Regulation 883/2004, art 3(j), defined in art 1(z) as:

‘family benefit’ means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.’

¹⁵⁷ Case C-25/95 *Otte* [1996] I-3745, at para 18:

‘In order to fall within the scope of Regulation No 1408/71, legislation must in particular cover one of the risks expressly specified in Article 4(1) of that regulation. That list is exhaustive, so that a branch of social security not mentioned does not fall within that category even if it confers upon individuals a legally defined position entitling them to benefits...’

grant in order to determine whether a sufficient link can be established between that allowance and any of the risks mentioned on the list.¹⁵⁸

TABLE OF EQUIVALENCE

Risk covered under Regulation 883/2004	Article No.	Benefit under Irish law	Statutory Provision
Sickness Benefit	3(a)	Illness Benefit	Social Welfare Consolidation Act 2005, s 40-46 ¹⁵⁹
Maternity Benefit	3(b)	Maternity Benefit	Social Welfare Consolidation Act 2005, s 47-51
Invalidity Benefits	3(c)	Invalidity Pension	Social Welfare Consolidation Act 2005, s 118-122
Old age Benefits	3(d)	State Pension (Contributory)	Social Welfare Consolidation Act 2005 s 108-113
		Pension	Social Welfare Consolidation Act 2005 s 114-117
		State Pension (Transition)	Social Welfare Consolidation Act 2005 s 114-117
Survivors Benefits	3(e)	Widow's/Widower's/Surviving Civil Partner's (Contributory) Pension	Social Welfare Consolidation Act 2005 s 162-171
Benefits in respect of accidents at work and occupational diseases	3(f)	Occupational Injuries Benefits	Social Welfare Consolidation Act 2005 s 69-98
Death Grants	3(g)	Occupational Injuries Benefits	Social Welfare Consolidation Act 2005 s 69-98
Unemployment benefits	3(h)	Jobseekers Benefit	Social Welfare Consolidation Act 2005 s 62-68
Pre-retirement benefits	3(i)	Pre-retirement Allowance	Social Welfare Consolidation Act 2005 S 149-151
Family benefits	3(j)	Child Benefit	Social Welfare Consolidation Act 2005

¹⁵⁸ *ibid.*

¹⁵⁹ Formerly known as Disability Benefit, changed pursuant to s 4 and schedule 1 (15) of the Social Welfare Law Reform and Pensions Act 2006

One Parent Family Payment	s 219-223 Social Welfare Consolidation Act 2005
Guardian's Payment (Non-Contributory)	s 172-178 Social Welfare Consolidation Act 2005
Domiciliary Care Allowance	s Social Welfare Consolidation Act 2005 s 186 ¹⁶⁰

Regulation 883/2004 expressly precludes any national residence –defined as the place where a person habitually resides¹⁶¹– requirements, unless such a requirement is expressly provided for in the Regulation,¹⁶² the effect of which is to ensure that many of the payments covered by a competent Member State are payable even where neither the worker or self-employed person or their family members reside in the competent Member State. Family Benefits, by example, which have been interpreted as having a very broad scope,¹⁶³ are thus payable irrespective of the place of residence of the family members.¹⁶⁴ In practical terms a Romanian worker or self-employed person working in Ireland benefits from a significantly higher rate of Child benefit payments in respect of his children living in Romania. Equally, a UK national, working in Ireland, would be better off, though the differential is far lower, receiving Child Benefit from Ireland. This provision of the Regulation has, partially due to the economic downturn, been questioned in Ireland, with the Minister for Social Protection seeking a review of the rules

¹⁶⁰ As inserted by (as inserted by section 15 of the Social Welfare and Pensions Act 2008 and amended by section 26 the Social Welfare Social Welfare (Miscellaneous Provisions) Act 2010.

¹⁶¹ Regulation 883/2004, art 1(3)(j).

¹⁶² Regulation 883/2004, art 7:

‘Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.’

¹⁶³ Regulation 883/2004, Recital 34:

‘Since family benefits have a very broad scope, affording protection in situations which could be described as classic as well as in others which are specific in nature...’

¹⁶⁴ Regulation 883/2004, art 67, provides that:

‘A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family members residing in another Member State, as if they were residing in the former Member State.’

governing Child Benefit at EU level¹⁶⁵ and in the UK, where the payment of some £50 million in respect of 50,000 children living abroad was questioned.¹⁶⁶ However, it appears likely that such a significant sea-change would be strongly resisted, with the EU Social Affairs Commissioner Laszlo Andor stating that he would be extremely reluctant to change the rules on the basis that any change could give rise to discrimination.¹⁶⁷

Child Benefit payments in Ireland are, pursuant to statute, subject to Habitual Residence.¹⁶⁸ However, this cannot be so, as a frontier¹⁶⁹ or cross-border worker or self-employed person remains entitled to Family Benefits as do workers and self-employed persons whose children reside in another Member State. Though, the Department of Social Protection's operational guidelines on Habitual Residence provide that workers or self-employed

¹⁶⁵ TheJournal.ie, 22 March 2011, '*Should Ireland pay child benefit for children living abroad?*' Where it is reported that:

'SOCIAL PROTECTION MINISTER Joan Burton has announced her intention to seek a review of EU rules requiring Ireland to pay child benefit to parents who come here to work – even if their children still live abroad. The announcement came as Department figures showed the state spent €15.4m last year on child benefit for children who don't live in Ireland – because 7,814 children overseas have parents living in the Irish state.'

¹⁶⁶ The Telegraph, 4 February 2013, '*Why are we sending Child benefit to Poland?*' <<http://www.telegraph.co.uk/news/worldnews/europe/eu/9847650/Why-are-we-sending-child-benefit-to-Poland.html>> accessed 18 March 2013. See further, Sky News, 4 February 2013, '*Child Benefit: £1m A Week For Children Abroad*', where it is asserted that:

'...the Government admitted just under 30,000 families are claiming benefits and tax credit for 50,000 children who live outside the UK but within the European Union (EU), as well as Iceland and Norway. It costs the UK taxpayer £55m a year to fund this system, which is only replicated in four other EU countries - 22 nations require the child to be resident in order to qualify.'

<<http://news.sky.com/story/1047093/child-benefit-1m-a-week-for-children-abroad>> accessed on 18 March 2013.

¹⁶⁷ The Irish Times, 12 October 2013, '*Efforts to save money on child benefit going abroad shelved*', where it is reported that:

'Ms Burton [The Minister for Social Protection] discussed the matter at a formal level with EU social affairs commissioner Laszlo Andor when he visited Dublin last year. Mr Andor told Ms Burton he would be extremely reluctant to change the system in case migrant workers were discriminated against.'

¹⁶⁸ Social Welfare Consolidation Act 2005. Sec 220(3):

'A qualified person, other than a person to whom section 219 (2)(a), (b) or (c) applies, shall not be qualified for child benefit under this section unless he or she is habitually resident in the State at the date of the making of the application for child benefit.'

¹⁶⁹ In Case C-236/87 *Anna Bergemann v Bundesanstalt für Arbeit* [1988] ECR 5125, the Court of Justice, at paras 12-13, held that a frontier worker only retains that status in the following circumstances:

'...only workers who... reside in a State other than the State of employment and who, on the other, return regularly and frequently, in other words "daily or at least once a week" to their State of residence may be regarded as having the status of frontier workers... Accordingly, a worker who, after having transferred his residence to a Member State other than the State of employment, no longer returns to that State, is not covered by the term "frontier worker" within the meaning of Article 1 (b).'

persons are, ostensibly, automatically deemed to be habitually resident, as is clear from Department of Social Protection guidelines:

‘Where the person is in that employment for at least a month or in self-employment for at least 6 months, the person will normally satisfy the habitual residence condition, while the employment is still ongoing.’¹⁷⁰

Migrant workers, employed or self-employed in Ireland and making Pay Related Social Insurance Contributions, who leave their families behind them in other Member States, are often unaware of their rights to family benefits in Ireland, which is, almost invariably, the *competent* State. A special rule applies where the spouse of the migrant worker is employed in the Child’s Member State of residence¹⁷¹ *and* has made a claim for the benefit¹⁷² –in these circumstances the payment of the benefit is split between the two jurisdictions, with the highest paying Member State paying a supplement to bring the payment up to the level of that Member State.¹⁷³

Irish legislation¹⁷⁴ provides that an application must be made in the State for Child Benefit within the prescribed period of 12 months of the

¹⁷⁰ Department of Social Protection, Operational Guidelines, at para 7.3.

¹⁷¹ Case C-16/09 *Schwemmer* [2010] ECR I-09717, at para 48:

‘As the Court has already, in effect, held, it follows from the anti-overlap rule laid down in Article 10(1)(a) of Regulation No 574/72 that benefits due in a Member State other than that in which the child concerned resides, either simply by virtue of the national legislation of that Member State or by the application, for example, of Article 73 of Regulation No 1408/71, take priority over benefits due under the legislation of the Member State of that child’s residence, which are consequently suspended. However, where an occupation is carried on in that latter State, Article 10(1)(b)(i) of Regulation No 574/72 prescribes the opposite solution, namely that the right to benefits paid by the Member State of the child’s residence prevails over the right to benefits payable by the Member State of employment, which are thus suspended...’

¹⁷² Case C-153/84 *Ferraioli* [1986] ECR 1401 at para 15:

‘...there is no suspension under article 76 of Regulation no 1408/71 of entitlement to family allowances payable in pursuance of article 73 of that regulation in the Member State of employment of one of the parents when the other parent resides with the children in another Member State and pursues there a professional or trade activity but does not receive family allowances for the children on the ground that not all the conditions laid down by the legislation of that member state for the receipt of such allowances are satisfied.’

¹⁷³ Regulation 883/2004, art 68(1)(b)(i):

‘...in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children, provided that there is such activity, and additionally, where appropriate, the highest amount of the benefits provided for by the conflicting legislations. In the latter case, the cost of benefits shall be shared in accordance with criteria laid down in the Implementing Regulation...’

¹⁷⁴ Social Welfare Consolidation Act 2005, s 241(4):

qualifying criteria being met.¹⁷⁵ Otherwise payment in respect of the unclaimed period is not possible, unless the claimant can show ‘good cause’.¹⁷⁶ This term is not defined in legislation but excludes ignorance of the law. Where good cause is shown, by example where the Department has erroneously misinformed a claimant as to their rights, the Department has discretion to back-date Child Benefit to the date of qualification.

Given that the entitlement is co-ordinated by Regulation 883/2004, is it open to a claimant to rely directly upon the Regulation and seek to over-ride national provisions? The Court of Justice has, in a number of cases, held that acquiring a right requires fulfilment of all conditions imposed by national law including prior application.¹⁷⁷ However, in these cases the Court of Justice was, by and large, concerned with preventing claimants from being deprived of social security rights. Therefore, there may be some wriggle room on this issue. Though given that Irish nationals’ who have not applied for the benefits face the same restrictions, it is unlikely that this will avail a late claimant. There is, nonetheless, a saving provision within the Regulation whereby a claim made in the Member State of residence may be treated as a claim made in competent Member State.¹⁷⁸ The wording of the

‘A person who fails to make a claim for child benefit within the prescribed time shall be disqualified for payment in respect of any day before the date on which the claim is made unless a deciding officer or appeals officer is satisfied that there was good cause for delay in making the claim, in which case, child benefit shall be payable from the first day of the month following that in which the claimant became a qualified person within the meaning of section 220.’

¹⁷⁵ Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007), reg. 182(k), (as amended by Social Welfare (Consolidated Claims, Payments and Control)(Amendment)(No. 3)(Prescribed Time) Regulations 2008, SI 243 of 2008), reg 3:

‘(k) in the case of child benefit, the period of twelve months from the day on which, apart from satisfying the conditions of making a claim, the claimant becomes a qualified person within the meaning of section 220.’

¹⁷⁶ Social Welfare Consolidation Act 2005, s 241.

¹⁷⁷ Case C-225/10 *Garcia* (not yet reported in ECR), at para 44:

‘...the recognition of such a right requires that the interested person should fulfil all the conditions, as to both form and substance, imposed by the national legislation of that State in order to be able to exercise that right, which may in some cases include the condition that a prior application must have been made for the payment of such benefits...’

See further: Case 153/84 *Ferraioli* [1986] ECR 1401, para 14; Case C-117/89 *Kracht* [1990] ECR I-2781, para 11; and Case C-119/91 *McMenamin* [1992] ECR I-6393 para 26.

¹⁷⁸ Regulation 883/2004, art 68(3):

‘If, under Article 67, an application for family benefits is submitted to the competent institution of a Member State whose legislation is applicable, but not by priority right in accordance with paragraphs 1 and 2 of this Article: (a) that institution shall forward the application without delay to the competent institution of the Member State whose

Regulation would suggest that this provision cannot be used to bypass time constraints in applying in the competent Member State, unless the non-competent Member State was made aware of the potential competency of another Member State and informed that Member State.¹⁷⁹

2.7. Assimilation of meaning and rights of ‘worker’ and the self-employed

In a potentially important development, Article 48 of the TFEU, which is contained within the Treaty chapter¹⁸⁰ governing the rights of ‘workers’, was amended and now categorises, for the first time, both employed and self-employed persons as ‘migrant workers’. This was recognised in *Salgado González*,¹⁸¹ where the Court of Justice, when addressing pension-related issues pertaining to a self-employed person, referred on three occasions in the judgment to the ‘self-employed worker, migrant or non-migrant...’.¹⁸² In its previous form, Article 42 TEC, reference was made only to ‘migrant workers’. The historic distinction between ‘workers’ and the self-employed has been diminished within the context of not just Regulation 883/2004. Chalmers et al¹⁸³ aver that the respective rights have been assimilated by both EU legislators and the Court of Justice, partially premised upon citizenship of the Union:

‘...both workers and the self-employed are EU citizens, and this fact has been used in recent years by both the court of Justice and the EU legislators to assimilate their rights.’¹⁸⁴

legislation is applicable by priority, inform the person concerned and, without prejudice to the provisions of the Implementing Regulation concerning the provisional award of benefits, provide, if necessary, the differential supplement mentioned in paragraph 2; (b) the competent institution of the Member State whose legislation is applicable by priority shall deal with this application as though it were submitted directly to itself, and the date on which such an application was submitted to the first institution shall be considered as the date of its claim to the institution with priority.’

¹⁷⁹ *ibid.*

¹⁸⁰ Chapter I, Title IV.

¹⁸¹ Case C-282/11 *Salgado González* (not yet reported in the ECR).

¹⁸² *ibid.* at paras 31 and 53.

¹⁸³ Damien Chalmers, Gareth Davies & Giorgio Monti *European Union Law*, (2nd Edition, Cambridge, 2010) at 832.

¹⁸⁴ *ibid.*

Chalmers et al further note that similar interpretation is being given, by the Court of Justice, to Article 45 and 49 TFEU,¹⁸⁵ the latter assertion borne out by the Court of Justice decision in *Royer* where it was held that, in respect of free movement of workers, establishment (self-employment) and services:

’...comparison of these different provisions shows that they are based on the same principles both in so far as they concern the entry into and residence in the territory of member states of persons covered by community law and the prohibition of all discrimination between them on grounds of nationality.’¹⁸⁶

The Court of Justice has held that there is no single definition of the concept¹⁸⁷ or definition¹⁸⁸ of a ‘worker’, it varies in accordance with the area in which it is to be applied and, used in the context of Article 45 TFEU, does not necessarily coincide with the definition applied in relation to Article 48 TFEU and Regulation No 1408/71. In *Twomey*,¹⁸⁹ it was held that the term ‘worker’ in Article 1(a) of Regulation No 1408/71 covered any person having the status of a person insured under the social security legislation of one or more Member States, whether or not pursuing a professional or trade activity.¹⁹⁰

¹⁸⁵ Chalmers (n 183) at 832.

¹⁸⁶ Case 48-75 *Royer* [1976] ECR 497, at para 12.

¹⁸⁷ Case C-208/07 *Chamier-Glisczinski* [2009] ECR I-6095, at para 68:

‘68. With regard, first of all, to the applicability of Article 39 EC, it should be pointed out at the outset that there is no single definition of worker/employed or self employed person in Community law; it varies according to the area in which the definition is to be applied (see, inter alia, Case C 543/03 *Dodl and Oberhollenzer* [2005] ECR I 5049, paragraph 27). Thus, the concept of worker used in the context of Article 39 EC and Regulation No 1612/68 does not necessarily coincide with the definition applied in relation to Article 42 EC and Regulation No 1408/71...’

¹⁸⁸ Case C-345/09 *Van Delft* 2010 I-09879, at para 88:

‘On the question of the applicability of Article 45 TFEU, it should be noted at the outset that there is no single definition of worker/employed or self-employed person in European Union law; it varies according to the area in which the definition is to be applied. Thus the concept of ‘worker’ used in the context of Article 45 TFEU does not necessarily coincide with the definition applied in relation to Article 48 TFEU and Regulation No 1408/71...’

See further: Case C-85/96 *María Martínez Sala* [1998] ECR I-2691, at para 31 :

‘It must also be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied. For instance, the definition of worker used in the context of Article 48 of the EC Treaty and Regulation No 1612/68 does not necessarily coincide with the definition applied in relation to Article 51 of the EC Treaty and Regulation No 1408/71.’

¹⁸⁹ Case C-215/90 *Twomey* [1992] ECR I-1823.

¹⁹⁰ *ibid.* at para 13:

On the basis of the foregoing, it would appear safe to assume that, in the context of social security benefits, at the very least, the historic distinction between workers and the self-employed has no effect upon the right to social security benefits. The question, of whether or not this can be said of social assistance, which is governed by Directive 2004/38, is another matter and requires clarity, though the European Commission, who, in 2004, undertook an examination of all of the Directives governing workers and the self-employed, now repealed and replaced by Directive 2004/38, asserted that, workers were defined as persons who were engaged in employed or self-employed activity:

‘...Article 7(3) is based on and clarifies certain provisions of Directive 68/360 and incorporates Court of Justice case-law regarding the retention of worker status where the worker is no longer engaged in employed or self-employed activity.’¹⁹¹

Further, when addressing the provisions of Directive 2004/38 dealing with the retention of the status of ‘worker’ or self-employed person, the Court of Justice in joined cases *Vatsouras and Koupatantz*¹⁹² made no distinction between the rights of workers and the self-employed:

‘Article 7 of Directive 2004/38 provides... 3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances: ...(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this

‘It should be noted first of all that, as the Court has consistently held, the definition of the concept of "worker" in Article 1(a) of Regulation No 1408/71 has a general scope and covers any person having the status of a person insured under the social security legislation of one or more Member States, whether or not pursuing a professional or trade activity...’

¹⁹¹ European Commission, *Free movement and residence of Union citizens within the European Union* (Oct. 2004). In respect of Article 7(3) of Directive 2004/38 (transposed into Irish law as Reg. 6(2)(c)(ii) of S.I. 656 of 2006).

¹⁹² Joined cases C-22/08 and C-23/08 *Vatsouras and Koupatantz* [2009] ECR I-04585.

case, the status of worker shall be retained for no less than six months...’,¹⁹³

2.8. Special non-contributory cash benefits

The *material rationale* of Regulation 883/2004 covers special non-contributory cash benefits,¹⁹⁴ which are defined as having the ‘characteristics both of the social security legislation referred to in Article 3(1) and of social assistance’¹⁹⁵ –described as ‘hybrid benefits’¹⁹⁶– and intended to provide supplementary, substitute or ancillary cover to social security benefits and guarantee a minimum subsistence income¹⁹⁷ or protection for the disabled.¹⁹⁸ The payment, which is not exportable and paid exclusively in the place of residence and in accordance with national legislation,¹⁹⁹ must be derived from compulsory taxation and is not dependent upon contributions.²⁰⁰ The permissible derogation, from the principle of exportability, is interpreted strictly by the Court of Justice, who will only apply the derogation to benefits which are both ‘special’ and ‘non-

¹⁹³ *ibid.* at para 24. The CJEU was dealing with applicants who had worked for less than a year, at para 25:

‘The referring court found that the ‘brief minor’ professional activity engaged in by Mr Vatsouras ‘did not ensure him a livelihood’ and that the activity pursued by Mr Koupatantze ‘lasted barely more than one month’.

It is for that reason the CJEU only made reference to 7(3)(c), as 7(3)(d) applies to persons who have been employed for more than 12 months.

¹⁹⁴ Regulation 883/2004, art 3(3).

¹⁹⁵ Regulation 883/2004, art 70(1).

¹⁹⁶ Case C-299/05 *Commission v European Parliament* [2007] ECR I-8695, at para 45:

‘The benefits at issue are therefore ‘hybrid’ benefits which the Council considers to be closely linked to the economic and social situation of the three Member States concerned.’

¹⁹⁷ Regulation 883/2004, art 70(2)(a)(i), which provides that special non-contributory cash benefits mean:

‘...supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned...’

¹⁹⁸ Regulation 883/2004, art 70(2)(a)(ii):

‘solely specific protection for the disabled, closely linked to the said person’s social environment in the Member State concerned...’

¹⁹⁹ Regulation 883/2004, art 70(4):

‘The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.’

²⁰⁰ Regulation 883/2004, art 70(2)(b):

‘where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary...’

contributory’ and are listed in Annex X of the Regulation,²⁰¹ resulting in some payments, defined by Member States as being special non-contributory cash benefits, being re-categorised by the Court of Justice as one of the benefits listed in Article 3(1) and thus exportable.²⁰² Historically, the Court of Justice took the view that special non-contributory cash benefits were exportable. This created significant controversy amongst Member States²⁰³ and eventually led to an amendment to Regulation 1408/71²⁰⁴ which imposed a residence requirement –deemed permissible by the Court of Justice²⁰⁵ and compatible with Article 48 of the Treaty on the Functioning of the European Union²⁰⁶– on special non-contributory cash benefits. For the purpose of Regulation 883/2004, ‘residence’ is defined as the place where a person habitually resides.²⁰⁷ However, in *Brey*,²⁰⁸ which is

²⁰¹ Case C-215/99 *Jauch* [2001] ECR I-1901, at para 21:

‘...Derogating provisions of that kind, such as those provided for by Article 10a of Regulation No 1408/71, must be interpreted strictly. This means that they can apply only to benefits which fulfil the conditions they define. It follows that Article 10a can apply only to benefits which satisfy the conditions defined in Article 4(2a) of Regulation No 1408/71, that is, benefits which are both special and non-contributory and are listed in Annex IIa to that regulation.’

²⁰² An example of which may be found in C-286/03 *Hosse* [2006] ECR I-1771, at para 46:

‘...a care allowance... does not constitute a special non-contributory benefit within the meaning of Article 4(2b) of Regulation No 1408/71 but a sickness benefit within the meaning of Article 4(1)(a) of that regulation.’

²⁰³ See Dorte Sindbjerg Martinsen, *The Social Policy Clash–EU Cross-Border Welfare, Union Citizenship and National Residence Clauses*, paper prepared for the EUSA Tenth Biennial International Conference, Montreal, Canada, May 17-19, 2007 at 6-7:

‘The legal and political contest over the nature of ‘special non-contributory’ benefits culminated with the assessment of the French supplementary allowance in the joined cases 379 to 381/85 and 93/86 Giletti et al...However, despite the Court’s conclusions, France still refused to comply, and the dispute over the supplementary allowance continued. Against this background, the Commission issued an infringement procedure, case C-236/88 against France. The Court again concluded that the French authorities were obliged to export what it considered to be an old age benefit. The legally imposed exportability of the French supplementary allowance did not, however, continue for long. On the 30 April 1992, the Council of Ministers unanimously adopted Regulation 1247/92, which overruled the Court’s extension of exportability. The collective political response had been clear: The interpretations by the Court had gone too far beyond the political intention. The Council managed to overcome the significant threshold of unanimity to rein-in this unintended and unwelcome development in case law.’

²⁰⁴ Regulation 1247/92 of 30 April 1992 amending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the community OJ No. L136, 19.5.92, p. 1.

²⁰⁵ Case C-537/09 *Bartlett* [2011] ECR I-03417, at para 38:

‘...as regards the special non-contributory benefits... it is permissible for the European Union legislature to adopt, in the course of implementation of Article 48 TFEU, provisions derogating from the principle of the exportability of social security benefits. In particular, the grant of benefits closely linked with the social environment may legitimately be made subject to a condition of residence in the State of the competent institution...’

²⁰⁶ *ibid.* at para 40:

‘...Article 10a of Regulation No 1408/71 and of Regulation No 1408/71, as amended, is not incompatible with the free movement of persons and with Article 48 TFEU in particular.’

²⁰⁷ Regulation 883/2004, art 1(j).

discussed in detail below, a number of Member States asserted that some special non-contributory cash benefits constitute social assistance and are thus governed by the *right to reside* requirements of Directive 2004/38. Advocate General Wahl has adopted this line of thinking in his Opinion, arguably placing what is ostensibly a policy issue before the Court of Justice. The Court of Justice, however, has adopted the same view:

‘As regards the compensatory supplement at issue in the main proceedings, it is clear from paragraphs 33 to 36 above that that benefit may be regarded as coming under the ‘social assistance system’ of the Member State concerned. As the Court found in paragraphs 29 and 30 of *Skalka*, that benefit, which is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, is funded in full by the public authorities, without any contribution being made by insured persons.’²⁰⁹

The implications of this decision are discussed below.

2.9. Habitual Residence

The term ‘habitual residence’ was considered to have a ‘community-wide’²¹⁰ meaning by the Court of Justice in *Swaddling*²¹¹ where it was held that:

‘The phrase ‘the Member State in which they reside’... refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and

²⁰⁸ Case C-140/12 *Brey*, Opinion of Advocate General Wahl.

²⁰⁹ Case C-140/12 *Brey* [2013] (not yet reported in the ECR), at para 62.

²¹⁰ Case C-90/97 *Swaddling* [1999] ECR I-01075, at para 28:

‘Pursuant to Article 1(h) of Regulation No 1408/71, the term ‘residence’ for the purposes of that regulation ‘means habitual residence’ and therefore has a Community-wide meaning.’

See further Case C-76/76 *Di Paolo* [1977] ECR 315, at para 17:

‘The concept of ‘the Member State in which he resides’ must be limited to the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated.’

²¹¹ *ibid.*

continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances...’

This formulation closely follows that which was espoused in the much earlier decision of the Court of Justice in *Di Paolo*.²¹² National legislation in the UK, which required an ‘appreciable’ period (eight weeks) of residence before a person could be found to be habitually resident, was deemed incompatible²¹³ with the Regulation 1408/71 in *Swaddling*. Under Irish legislation there is a rebuttable presumption that a person is not habitually resident unless he or she has been resident for two years,²¹⁴ in the State or the Common Travel Area.²¹⁵ This presumption is, arguably, incompatible with *Swaddling* and, in the context of persons actually employed in this State, entirely contrary to the decision in *Di Paolo*, where it was held that a person in stable employment in a Member State enjoys a presumption that he or she resides²¹⁶ there and thus automatically meets the habitual residence requirement of Regulation 883/2004. In practice, however, a person in stable employment or self-employment in this state would be

²¹² Case C-76/76 *Di Paolo* [1977] ECR 315, at para 22:

‘Thus for the purposes of applying Article 71 (1) (b) (ii) of Regulation No 1408/71, account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances.’

²¹³ *Swaddling* (n 210), at para 33:

‘Consequently, without there being any need to consider the implications of Article 48 of the Treaty for the outcome of the case before the national court, the answer to the question referred must be that Article 10a of Regulation No 1408/71, read together with Article 1(h) thereof, precludes the Member State of origin - in the case of a person who has exercised his right to freedom of movement in order to establish himself in another Member State, in which he has worked and set up his habitual residence, and who has returned to his Member State of origin, where his family lives, in order to seek work - from making entitlement to one of the benefits referred to in Article 10a of Regulation No 1408/71 conditional upon habitual residence in that State, which presupposes not only an intention to reside there, but also completion of an appreciable period of residence there.’

²¹⁴ Social Welfare Consolidation Act 2005, s 246(1):

‘For the purpose of each provision of this Act specified in *subsection (3)*, it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date.’

²¹⁵ Social Welfare Consolidation Act 2005, s 246(2):

‘In *subsection (1)* “other part of the Common Travel Area” means the United Kingdom of Great Britain and Northern Ireland, the Channel Islands and the Isle of Man.’

²¹⁶ *Di Paolo* (n 212), at para 19:

‘In fact, whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State.’

deemed to be habitually resident.²¹⁷ The habitual residence rules²¹⁸ applied by the Department of Social Protection in respect of pre-active Jobseekers – who are afforded special protection by the Court of Justice²¹⁹ – entering this State to seek employment, are also contrary to EU law. The habitual residence test set out in *Di Paolo* and *Swaddling* have been codified in Article 11 of Regulation 987/2009.²²⁰

The test for habitual residence formulated under Irish legislation,²²¹ which is applied equally to citizens and non-citizens,²²² closely follows the test espoused by the Court of Justice in *Swaddling*. In the UK the test was put on a legislative footing in 1994, ostensibly to discourage social welfare tourism.²²³ In Ireland it was introduced in 2004.²²⁴ The potential effect of the test on Irish citizens may be seen in *S v Minister for Social Protection*,²²⁵ where the applicant, who had left the Ireland some 20 years earlier, was now returning from Saudi Arabia in very difficult circumstances and without

²¹⁷ Department of Social Protection, Operational Guidelines, Habitual Residence (27/9/2012), at para 7.3:

‘Where the person is in that employment for at least a month or in self-employment for at least 6 months, the person will normally satisfy the habitual residence condition, while the employment is still ongoing.’

Available on <<http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx>> accessed on 21 April 2013.

²¹⁸ *ibid.* at Appendix 1 :

‘A jobseeker who moves from one EEA country to another in order to seek employment cannot claim the advantages for migrant workers under EC law and is subject to the habitual residence condition in the normal manner. Where an EEA national has not been employed since coming to Ireland and makes a claim for any of the payments listed in Section 1 above, the five habitual residence factors set out in Part 7 should be examined in each case.’

²¹⁹ Discussed in this Chapter in section 2.14.

²²⁰ (n 8).

²²¹ Social Welfare Consolidation Act 2005, s 246(4):

‘Notwithstanding the presumption in subsection (1), a deciding officer or the Executive, when determining whether a person is habitually resident in the State, shall take into consideration all the circumstances of the case including, in particular, the following: (a) the length and continuity of residence in the State or in any other particular country; (b) the length and purpose of any absence from the State; (c) the nature and pattern of the person’s employment; (d) the person’s main centre of interest; and (e) the future intentions of the person concerned as they appear from all the circumstances.’.

²²² *Douglas v Minister for Social Protection* [2012] IEHC 27, at para 15:

‘The entitlement to social welfare here... can operate... against an Irish citizen, against a French citizen, on precisely the same ground of habitual residence which is applied in Ireland...’

²²³ *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, Walker LJ at para 76:

‘The Secretary of State’s statutory statement is very largely concerned with the habitual residence test (introduced into social security legislation in 1994). It had the legitimate purpose of discouraging “benefit tourism.”

²²⁴ Social Welfare (Miscellaneous Provisions) Act 2004, s 17 and schedule 1.

²²⁵ 2012 323JR.

financial support. The applicant, who had two young children, was refused social welfare on the grounds that she was not habitually resident and sent to wholly unsuitable emergency accommodation. This decision was challenged before the High Court, with an *ex-parte* judicial review leave application being made on Good Friday in 2012 –with reliance being placed upon the respondent’s supplementary operational guidelines on Habitual Residence which appeared to be aimed at assisting persons such as the applicant²²⁶– made returnable on an *inter parte* basis to the following week where the respondent agreed to make exceptional needs²²⁷ payments to the applicant who, shortly thereafter, was deemed to be habitually resident.

In the context of social welfare claims, habitual residence *per se* has received relatively little attention before the Courts in Ireland. This is, perhaps, due to the subjective nature of the habitual residence test and the reluctance of the courts in Ireland to overturn decisions on the basis of the factual or subjective merits of a case. Judicial review is primarily concerned with correcting defects in the decision-making process or errors of law.²²⁸ This was certainly the view adopted by Hedigan J. in *Jama v Minister for Social Protection*,²²⁹ a judicial review, where it was held that:

‘The applicant’s concern in this application is the criteria applied to assess “habitual residence” of a refugee in applying for child benefit, and specifically, as to when that entitlement commences. It seems to me that the best course of action in these cases, where an applicant does not agree with the criteria applied, is to avail of the special form of appeal provided in the statutory framework.’²³⁰

Charleton J. in *Douglas v Minister for Social Protection*,²³¹ where the applicant made a statutory appeal²³² to the High Court, was –quite properly

²²⁶ Department of Social Protection, Habitual Residence Condition (HRC) Guidelines–Supplement, available on <<http://www.welfare.ie/en/Pages/Habitual-Residence-Condition-HRC-Guidelines---Supplement.aspx>> accessed 2 April 2012.

²²⁷ Social Welfare Consolidation Act 2005, s 200. This is discussed in Chapter 3, section 3.

²²⁸ Discussed in Chapter 3, section 4.

²²⁹ [2011] IEHC 379.

²³⁰ *ibid.* at para 6.8.

²³¹ [2012] IEHC 27.

on the basis of the Supreme Court decision in *Castleisland*²³³ –willing to consider the merits of the decision,²³⁴ which would not, in the absence of a claim of unreasonableness, be appropriate in a judicial review. In *Douglas*, the learned judge also considered the question of what, if any, rights, a UK national, now residing in Ireland and seeking social welfare, could derive from having resided in the Common Travel Area (CTA). Section 246 of the Social Welfare Consolidation Act 2005 provides that a person is presumed not to be habitually resident if not living in Ireland or the other part of the CTA²³⁵ for two years. The applicant, a lay litigant, appears to have argued that residence in the CTA meant that she was automatically habitually resident. Though not alluded to in the *Douglas* judgment, an Irish person travelling from Ireland to the UK would, as noted by the Supreme Court in *Patmalniece*,²³⁶ have both a right to reside and pass the habitual residence test by virtue of the CTA.²³⁷ The arrangements between the UK and Ireland under the CTA are recognised in the TFEU.²³⁸ Charleton J. accepted that persons coming from the UK were, by virtue of s. 246, entitled to special

²³² Social Welfare Consolidation Act 2005, s 320. Discussed in Chapter 3, section 3.8.

²³³ *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs* [2004] IESC 40:

‘Clearly, on the authorities the High Court or this court on appeal is entitled to consider whether it was open to the appeals officers to come to the decision which she did arrive, at and, if not, whether the evidence conclusively established that Mr. Walsh was an independent contractor. If so, the High Court or this court on appeal can make a declaration to that effect. A statutory appeal on a question of law is not a judicial review and a question of law includes the question of whether the evidence supports only one conclusion.’

²³⁴ *Douglas* (n 231) at para 15:

‘Given those wide criteria and given the background of the appellant living all her 49 years in the United Kingdom, prior to coming to Ireland four months and two weeks ago, the date on which she applied, her intentions as they appear, her main centre of interest, the nature and pattern of her employment and above all the length and continuity of her residence in the State, I cannot see that there has been any serious and significant error which would entitle me to interfere with the decisions made in this case.’

²³⁵ Social Welfare Consolidation Act, 2005, s 246 (2):

‘In subsection (1) “other part of the Common Travel Area” means the United Kingdom of Great Britain and Northern Ireland, the Channel Islands and the Isle of Man.’

²³⁶ *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, Hope LJ at para 1:

‘... regulation 2 of the State Pension Credit Regulations 2002 (SI 2002/1792) (“the 2002 Regulations”) ...is not easy to summarise in a few words, but its general effect is to restrict entitlement to state pension credit to those who have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland (“the Common Travel Area”).’

²³⁷ The applicant in *Patmalniece* unsuccessfully argued that the special consideration given to persons from Ireland was discriminatory against her, as a Latvian citizen.

²³⁸ Treaty on the Functioning of the European Union, Protocol 20, art 2:

‘The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (“the Common Travel Area”)...’

treatment.²³⁹ Charleton J., however, held that did not extend to such persons being deemed habitually resident automatically, as, although the presumption would not work against them, they still, nonetheless had to meet the five stage test set out in s. 246:

‘This provides that a deciding officer, when determining whether a person is habitually resident in the State (which exclusively means Ireland but not the common travel area), shall take into consideration all the circumstances of the case including and, in particular, I quote:-
(a) The length and continuity of residence in the State or any other particular country; (b) The length and purpose of any absence from the State; (c) The nature and pattern of a person’s employment; (d) The person’s main centre of interest; and (e) The future intentions of the person concerned as they appear from all of the circumstances.’²⁴⁰

Requiring, as noted by O’Neill J. in *Ayavoro*,²⁴¹ that claimants must furnish the necessary proofs requested by the Department of Social Protection.

Habitual residence was again at issue in *Solovastru v Minister for Social Protection and ors.*,²⁴² however, here the court was primarily concerned with the controversial ‘right to reside’ requirement found in section 246(5) of the Social Welfare Consolidation Act 2005²⁴³ which provides that, in order to be habitually resident, a claimant must first have a *right to reside* in the State.²⁴⁴

²³⁹ *Douglas* (n 231) at para 4:

‘Section 246 of the Social Welfare Consolidation Act 2005, provides for special treatment for persons coming from Great Britain, defined as the common travel area, namely the United Kingdom, the Channel Islands and the Isle of Man.’

²⁴⁰ *Douglas* (n 231). at para 5.

²⁴¹ *Ayavoro v HSE & Minister for Social* [2009] IEHC 66:

‘It is quite clear to me and, indeed, in my view, beyond any reasonable arguments that both respondents are entitled to seek, and indeed, demand, from the applicant for the purposes of determining whether he was entitled to either Supplementary Welfare Allowance or a Jobseeker’s Allowance documents and information to establish that the conditions for obtaining these benefits were satisfied, in particular, the habitual residency condition...’

²⁴² [2011] IEHC 532.

²⁴³ As inserted by section 15 of the Social Welfare and Pensions Act 2009 (No. 2).

²⁴⁴ *ibid*:

‘Notwithstanding subsections (1) to (4) and subject to subsection (9), a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State.’

2.10. Right to Reside

Prior to addressing the Irish statutory provisions and case law dealing with the right to reside it is useful to consider the UK position. UK legislation was amended in 2004²⁴⁵ and 2006 to introduce the ‘right to reside’ as a prior condition to the application of the habitual residence test –if a social welfare claimant could not establish a right to reside he or she could not be treated as habitually resident, irrespective of the claimant’s ability to pass the habitual residence conditions.²⁴⁶ The right to reside test is applied to a number of social welfare payments in the UK, including Jobseeker’s Allowance.²⁴⁷ As with Irish legislation, complying with the right to reside condition in the UK is contingent upon having a right to reside under Directive 2004/38.²⁴⁸ UK and Irish nationals are deemed automatically to have a right to reside.²⁴⁹ The stated purpose of the UK regulations²⁵⁰ which introduced the right to reside requirement was to reflect the terms of Directive 2004/38 and to modify the right to reside requirement in the habitual residence test to take account of Article 24(2) of the Directive:

²⁴⁵ Social Security (Habitual Residence) Amendment Regulations 2004, effective from 1 May 2004.

²⁴⁶ The Social Security (Persons from Abroad) Amendment Regulations 2006 (S.I. 1026 of 2006), explanatory note:

‘A person who does not have a right to reside in the United Kingdom, Channel Islands, Isle of Man or Republic of Ireland cannot be treated as habitually resident.’

²⁴⁷ The Social Security (Persons from Abroad) Amendment Regulations 2006 (S.I. 1026 of 2006), reg 9(2):

‘No claimant shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless he has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3).’

²⁴⁸ Reg 9(4):

‘A claimant is not a person from abroad if he is— (a) a worker for the purposes of Council Directive No. 2004/38/EC; (b) a self-employed person for the purposes of that Directive; (c) a person who retains a status referred to in sub-paragraph (a) or (b) pursuant to Article 7(3) of that Directive; (d) a person who is a family member of a person referred to in sub-paragraph (a), (b) or (c) within the meaning of Article 2 of that Directive; (e) a person who has a right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive...’

²⁴⁹ *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621, at para 5:

‘...a United Kingdom national has a right to reside by virtue of his right of abode under s.2(1) of the Immigration Act 1971. Thus all United Kingdom nationals pass that test. So do Irish nationals.’

²⁵⁰ Social Security (Persons from Abroad) Amendment Regulations 2006 (S.I. 1026 of 2006).

‘The amendments are made in consequence of Council Directive No. 2004/38/EC (OJ L 158, 30.4.04, p. 77) (“the Directive”), the provisions of which are to be transposed by the Immigration (European Economic Area) Regulations 2006 (S.I. 2006/1003)... The income-related benefit regulations provide that a claimant is ineligible for benefit where he or she is a “person from abroad”, that is to say where he or she is not habitually resident in the United Kingdom, Channel Islands, Isle of Man or Republic of Ireland. A person who does not have a right to reside in the United Kingdom, Channel Islands, Isle of Man or Republic of Ireland cannot be treated as habitually resident. These Regulations: (a) restate more simply the definition of “person from abroad”; (b) set out afresh the categories of persons who are excluded from that definition so as to reflect the terms of the Directive; and (c) modify the right to reside requirement in the habitual residence test to take account of Article 24(2) of the Directive.’²⁵¹

It was noted by the Court of Appeal in *Patmalniece*²⁵² that the right to reside test was introduced to prevent social welfare tourism²⁵³ and economically inactive persons from being able to meet the habitual residence conditions,²⁵⁴ thus ensuring that such persons could not obtain benefits.²⁵⁵ In Ireland the test appears to have been brought in in response to the decision of an appeals officer of the Social Welfare Appeals Office who found an

²⁵¹ Ibid. explanatory note.

²⁵² *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621.

²⁵³ *ibid.*

²⁵⁴ In *Patmalniece* (n 248) the Court of Appeal noted that:

‘...the decision of the House of Lords in *Chief Adjudication Officer v Wolke* [1997] 1 WLR 1640 was perceived as creating a major difficulty in relation to economically inactive EU nationals.’

²⁵⁵ *ibid.* at para 10:

‘The purpose of the introduction of that requirement was made plain by the Secretary of State in the statement he was required to make (pursuant to s.172(1) of the 2002 Act) because the 2004 Regulations had been referred to the Social Security Advisory Committee. The underlying purpose of the introduction of a "right to reside" test into the UK's social security system was to protect that system from exploitation by those who do not wish to come to work but to live off benefits (§4). The Committee had taken the view that the existing habitual residence test was sufficient to prevent "benefit tourism". The Secretary of State, however, concluded that the habitual residence test was ineffective in withholding entitlement to income-related benefits from those who had decided to live in the UK indefinitely without being economically active (§14). The 2004 Regulations were: "intended to fill a gap in measures to safeguard the public purse against exploitation by people with no right to reside here, irrespective of nationality.’

asylum-seeker habitually resident and thus entitled to child benefit, in order to exclude such persons.²⁵⁶

The right to reside test has been challenged in a number of decisions in the UK on a number of different bases. In *Abdirahman*²⁵⁷ the applicants, nationals of Sweden and Norway,²⁵⁸ neither of whom was working or seeking work,²⁵⁹ sought to challenge the right to reside test on the basis of Articles 12 and 18 TFEU. The Court of Appeal applied the reasoning of the Court of Justice decision in *Trojani*,²⁶⁰ where it was held that Article 18 was subject to limitations and conditions:

‘...a citizen of the Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality.’²⁶¹

The Court of Justice, however, also held that possession of a residence permit permitted a Union citizen to rely upon Article 12 EC in order to be

²⁵⁶ Free Legal Aid Advice Centre, *FLAC Concerns in relation to the Application of the Habitual Residence Requirement* (2008) available on <www.flac.ie/download/doc/flac_submission_to_ihrc_re_hrc_30.07.08.doc> Accessed 22 June 2013.

²⁵⁷ *Abdirahman & Others v Secretary of State for Work and Pensions* [2007] EWCA Civ 657.

²⁵⁸ Norway is not an EU Member State. However, it is a member of the European Economic Area (EEA), a free-trade area created in 1994 by an agreement between the European Free Trade Association (EFTA) and the EU.

²⁵⁹ (n 257) at paras 6-7:

‘Ms Abdirahman is Swedish by nationality, and so a citizen of the EU. She came to England from Sweden on 1 March 2004 with her three children. She stated that her reason for coming was that she had family here, and she intended to remain here permanently. At the relevant time she did not work and was not seeking work in the UK... Mr Ullusow is a Norwegian citizen, having been born in Somalia on 5 December 1936. He has an adult daughter of his first marriage, his first wife having died. His daughter travelled to England in 2004. Shortly afterwards he followed her, intending to find her and to persuade her to return with him to Norway. She would not return, and he decided to stay. He claimed pension credit on 14 June 2004; he was not working or seeking work at that time.’

²⁶⁰ Case C-456/02 *Trojani v Centre Public d'aide sociale de Bruxelles* [2004] ECR I-7573.

²⁶¹ *ibid.* at para 46.

granted social assistance.²⁶² The Court in *Abdirahman* ultimately held that the right to reside was proportionate to the legitimate objective of protecting public finances.²⁶³

Sixteen months later, in *Kaczmarek*,²⁶⁴ the applicant attempted to distinguish *Abdirahman* on the basis of having been previously lawfully resident in the UK, citing *Trojani*,²⁶⁵ where it was held that:

‘... a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.’²⁶⁶

This was rejected outright by the Court,²⁶⁷ as was the *Baubast* argument – a right of residence premised upon citizenship of the Union derived from Article 18 TFEU,²⁶⁸ – on the basis that it would ‘attack the Directive [2004/38]’²⁶⁹ which was not actually in force at that time. In both

²⁶² *Trojani* (n 260), at para 46:

‘However, once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the Minimex.’

²⁶³ *Abdirahman* (n 257), at para 33:

‘It seems to me, on the basis of those decisions, in particular that of *Trojani*, that article 18 does not create a right of residence for an EU citizen in another Member State, in a case in which the limitations imposed under Directive 90/364 are not satisfied, and that those limitations are proportionate to the legitimate objective in protecting the public finances of the host Member State.’

²⁶⁴ *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA 1310.

²⁶⁵ *Trojani* (n 260) at para 43:

²⁶⁶ *ibid.* at para 43.

²⁶⁷ *Kaczmarek* (n 264) at para 16:

‘The question in relation to Article 12 is a narrow one. It is: Does the reference to lawful residence "for a certain time" in paragraph 43 of *Trojani* open the door to eligibility based on residence of unspecified but significant duration and of a type which evidences a degree of social integration in the host Member State? In my judgment, it does not. I respectfully agree with the Commissioner who considered (at paragraph 10) that the reference to "a certain time" is a reference to specific qualifying periods which give rise to an express right of residence. By its juxtaposition with "or possesses a residence permit", it is being advanced as one of two ways in which an economically inactive migrant may rely on Article 12 as a result of specific and substantive entitlement. Moreover, it would be wholly undesirable if Article 12 were to give rise to an open-textured temporal qualification of the kind suggested on behalf of the appellant. Eligibility is primarily and more appropriately a matter for normative regulation rather than discretion or subjective evaluation on a case by case basis. Article 12 should be approached with that in mind. Accordingly, I reject this ground of appeal.’

²⁶⁸ Discussed in this Chapter in section 2.14.

²⁶⁹ *Kaczmarek* (n 264) at para 22:

‘It seems that this is what the Commissioner had in mind in the present case when he said (at paragraph 15): "However, it seems to me that to rely on Article 18(1) where the Council of the European Communities has apparently deliberately excluded a class of persons from

Abdirahman and *Kaczmarek* Advocate General Geelhoed's Opinion in *Trojani* was cited:

'So long as social security systems have not been harmonised in terms of the level of benefits, there remains a risk of social tourism, i.e. moving to a Member State with a more congenial social security environment.'²⁷⁰

The reference to social welfare tourism was somewhat harsh in respect of the applicant in *Kaczmarek* who had been a student and a worker prior to pregnancy and whose child was ill. In neither case was Regulation 1408/71 relied upon.²⁷¹

In *Tilianu*,²⁷² in both the High Court and the Court of Appeal,²⁷³ it was held that formerly self-employed persons could not qualify for Jobseeker's Allowance as they no longer retained a right to reside under Directive 2004/38, immediately upon cessation of self-employment. The legal argument –premiered solely upon arguing that the applicant retained a right to reside under Directive 2004/38– advanced was, arguably, too narrow, insofar as Regulation 1408/71 was not relied upon to assert a right to reside.

The compatibility of the right to reside test –as applied to State pension credit (a means tested, non-contributory benefit) – with the forerunner of Regulation 883/2004, Regulation 1408/71, was considered by Court of Appeal in the UK in *Patmalniece v Secretary of State for Work and*

the scope of a Directive would be to attack the Directive ... Article 18(1) may be relied upon to supplement a Directive but, in proceedings before a national court or tribunal, it cannot be relied upon to remove limitations necessarily implicit in a Directive." In my view, this analysis is correct. It is properly founded on *Abdirahman*, by which we too are bound and with which I agree in any event.'

²⁷⁰ *Trojani* (n 260) Opinion of Advocate General Geelhoed, at para 18.

²⁷¹ *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621, at para 13:

'None of the claimants in *Abdirahman* and *Kaczmarek* relied on 1408/71.'

²⁷² *The Queen on the application of M Tilianu v Secretary of State for Work and Pensions* [2010] EWHC 213 (Admin).

²⁷³ *The Queen on the application of M Tilianu v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397.

Pensions.²⁷⁴ It was accepted that the applicant –a failed asylum-seeker and former third country national whose state of origin acceded to the Union in 2004– came within the personal scope of Regulation 1408/71 and that the payment was within the material scope of the regulation.²⁷⁵ It was also accepted that Article 3 of Regulation 1408/71 prohibited direct and indirect discrimination unless it was objectively justified and proportionate –citing the test applied in *Borawitz*.²⁷⁶ The applicant’s case was, arguably, fundamentally flawed, insofar as she retained entitlement to her exportable Latvian pension,²⁷⁷ even though resident abroad –thus excluding her from obtaining a pension in the UK– and she did not enter the UK to seek employment, nor had she ever worked in the UK and had no intention of ever doing so. The legal point being raised was one of considerable importance and deserved to be advanced with the best possible factual scenario. Instead it was heard on the weakest possible factual matrix: a non-economically active, retired person seeking to obtain a better pension in another Member State –something which may be excluded by Regulation 1408/71. The Court of Appeal once again relied upon *Trojani* and to overcome the Article 3 prohibition on discrimination, held that it was proportionate to preclude those who are not economically active and not self-sufficient from access to social assistance:²⁷⁸

‘It is important to appreciate that both this court and the Court of Justice have accepted, as part of the ratio of their decisions, the proposition that to preclude those who are not economically active and not self-sufficient from access to social assistance, by depriving them

²⁷⁴ *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621.

²⁷⁵ *ibid.* at para 3

‘Article 3 of Council Regulation (EC) 1408/71 required that persons within the scope of the Regulation should enjoy the same benefits under legislation of a Member State as the nationals of that state. Ms Patmalniece comes within the personal scope of the 1971 Regulation. Council Regulation 647/2005 of 13 April 2005 included State Pension Credit under the United Kingdom’s State Pension Credit Act 2002 (the 2002 Act) within the material scope of 1408/71.’

²⁷⁶ Case C-124/99 *Borawitz* [2000] ECR I-7293.

²⁷⁷ *Patmalniece* (n 274) at para 2:

‘But she did not return to Latvia; she was destitute apart from her Latvian pension, worth about £50 a month (2005 valuation)’

²⁷⁸ *Patmalniece* (n 274) at para 30.

of a right of residence, pursues the legitimate aim of protecting the public finances and is proportionate to that aim.’

The Court then considered the distinction between social security, social assistance and non-contributory cash benefits which bore similarities of social assistance and security and determined that such payments were subject to the right to reside condition because such payments were subject to national legislation.²⁷⁹

Before a year had passed, the Commission was engaged with the UK authorities in the context of the infringement procedure, requesting them to submit observations on the compatibility of the right to reside test in respect of benefits falling within Regulation 1408/71, with EU law.²⁸⁰ At this point *Patmalniece* was awaiting appeal to the Supreme Court in the UK. The judgment in *Patmalniece* was delivered on 16 March 2011 but pre-dates the issuing of a reasoned opinion and request, by the Commission, to the UK authorities, to cease the application of the right to reside test. The Court in *Patmalniece* was, however, aware of and made reference to, the fact that the compatibility, with EU law, of the right to reside to reside test, was being questioned by the Commission.²⁸¹ However, in the absence of a reasoned opinion from the Commission the Court was unwilling to draw any conclusions one way or the other.²⁸²

²⁷⁹ *Patmalniece* (n 274) at paras 41 and 53:

‘It is for those reasons that the amended 1408/71 draws a distinction between social security benefits, within Article 4.1 and hybrid benefits, within Article 4.2a. Social security benefits cannot be subjected to a residence condition, they must be exportable, whereas hybrid benefits may be the subject of a residence condition. Entitlement to hybrid benefits depends upon the legislation of the country of residence, which reflects the social and economic conditions in that country... For the reasons I have given, 1408/71 does not have the effect of rendering the purpose of the right of residence requirement illegitimate.’

²⁸⁰ *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, at para 40:

‘...by letter dated 4 June 2010 the European Commission invited the United Kingdom pursuant to article 258 TFEU to submit observations on the compatibility with EU law of the imposition of a right to reside test for benefits, including state pension credit, falling within the scope of Regulation 1408/71.’

²⁸¹ *ibid.* at para 40.

²⁸² *Patmalniece* (n 280) at para 40:

‘So far, no opinion has yet been issued by the Commission with reference to any alleged infringement of Regulation 1408/71. In these circumstances I would not draw any conclusions either one way or the other from these developments.’

Once again reliance was placed upon the reasoning applied in *Trojani* and the Advocate General's opinion:

'The Secretary of State's justification lies in his wish to prevent exploitation of welfare benefits by people who come to this country simply to live off benefits without working here. That this is a legitimate reason for imposing the right of residence test finds support in Advocate General Geelhoed's opinion in *Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 820, para 70 that it is a basic principle of Community law that persons who depend on social assistance will be taken care of in their own Member State.'²⁸³

The Court, again, noted that the applicant had never been economically active in the UK²⁸⁴ and had not come to the UK with the intention of working there.²⁸⁵ However, the respondent, the Secretary of State for Work and Pensions, accepted that, whilst the effect of the right to reside test was that the social welfare entitlement at issue would be denied to social welfare tourists,²⁸⁶ persons who were economically or socially integrated would be eligible.²⁸⁷ The Court engaged in a consideration of whether or not the difference in treatment as between nationals and non-nationals, resulting from the application of the right to reside test, was based upon objectively justified considerations independent of nationality.²⁸⁸ The Court held that:

²⁸³ *Patmalniece* (n 280) at para 46.

²⁸⁴ *Patmalniece* (n 280) at para 4:

'But she has not worked at any time while she has been in this country, and she has no other income...'

²⁸⁵ *Patmalniece* (n 280) at para 14:

'She did not come to this country to work here...'

²⁸⁶ *Patmalniece* (n 280) at para 38:

'The underlying purpose was said to be to safeguard the United Kingdom's social security system from exploitation by people who wished to come to this country not to work but to live off incomerelated benefits, while allowing those who come here genuinely to work to have access to them: para 4 of Cm 6181.'

²⁸⁷ *Patmalniece* (n 280) at para 42:

'A person would be eligible to receive state pension credit if he could show economic integration in the United Kingdom or a sufficient degree of social integration here. Where there was social integration, the person would be eligible. What the regulation sought to do was to prevent exploitation of welfare benefits by people who came to this country simply to live off benefits without working or having worked here.'

The Court of Justice, in Case C-158/07 *Forster* [2008] ECR I-8507, accepted that, in respect of study finance, governed by Article 24(2) of Directive 2004/38, the degree of social integration could extend to five years residency.

²⁸⁸ *Patmalniece* (n 280) at para 15:

‘...the Secretary of State's purpose was to protect the resources of the United Kingdom against resort to benefit, or social tourism by persons who are not economically or socially integrated with this country. This is not because of their nationality or because of where they have come from. It is because of the principle that only those who are economical or socially integrated with the host Member State should have access to its social assistance system. The principle, which I take from the decision in *Trojani*, is that it is open to Member States to say that economical or social integration is required. A person's nationality does, of course, have a bearing on whether that test can be satisfied. But the justification itself is blind to the person's nationality. The requirement that there must be a right to reside here applies to everyone, irrespective of their nationality.’

Of course, the final sentence from the foregoing passage is contradictory as the right to reside test does not apply to ‘everyone’ as UK and Irish citizens –the latter on foot of the Common Travel Area agreement– are deemed automatically to have a right to reside. The line of reasoning adopted by the Supreme Court in *Patmalniece* –subjecting special non-contributory cash benefits to a right to reside test under Directive 2004/38– has also been adopted by both the Advocate General and the Court of Justice in *Brey*²⁸⁹:

‘It cannot therefore be inferred from Article 70(4) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, that EU law precludes national legislation, such as that at issue in the main proceedings, under which the right to a special non-contributory cash

‘The parties are agreed that article 3(1) of Regulation 1408/71 does not prohibit indirect discrimination if it is objectively justified by considerations that are independent of the nationality of the person concerned... what the Secretary of State has to show is that the difference in treatment of nationals of other member states is based on objective considerations independent of nationality. If the Secretary of State can meet this requirement, there is no need to examine the question of proportionality. If he cannot do so, it will not help him to say that the conditions for entitlement are proportionate. There are, then, two questions that need to be addressed. First, do the Secretary of State's reasons for the difference in treatment provide an objective justification for it? Secondly, if they do, is that justification based on considerations that are independent of the nationality of the persons concerned? The jurisprudence of the European Court has consistently shown that these are matters for the national court to determine: *Bressol v Gouvernement de la Communauté Française* [2010] 3 CMLR 559, para 64.’

²⁸⁹ Case C-140/12 *Brey* (not yet reported in ECR), Opinion of Advocate General Wahl.

benefit is conditional upon meeting the necessary requirements for obtaining a legal right of residence in the Member State concerned.’²⁹⁰

Within six months of the decision in *Patmalniece* the European Commission announced²⁹¹ that it had issued a reasoned opinion, under EU infringement procedure, pursuant to Article 258 TFEU,²⁹² requesting the UK authorities to cease the application of the ‘right to reside’ test in the premises that the test indirectly discriminated against non-UK nationals coming from other EU Member States and, in so doing, contravened EU law.²⁹³ The Commission also made a distinction between rights accruing under Directive 2004/38 and rights accruing under Regulation 883/2004, holding that Regulation 883/2004 concerned social security benefits and not social assistance benefits.²⁹⁴ Equally, the Commission averred that Directive 2004/38 permitted restrictions of access to social assistance only but could not restrict access to social security benefits, including special non-contributory cash benefits.²⁹⁵ This issue, which, to date remains live before the Commission, has become a matter of considerable controversy in the

²⁹⁰ *ibid.* at para 42.

²⁹¹ European Commission, *Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits*, 29 September 2011. Available on <http://europa.eu/rapid/press-release_IP-11-1118_en.htm> accessed on 12 November 2011.

²⁹² Art 258 TFEU:

‘If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.’

²⁹³ European Commission (n 291) at 1:

‘EU rules on the social security coordination (EC Regulation EC 883/2004) allow the UK to grant social benefits only to those persons who habitually reside in the UK, however Article 4 of this Regulation prohibits indirect discrimination through the requirement for non-UK citizens to pass an additional right to reside test. Any discrimination in providing social security benefits (including non-contributory cash benefits) also constitutes an obstacle to free movement guaranteed by Article 21 of the Treaty.’

²⁹⁴ *ibid.* at 2:

‘EU social security coordination rules (EC Regulation EC 883/2004) concern social security benefits and not social assistance benefits. Under these rules, EU citizens have the same rights and obligations as nationals of the country where they are covered.’

²⁹⁵ European Commission (n 291) at 2:

‘The EU directive on the free movement of EU citizens (Directive 2004/38/EC) allows for restrictions of access to social assistance only, but it cannot restrict the access to social security benefits (including special non-contributory cash benefits). In the absence of any such explicit derogation, the principle of equal treatment ensures that EU citizens may not be treated differently from the nationals of a Member State.’

UK with the Government promptly rejecting ‘in the strongest possible manner’ the Commission’s reasoned opinion.²⁹⁶

In Ireland, in *Solovastru v Minister for Social Protection & Ors*,²⁹⁷ the question of whether or not a post-active or formerly self-employed Romanian national could meet the qualifying conditions for Jobseeker’s Allowance and other social welfare payments, was before the Court. Jobseeker’s Allowance is payable to those actively seeking and available to take up employment.²⁹⁸ The case was heard on an interlocutory basis in the Irish High Court before Charleton J. in November 2010. During the course of the interlocutory hearing, the respondent argued that the applicant was ‘prohibited’ for taking up employment. The applicant argued that, although the transitional provisions restricting the access of Romanian nationals to the Irish labour market –requiring such persons to obtain an employment permit²⁹⁹– meant that it would be more difficult for the applicant to actually take up employment, he was, nonetheless, available for and seeking work. The fact that he had to obtain an employment permit prior to taking up a position did not mean that he was prohibited from taking up employment. Such a proposition would be entirely contrary to EU³⁰⁰ and national law.³⁰¹

However, the respondent then sought to rely upon the ratio of the UK Court of Appeal decision in *Tilianu*, where it was held that post-active or formerly self-employed persons did not retain a right to reside under the provisions of Directive 2004/38. At this point the applicant sought a Preliminary Reference to the Court of Justice. This was declined by the Court. The *Solovastru* case went to full hearing in March 2011 before Dunne J., where the question, now squarely before the Court, was whether or not a post-

²⁹⁶ Steven Kennedy, *EEA nationals: the ‘right to reside’ requirement for benefits*, SN/SP/5972, 5 December 2011, House of Commons Library, at 2:

‘At Work and Pensions Questions on 28 November [2011] the Minister for Employment, Chris Grayling, said that the Government were “formally rejecting in the strongest possible manner” the Commission’s reasoned opinion.’

²⁹⁷ There is no written judgment in this interlocutory hearing.

²⁹⁸ Social Welfare Consolidation Act 2005, s 141.

²⁹⁹ Employment Permits Acts 2003, s 2 (as amended by s 3 of the Employment Permits Act 2006).

³⁰⁰ Annex VII of the Treaty of Accession 2005.

³⁰¹ Employment Permits Acts 2003-2006.

active or formerly self-employed person had a right to reside –the applicant’s social welfare entitlements had been reviewed and withdrawn by the Department of Social Protection in June 2010 on foot of a negative Social Welfare Appeals Office decision on Jobseeker’s Allowance, refused on the basis that the applicant was not available for work due to the requirement to have an employment permit. Whilst the right to reside was not initially cited as a reason for the refusal by either the Department or the SWAO, Charleton J. was unwilling to grant interlocutory relief and it is unlikely that Dunne J. or any other court for that matter would have ignored an express statutory provision, as a consequence of which the right to reside became the central issue.

The Court, in *Solovastru*, was dealing with a special non-contributory cash benefit –Ireland lists a number of such payments³⁰² in Annex X of Regulation 883/2004– namely Jobseeker’s Allowance. The Court of Justice, in *Hosse*,³⁰³ held that social security benefits and special non-contributory cash benefits were mutually exclusive³⁰⁴ and that a payment which satisfies the conditions of the former cannot be analysed as a special non-contributory cash benefit. It may be then that Jobseeker’s Allowance is a social security benefit.

Section 246(6)(b) of the Social Welfare Consolidation Act 2005 (as inserted by Social Welfare and Pensions Act (No. 2) 2009, s 15) sets out a finite list

³⁰² Regulation 883/2004, Annex X:

‘IRELAND (a) Jobseekers’ allowance (Social Welfare Consolidation Act 2005, Part 3, Chapter 2); (b) State pension (non-contributory) (Social Welfare Consolidation Act 2005, Part 3, Chapter 4); (c) Widow’s (non-contributory) pension and widower’s (non-contributory) pension (Social Welfare Consolidation Act 2005, Part 3, Chapter 6); (d) Disability allowance (Social Welfare Consolidation Act 2005, Part 3, Chapter 10); (e) Mobility allowance (Health Act 1970, Section 61); (f) Blind pension (Social Welfare Consolidation Act 2005, Part 3, Chapter 5).’

³⁰³ Case C-286/03 *Hosse* [2006] ECR I-1771

³⁰⁴ *ibid.* at para 36:

‘The scheme of Regulation No 1408/71 shows that the concept of ‘social security benefit’ within the meaning of Article 4(1) and the concept of ‘special non-contributory benefit’ within the meaning of Article 4(2a) and (2b) of the regulation are mutually exclusive. A benefit which satisfies the conditions of a ‘social security benefit’ within the meaning of Article 4(1) of Regulation No 1408/71 therefore cannot be analysed as a ‘special non-contributory benefit’

Cf. the European Parliament argued, in Case C-299/05 *Commission v Parliament and Council* [2007] ECR Page I-08695, that benefit could be covered simultaneously by both Article 4(1) and Article 4(2a) of Regulation No 1408/7.

of persons who have a right to reside, these include: an Irish citizen;³⁰⁵ a person who has a right to enter and reside in the State pursuant to the *European Communities (Free Movement of Persons) (No. 2) Regulations 2006* (S.I. No. 565 of 2006) –which transposes Directive 2004/38 into Irish law;³⁰⁶ refugees;³⁰⁷ and third country nationals with permission to remain.³⁰⁸ The application of this test is problematic for a number of reasons. First and foremost of which is that it indirectly discriminates against non-Irish nationals coming from other EU Member States. Secondly, even if it were deemed that the indirect discrimination served a legitimate aim, was objectively justified and proportionate, it does not appear to countenance any other circumstance or situation where a person could be deemed to have a right to reside, such as the right of residence, identified by the Court of Justice in *Teixeira*,³⁰⁹ enjoyed by non-economically active parents of a child in education in another Member State.³¹⁰

In *Solovastru* the Minister for Social Protection argued that the applicants –a formerly self-employed person with almost two years self-employment, his wife and six children– who applied for Jobseeker’s Allowance, no longer retained a right to reside³¹¹ for the purpose of national and EU legislation and therefore could not be habitually resident. Habitual residence is a

³⁰⁵ Social Welfare Consolidation Act 2005, s 246(6)(a):

‘...an Irish citizen under the Irish Nationality and Citizenship Acts 1956 to 2004’.

³⁰⁶ Social Welfare Consolidation Act 2005, s 246(6)(b):

‘(b) a person who has a right to enter and reside in the State under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977) or the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997).’

³⁰⁷ Social Welfare Consolidation Act 2005, s 246(6)(c):

‘...a person in respect of whom a declaration within the meaning of section 17 of the Act of 1996 is in force...’

³⁰⁸ Social Welfare Consolidation Act 2005, s 246(6)(f)-(h):

‘...a person who has been granted permission to remain in the State under Regulation 4(4) of the Regulations of 2006... a person who has been granted permission to enter, and reside in, the State under Regulation 16(3)(a) or 16(4)(a) of the Regulations of 2006 by the Minister for Justice, Equality and Law Reform... a person whose presence in the State is in accordance with a permission to be in the State given by or on behalf of the Minister for Justice, Equality and Law Reform under and in accordance with section 4 or 5 of the Immigration Act 2004.’

³⁰⁹ Case C-480/08 *Teixeira* [2010] ECR I 1107.

³¹⁰ Discussed below in this Chapter in section 2.14.

³¹¹ The right to reside was not per se challenged in the pleadings as the respondent had given different reasons for the decisions to refuse Supplementary Welfare Allowance and Jobseeker’s Allowance.

requirement for Jobseeker's Allowance.³¹² This case had the additional complication of having applicants who were Romanian nationals subject to restrictions³¹³ in respect of taking up employment in Ireland as 'workers', insofar as they required an Employment Permit³¹⁴ in order to do so. In spite of a comprehensive and broad range of legal arguments made in written legal submissions, the court in *Solovastru* decided the case on relatively narrow grounds and in so doing followed the reasoning of the High Court and the Court of Appeal in the UK in *R. (Tilianu) v. Secretary of State for Work and Pensions*,³¹⁵ which was argued and determined exclusively on the basis of Directive 2004/38. In *Solovastru* the court considered the provisions of Article 7³¹⁶ of Directive 2004/38, which provides for rights of residence beyond three months³¹⁷ and provides that a right of residence may be derived from *inter alia*³¹⁸ employment or self-employment.³¹⁹ The court then addressed Article 7(3) which prescribes the circumstances in which a person may be deemed to *retain* the status –and consequently a right to reside– of an employed or self-employed person, where:

- (a) he/she is temporarily unable to work as the result of an illness or accident;
- (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;³²⁰

³¹² Social Welfare Consolidation Act 2005, s 141(9):

'A person shall not be entitled to unemployment assistance under this section unless he or she is habitually resident in the State at the date of the making of the application for unemployment assistance.'

³¹³ Discussed comprehensively in Chapter 2.

³¹⁴ Employment Permits Act 2003, s 2 (as amended by the Employment Permits Act 2006, s 3).

³¹⁵ [2010] E.W.C.A. Civ. 1397.

³¹⁶ Transposed into Irish law as S.I. 656 of 2006, reg 6.

³¹⁷ Art 6 of Directive 2004/38 provides that:

'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.'

³¹⁸ Directive 2004/38, art 7, also provides that a right of residence may be derived from self-sufficiency and/or attendance on a course of education.

³¹⁹ Directive 2004/38, art 7(1):

'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State...'

³²⁰ S.I 656 of 2006, art 6(2)(ii):

- (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;³²¹
- (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

Dunne J. referred to and followed the passages from the UK High Court decision *Tilianu* where it was held that Directive 2004/38 retained the historic distinction between employed and self-employed persons,³²² that the wording of the Directive was not apt in Articles 7(3)(b)-(d) to cover self-employed persons:

‘Further the wording of the Directive is not apt in Articles 7(3)(b)-(d) to cover self-employed persons. A distinction is drawn between workers, and having the status of worker on the one hand and self-employed persons on the other. That distinction is made in Article 7(1) and 7(3). Where ‘status of worker’ is used in Article 7(3) it is referring to someone in employment as opposed to a self-employed person. When the same phrase is used in Article 7(3)(c) and (d) in my judgment it has that same meaning. The use of the words ‘involuntary unemployment’ in sub article (b) is not apt for those who have been self-employed and in any event it is followed by the words ‘having been employed for more than one year’. A ‘jobseeker’ is a person

‘...he or she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with a relevant office of the Department of Social and Family Affairs and FÁS,’

³²¹ S.I. 656 of 2006, art 6(2)(iii) provides that:

‘...subject to subparagraph (d), he or she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first year and has registered as a job-seeker with a relevant office of the Department of Social and Family Affairs and FÁS...’

³²² *R. (Tilianu) v Secretary of State for Work and Pensions* [2010] EWHC 213, at para 24:

‘In my judgment there is no doubt as to the meaning of the Directive. There has been historically a distinction in the way those who have been in employment and those that have been self-employed are treated under EU law. It does not seem to me to be credible that a change which would have the effect of bringing a new group of people into the social assistance system would have been introduced without mention either in the recitals or in the *travaux préparatoires*...’

seeking employment rather self-employment. Similar points can be made in relation to (c)."³²³

This aspect of the decision is problematic insofar as it is contrary to the assimilation of rights *vis à vis* workers and the self-employed, discussed above and the fact that the European Commission were of the view that Article 7(3) had modified earlier provisions which it repealed,³²⁴ though, an examination of the earlier Directives which were consolidated by Directive 2004/38 appear to grant less rights to the self-employed than workers.³²⁵ More fundamentally, the decision in *Solovastru* wholly ignored the rights granted to self-employed persons by virtue of Regulation 883/2004, which is not referred to at all in the judgment. There is no ambiguity –such as might be said to exist in Directive 2004/38– in Regulation 883/2004 as regards the rights of the self-employed. Its forerunner, Regulation 1408/71, was expressly extended by Regulation 1390/81³²⁶ to include self-employed people.³²⁷ The purpose of this latter regulation was defined by the Court of Justice in *van Roosmalen*³²⁸ as being intended to guarantee to such persons the same protection as is accorded to employed persons.³²⁹

³²³ *ibid.* at para 42.

³²⁴ (n 191).

³²⁵ Directive 75/34 (repealed by Directive 2004/38) deals with the rights of the self-employed. Whilst the recital to the preamble provides that ‘establishment... means that such persons have a definite interest in enjoying the same right to remain as that granted to workers...’, the Directive is primarily concerned with permanent residence, retirement and incapacity to work.

³²⁶ Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 143 , 29/05/1981 P. 0001 - 0032

³²⁷ Regulation 1390/81, preamble:

‘Whereas Regulation (EEC) No 1408/71, even though it applies to employed persons, already covers certain categories of self-employed persons ; whereas, for reasons of equity, it would be appropriate to apply, to the largest possible extent, the same rules to self-employed persons as are laid down for employed persons...’

³²⁸ Case C-300/84 *Van Roosmalen* [1986] ECR 03097.

³²⁹ *ibid.* at para 20:

‘Since Regulation No 1390/81 was adopted in order to achieve the same objectives as Regulation 1408/71, the concept of ‘self-employed person’ is intended to guarantee to such persons the same protection as is accorded to employed persons and must therefore be interpreted broadly.’

The learned Judge in *Solovastru* held that the applicant, as a formerly self-employed person, had no right to reside in this State³³⁰ and laid particular emphasis on the labour market restrictions in place in respect of Romanian nationals.³³¹ The Court of Justice in *van Roosmalen* expressly defined the term ‘self-employed’ for the purpose of Regulation 883/2004, as governing persons who ‘are pursuing or have pursued’³³² self-employment. The applicants in *Solovastru*, in written legal submissions, had argued that a right to reside³³³ could be derived directly³³⁴ from Treaty provisions governing Establishment –applicable even where secondary law failed to adequately realise the full objectives of the Treaty provision³³⁵– and equality of treatment³³⁶ and referred to a long line of Court of Justice case law in this regard, by example, in the sphere of social housing, *Commission v Italy*, where it was held that:

³³⁰ *Solovastru v Minister for Social Protection* [2011] IEHC 532, at 19:

‘Thus, it is clear that the first named applicant is not entitled to reside here and therefore cannot be entitled to look for jobseekers allowance.’

³³¹ *Solovastru v Minister for Social Protection* [2011] IEHC 532, at 14:

‘Thus it is clear that the normal EU provisions regarding the free movement of workers are not applicable to citizens of Romania during the period covered by the transitional provisions. Under the transitional provisions it was open to existing Member States to extend the period during which the transitional arrangements would apply thereby restricting access to Irish labour market for Romanian citizens.’

³³² Case C-300/84 *Van Roosmalen* [1986] ECR 03097 at para 23:

‘... ‘self-employed person’ within the meaning of article 1(a)(iv) of regulation no 1408/71, as amended by regulation no 1390/81, applies to persons who are pursuing or have pursued, otherwise than under a contract of employment or by way of self-employment in a trade or profession, an occupation in respect of which they receive income permitting them to meet all or some of their needs...’

³³³ Case C-151/96 *Commission v Ireland* [1997] ECR I-03327, at para 13:

‘...the Court pointed out in *Commission v France* that, under Community law, every national of a Member State is assured of freedom both to enter another Member State in order to pursue an employed or self-employed activity and to reside there after having pursued such an activity.’

See further, Case-334/94 *Commission v France* [1996] ECR I-01307 at para 21:

‘Under Community law, every national of a Member State is assured of freedom both to enter another Member State in order to pursue an employed or self-employed activity and to reside there after having pursued such an activity.’

³³⁴ In Case C-251/98 *Baars* [2000] I-02787, at para 27:

‘Article 52 of the Treaty constitutes one of the fundamental provisions of community law and has been directly applicable in the Member States since the end of the transitional period.’

³³⁵ In Case C-11/77 *Patrick v France* [1977] ECR 01199, at para:

‘It is not possible to invoke against the direct effect of the rule on equal treatment with nationals contained in article 52 the fact that the council has failed to issue the directives provided for by articles 54 and 57 or the fact that certain of the directives actually issued have not fully attained the objectives of non-discrimination required by article 52.’

³³⁶ Case C-2/74 *Reyners v Belgian State* [1974] 00631, at paras 24-25:

‘The rule on equal treatment with nationals is one of the fundamental legal provisions of the community... as a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all the other member states’

‘If complete equality of competition is to be assured, the national of a member state who wishes to pursue an activity as a self-employed person in another member state must therefore be able to obtain housing in conditions equivalent to those enjoyed by those of his competitors who are nationals of the latter state . Accordingly, any restriction placed not only on the right of access to housing but also on the various facilities granted to those nationals in order to alleviate the financial burden must be regarded as an obstacle to the pursuit of the occupation itself.’³³⁷

A right to Jobseeker’s Allowance, a special non-contributory cash benefit listed in Annex X of Regulation 883/2004, was also asserted. It is submitted that on the basis of this provision and the decision of the Court of Justice in *van Roosmalen*, there is little doubt that the applicant in *Solovastru* was entitled to reside in the State and to receive Jobseeker’s Allowance. This argument is supported by the Court of Justice ruling in *Walsh*³³⁸ where it was held that a worker does not lose his status as a worker within the meaning of Regulation 1408/71 by reason of unemployment:

‘...a person who is entitled under the legislation of a Member State to benefits covered by Regulation 1408/71 by virtue of contributions previously paid compulsorily does not lose his status as a ‘worker’ within the meaning of Regulations 1408/71 and 574/72 by reason only of the fact that at the time when the contingency occurred he was no longer paying contributions and was not bound to do so.’³³⁹

Further, Ireland was the competent Member State as this is where the applicant was last self-employed. These arguments were advanced in three further High Court cases, which are addressed below. The *Solovastru* case, having been appealed to the Supreme Court, is currently awaiting a date for hearing, where all of these issues will be aired once again.

³³⁷ Case C-63/86 *Commission v Italy* [1988] ECR 00029, at para 16.

³³⁸ Case C-143/79 *Walsh* [1980] ECR 01639.

³³⁹ *ibid.* at para 7.

Other difficulties arise in the judgement such as the learned judge's assertion that Annex VII of the Treaty of Accession 2005 limited the full application of Article 49 TFEU rights.³⁴⁰ This is problematic as the Annex only permitted restrictions in respect of 'workers'.³⁴¹ Further, the learned judge appeared to accept the respondent's argument that even if the applicant was entitled to social welfare it would only be for six months.³⁴² This assertion is equally problematic³⁴³ as Directive 2004/38 makes a distinction between those who have worked for less³⁴⁴ than a year and those who have worked for more³⁴⁵ than a year. It is only the former who are restricted to the six month rule.

Two weeks after the *Solovastu* case was heard and prior to judgment being given,³⁴⁶ the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom) made a Preliminary Reference to the Court of Justice in Joined case *Czop and Punakova*,³⁴⁷ where both applicants, formerly self-employed persons, were deemed by the UK authorities to have no right to reside and were refused social welfare on that basis. The referring tribunal raised a number of questions in the reference: did the applicants had a right to reside

³⁴⁰ *Solovastru v Minister for Social Protection & Ors* [2011] IEHC 532:

'It is also important to bear in mind the provisions of Annex 7 to the Act of Accession referred to above which provides for transitional provisions applicable to nationals of Romania. The provisions of the Annex limit the full application of Article 45 (previously Article 39) and Article 49 to Romanian nationals.'

³⁴¹ The provisions of the Treaty of Accession, 2005 are discussed in Chapter 2, section 4.

³⁴² *Solovastru* (n 340):

'Counsel on behalf of the respondents examined and compared the provisions of Regulation of the 2006 Regulations and Article 7 of the 2004 Directive. It was pointed out that even if the first named applicant was "employed" the right to reside in the jurisdiction would have ceased after six months. In that regard, reference was made to the provisions of Regulation 6(2)(d) which provides "in a case to which subpara.(c)(iii) applies the right to remain referred to in para. (c)'

³⁴³ It was not disputed that the applicant had been lawfully self-employed for a period of in excess of 12 months.

³⁴⁴ Directive 2004/38, art 7(3)(c):

'...he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months...'

³⁴⁵ Directive 2004/38, art 7(3)(b):

'he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office...'

³⁴⁶ It may be that the existence of this reference should have been brought to the attention of the Court in *Solovastru*.

³⁴⁷ Joined cases C-147/11 & C-148/11 *Czop and Punakova* (not yet reported in the ECR), Reference for a preliminary ruling from Upper Tribunal (United Kingdom) made on 25 March 2011 - Secretary of State for Work and Pensions v Lucja Czop OJ L 257, p. 2.

premised upon Regulation 1612/68 and the reasoning of the Court of Justice in *Baumbast* and *Teixeira*; was there a general principle of EU law that equates the position of workers and the self-employed; would it impede or deter the freedom of establishment if the claimant did not have a right to reside and; was there a right to reside on any other basis? The judgment, given on September 2012, is addressed below. Shortly after judgment was given in *Solovastru* in June 2011³⁴⁸ and prior to the hearing in *Hrisca* in December 2011, the European Commission issued a press release,³⁴⁹ ostensibly calling upon the UK authorities to cease the application of the right to reside test –this is discussed below.

Less than six months after the decision in *Solovastru* was delivered, a second case, *Hrisca v Minister for Social Protection*³⁵⁰ came before the High Court in Ireland, this time concerning a Romanian national who had been self-employed in Ireland for four years, had children attending school in the State and was the parent of an Irish citizen child.³⁵¹ The presence of this latter factor made it possible to widen the legal argument beyond that which was argued in *Solovastru*, to include reliance upon the decision of the Court of Justice in *Zambrano*³⁵² where it was held that:

‘...Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.’³⁵³

³⁴⁸ 9 June 2011.

³⁴⁹ 29 September 2011.

³⁵⁰ [2011] 640 JR.

³⁵¹ The applicant, having resided lawfully for 3 years in the State, prior to the birth of his child, fulfilled the requirements of the Irish National and Citizenship Act 2004.

³⁵² Case C-34/09 *Zambrano* [2011] I-01177.

³⁵³ *ibid* at para 45.

The ratio *Zambrano*, the right to reside and work premised upon the parentage of a Member State citizen child, was combined with Article 14 of Annex VII of the Treaty of Accession, which provided that third country nationals could not be treated more favourably, by Member States, than Romanian nationals:

‘Romanian migrant workers and their families legally resident and working in another Member State or migrant workers from other Member States and their families legally resident and working in Romania shall not be treated in a more restrictive way than those from third countries resident and working in that Member State or Romania respectively. Furthermore, in application of the principle of Community preference, migrant workers from third countries resident and working in Romania shall not be treated more favourably than nationals of Romania.’³⁵⁴

It was also argued that the ratio of *Teixeira*³⁵⁵ applied to self-employed persons. In *Teixeira* it was held that a person previously employed in a Member State and who no longer retained a right to reside on any other basis³⁵⁶ could derive a right to reside on the basis of Article 12 of Regulation 1612/68, the purpose of which was to enable children to attend education under the best possible conditions.³⁵⁷ The applicant in *Hrisca* was, however, faced with the difficult task of asking another High Court judge not to follow an existing High Court judgment which went squarely against him, though on the other hand EU law, if found to support the applicant’s position, would clearly have to prevail.³⁵⁸ In Ireland, a High Court judge is not strictly bound by the decision of another High Court

³⁵⁴ Treaty of Accession, 2005, Annex VII, art 14.

³⁵⁵ Case C-480/08 *Teixeira* [2010] ECR I 1107.

³⁵⁶ This case is discussed in this Chapter in section 2.14.

³⁵⁷ Regulation 1612/68, art 12:

‘The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory... Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.’

³⁵⁸ Case C-106/77 *Simmenthal* [1978] ECR 629 at para 17 (n 14).

judge,³⁵⁹ though the prevailing view is that, generally speaking, previous decisions should be followed,³⁶⁰ to avoid second-guessing and ensure consistency. In *In Re Worldport Ltd* it was held that:

‘In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered.’³⁶¹

Nonetheless, a court may come to a different view where *inter alia* it was clear that the initial decision was not based upon a review of significant relevant authority or where there is a clear error in the judgment³⁶² and, even in circumstances where neither is applicable, a Court, though bound by an earlier decision, is not barred from making a Preliminary Reference, as is clear from the decision of Hogan J. in *M.M. v Minister for Justice, Equality & Law Reform and Ors*:

³⁵⁹ *M.M. v Minister for Justice, Equality & Law Reform and Ors* [2012] IEHC 547, Hogan J, at para 21:

‘the decisions of one or more High Court judges cannot strictly bind another’

³⁶⁰ *ibid.* at para 21:

‘...the established practice of this Court is that, generally speaking, previous decisions should be followed’

See further, *I. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 66, *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976] I.L.R.M. 50 at 53 in *Re Worldport Ltd.* [2005] IEHC 189 and in *PH v. Ireland* [2006] IEHC 40, [2006] 2 I.R. 540.

³⁶¹ *In Re Worldport Ltd.* [2005] IEHC 189.

³⁶² *ibid.*:

‘Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period.’

‘The position is somewhat different so far as the desirability of a reference under Article 267 TFEU is concerned. Here the applicant points to two discrete lines of argument which were not before the Court in *Ahmed* so far as the interpretation of Article 4(1) of the Directive is concerned, namely, (i) the various different language texts of the Directive and (ii) a decision of the Dutch Council of State of July 12, 2007. The applicant contends that these new factors justify the Court taking a different view on the desirability of a reference.’³⁶³

In *Hrisca*, what was before the Court was a motion seeking interlocutory relief in the form of social welfare payments pending the determination of the proceedings and a Preliminary Reference under the accelerated procedure.³⁶⁴ The applicant argued that, in spite of the *Solovastru* and *Tilianu* decisions, the question of the rights of the self-employed was still in controversy. The respondent, not unsurprisingly, argued that the issue had been determined in both this jurisdiction and in the UK. The applicant in *Hrisca* had been refused Supplementary Welfare Allowance (SWA) and had an application for Jobseeker’s Allowance pending.³⁶⁵

³⁶³ *M.M. v Minister for Justice, Equality & Law Reform and Ors* [2012] IEHC 547, where Hogan J., at para 24, though bound by two previous authorities, nonetheless determined that this did not preclude a Preliminary Reference to the Court of Justice. This is consistent with the Supreme Court decision in *Campus Oil v Minister for Industry* [1983] 1 I.R. 82:

‘It is not within the power of the Oireachtas, or of any rule-making authority, to give any national court the power to modify or to control the unqualified jurisdiction conferred upon the national judge by article 177 of the Treaty. The national judge has an untrammelled discretion as to whether he will or will not refer questions for a preliminary ruling under article 177. In doing so, he is not in any way subject to the parties or to any other judicial authority.’

³⁶⁴ Consolidated version of the Rules of Procedure of the Court of Justice (2010/C 177/01), art 104a:

‘At the request of the national court, the President may exceptionally decide, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to apply an accelerated procedure derogating from the provisions of these Rules to a reference for a preliminary ruling, where the circumstances referred to establish that a ruling on the question put to the Court is a matter of exceptional urgency.’

In Case C-370/12 *Pringle* (not yet reported in the ECR) it was held, at para 4, that this rule applied:

‘...where the circumstances referred to establish that a ruling on the question put to the Court is a matter of exceptional urgency.’

³⁶⁵ The application had actually been closed, requiring the applicant to make a new application.

Supplementary Welfare Allowance is social assistance and is, as such, excluded from the scope of Regulation 883/2004³⁶⁶ and governed by Directive 2004/38.³⁶⁷ However, SWA is payable where a claimant is awaiting a decision on a ‘primary’ payment such as Jobseeker’s Allowance.³⁶⁸

White J., accepted that the decisions in *Tilianu* and *Solovastru* might be ‘correct or incorrect’,³⁶⁹ but that it would not be appropriate at an interim stage for the court to take a different view³⁷⁰ to that of Dunne J. and that *Solovastru* represented the law as it presently stood:

‘I want to be careful, because I am dealing with an interim application. It is an issue which will be argued again in the plenary hearing, but it seems clear to this Court, as far as Irish law is concerned, in the *Solavastru* case, a determination has been made that the distinction is still very much there, that it is in accordance with EU law and I, on the basis of the decision, in *Worldport Ireland Ltd* a decision of Clarke J., 16th June, 2005 which has been opened to the court in the submissions, that unless for a good reason, and certainly at an interim stage, it would not, in anyway, be appropriate for this Court to take a view other than that taken in the *Solavastru* case as to the distinction between employed and self-employed.’³⁷¹

³⁶⁶ Regulation 883/2004, art 3(5)(a).

³⁶⁷ Directive 2004/38, art 24.

³⁶⁸ Department of Social Protection, *Supplementary Welfare Allowance Scheme, Operational Guidelines* (22 February 2013) available on <<http://www.welfare.ie/en/Pages/Supplementary-Welfare-Allowance-Scheme-SWA.aspx>> accessed 29 June 2013:

‘... to provide immediate and flexible assistance for those in need who are awaiting decision on payment of other State schemes...’

³⁶⁹ *Hrisca v Minister for Social Protection & Ors* [2011] 640 JR, unreported, White J., High Court, 16 February 2012, at para 24:

‘Because of the jurisprudence, that the distinction between employment and self employed, operates which may, ultimately, be correct or incorrect’.

³⁷⁰ *ibid.* at para 22:

³⁷¹ *Hrisca* (n 369) at para 24:

‘...following the law, as it stands in the High Court, on the interpretation of regulation 6 that Mr Hrisca’s work status was self employed that the decision of the deciding officer was not in any way perverse and in accordance with the law as it stands at the moment.’

The learned Judge nonetheless determined that a Preliminary Reference to the Court of Justice of the European Union, albeit on grounds that were not raised in *Solovastru*,³⁷² was warranted:

‘Counsel on behalf of the applicants, in the course of seeking a referral of a preliminary issue to the EU, raised, in the court’s view, matters of some importance... In the judgment [Solovastru], it was not referred to and the issue, also, has added import due to a recent EU decision in Zambrano 8th March, 2011 case no C-34/09... Counsel argues on behalf of the applicants for a preliminary reference to the Court of Justice of the EU, on another ground, an alleged right of residence pursuant to Article 12 of regulation 1612/68, predicated on the third named applicant, Denisa Hrisca, an EU citizen attending a primary school in Ireland. The court is of the view that this was not considered in the Solovastru judgment.’³⁷³

The Court, in this regard, was undoubtedly influenced by the existence of the preliminary reference from the UK in *Czop* and *Punakova* and the position of the Commission. The applicant was subsequently refused his application for Jobseeker’s Allowance and a second judicial review was brought, this time challenging the right to reside test. Both proceedings were settled prior to the preliminary reference being made to the Court of Justice.

In September 2012 the Court of Justice gave judgment in the *Czop* and *Punakova*³⁷⁴ preliminary references. Given the questions asked by the referring tribunal, it was not unreasonable to expect that this judgment would determine this difficult issue once and for all. This, however, was not so –there was no Advocate General’s opinion– as both applicants succeeded on other grounds not, strictly speaking, associated with their self-employment.³⁷⁵ The Court held that there was no necessity to consider a

³⁷² *Hrisca* (n 369) at para 27:

³⁷³ *Hrisca* (n 369) at para 27. The case was ultimately settled and the reference did not proceed.

³⁷⁴ Joined cases C-147/11 & C-148/11 *Czop and Punakova* (not yet reported in the ECR).

³⁷⁵ Ms Punakova was deemed to have a right of residence premised upon being the primary carer of her son who was in education (see para 27-28). Ms Czop was deemed to have Permanent Residence, having resided legally for five years (see para 34).

right of residence on any other basis.³⁷⁶ The Court of Justice did, nonetheless, determine that the provisions of Regulation 1612/68 and the ratio of *Teixeira* did not –as had been argued in *Hrisca*– apply to self-employed persons.³⁷⁷

The issue arose again in the High Court in Ireland in two cases, in the first quarter of 2013, in *Genov v Minister for Social Protection*³⁷⁸ and *Gusa v Minister for Social Protection*,³⁷⁹ which were joined for the purpose of the hearing on the basis that the same legal point arose in each case. Here, the applicants, a Bulgarian and Romanian national, respectively, armed with the Commission’s press release on the infringement procedure against the UK, squarely challenged the compatibility of the right to right test with EU law, in particular the right to equal treatment pursuant to Article 4 of Regulation 883/2004. Both applicants were formerly self-employed persons and were refused Jobseeker’s Allowance on the basis that they did not have a right to reside in the State and could not, for the purpose of Irish law,³⁸⁰ be habitually resident irrespective of their capacity to meet the qualifying conditions for habitual residence. The direct challenge to the right to reside test, of course, meant that the primary legal point being raised in the *Genov* and *Gusa* cases could be distinguished from those raised in *Solovastru*. Notwithstanding this, the applicants faced formidable hurdles because of the precedent in *Solovastru* and because of the decision of the UK Supreme Court in *Patmalniece* where the right to reside test was held to serve a legitimate aim, was objectively justified and proportionate for the purpose of protecting the State’s welfare system.

³⁷⁶ *Czop and Punakova* (n 374) at para 39:

‘In these circumstances, there is no need to consider whether Ms Czop also has a right of residence on another basis under European Union law.’

³⁷⁷ *ibid.* at para 40:

‘...Article 12 of Regulation No 1612/68 must be interpreted as conferring on the person who is the primary carer of a migrant worker’s or former migrant worker’s child who is attending educational courses in the host Member State a right of residence in that State, although that provision cannot be interpreted as conferring such a right on the person who is the primary carer of the child of a person who is self-employed...’

³⁷⁸ [2013] 88 JR.

³⁷⁹ [2013] 140 JR.

³⁸⁰ Social Welfare Consolidation Act 2005, s 246(5) as inserted by the Social Welfare and Pensions Act 2009 (No. 2), s15.

The applicants argued that their residence rights in the State were derived, primarily, from Regulation 883/2004, which governed social *security* benefits, as opposed to Directive 2004/38 which governed social *assistance*. It was also argued that EU law prohibited the deduction of contributions upon which there was no return.³⁸¹ The payment at issue, Jobseeker's Allowance, is a special non-contributory cash benefit, listed, as such, by Ireland, under Annex X of Regulation 883/2004. The question of which camp –social *security* or *assistance*– Jobseeker's Allowance falls into has been addressed by the Court of Justice in joined cases *Vatsouras and Koupatantze*³⁸² where the social welfare payment at issue was 'basic benefits in favour of job-seekers'.³⁸³ Here, the Court of Justice held that benefits intended to facilitate access to the labour market could not be regarded as social assistance within the meaning of Article 24(2) of Directive 2004/38:

'Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.'³⁸⁴

In the, earlier, *Collins*³⁸⁵ case, the Court of Justice held that:

'Jobseeker's allowance is a social security benefit provided under the Jobseekers Act 1995 ('the 1995 Act'), section 1(2)(i) of which requires the claimant to be in Great Britain... The jobseeker's allowance introduced by the 1995 Act is a social security benefit which replaced unemployment benefit and income support, and

³⁸¹ Case C-388/09 *da Silva Martins* [2011] I-05737 at para 73:

'However, according to settled case-law, such compatibility would exist only to the extent that, in particular, the national legislation concerned does not place the worker at a disadvantage compared to those who pursue all their activities in the Member State where it applies and does not purely and simply result in the payment of social security contributions on which there is no return...'

See further: joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I 2829, para 51; Case C-493/04 *Piatkowski* [2006] ECR I 2369, para 34; Case C-3/08 *Leyman* [2009] ECR I 9085, para 45; and *van Delft and Others*, para 101.

³⁸² Joined cases C-22/08 and C-23/08 *Vatsouras and Koupatantz* [2009] ECR I-04585.

³⁸³ *ibid.* at para 18.

³⁸⁴ *Vatsouras and Koupatantz* (n 382) at para 45.

³⁸⁵ Case C-138/02 *Collins* [2004] ECR I 2703.

requires in particular the claimant to be available for and actively seeking employment and not to have income exceeding the applicable amount or capital exceeding a specified amount.’³⁸⁶

The referring UK authorities also referred to Jobseeker’s Allowance as a social security benefit.³⁸⁷ The Court of Justice, however, left open the question of whether or not the applicant, a pre-active jobseeker, came within the *scope ratione personae* of Regulation 1408/71.³⁸⁸

The respondent in *Genov* and *Gusa* argued that Jobseeker’s Allowance and indeed all social welfare payments, be they social security or social assistance, are governed by Directive 2004/38, citing *Trojani*,³⁸⁹ *Solovastru*³⁹⁰ and *Patmalniece*.³⁹¹ The respondent also argued that special non-contributory cash benefits were payable under the rules of the *legislation* of the Member State paying the benefits. The term ‘legislation’, however, has been interpreted by the Court of Justice in *Walsh*³⁹² as not just meaning the legislation of the Member State but also includes and is combined with, the provisions of EU regulations and rules.³⁹³ The applicants accepted that Member States could place restrictions upon the

³⁸⁶ *Collins* (n 385) at paras 15 and 68. See also the Advocate General’s Opinion, at para 18: ‘Income-based jobseeker’s allowance is listed in Annex IIa (O)(United Kingdom)(h) of Regulation No 1408/71. It must therefore be considered to be a social security benefit falling within the material scope thereof.’

³⁸⁷ *ibid.* question 3 of the preliminary Reference: ‘If the answers to both questions 1 and 2 are not in the affirmative, do any provisions or principles of European Community law require the payment of a social security benefit with conditions of entitlement like those for income-based jobseeker’s allowance to a person in the circumstances of the claimant in the present case?’

³⁸⁸ *ibid.* at para 52: ‘First of all, without there being any need to consider whether a person such as the appellant in the main proceedings falls within the scope *ratione personae* of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) (‘Regulation No 1408/71’), it is clear from the order for reference that the person concerned never resided in another Member State before seeking employment in the United Kingdom, so that the aggregation rule contained in Article 10a of Regulation No 1408/71 is inapplicable in the main proceedings.’

³⁸⁹ Case C-456/02 *Trojani v Centre Public d’aide sociale de Bruxelles* [2004] ECR I-7573.

³⁹⁰ *Solovastru v Minister for Social Protection* [2011] IEHC 532.

³⁹¹ *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11.

³⁹² Case C-143/79 *Walsh* [1980] ECR 01639.

³⁹³ *ibid.* at paras 8-9: ‘In its judgment in Case 51/73... *Smieja* (1973) ECR 1213 the Court construed that concept... as embracing the provisions of Community law... The answer to the third question must therefore be that the expression ‘the legislation of two or more Member States... must be understood as also including the provisions of Community Regulations.’

granting of social assistance and limit it to those having a right to reside pursuant to Directive 2004/38, but that the right to reside test could not be applied to social security benefits, such as those governed by Regulation 883/2004, a line of reasoning supported by the Commission.³⁹⁴ The applicants further contended that, in any event, whilst Jobseeker's Allowance was a special non-contributory cash benefit, which was contingent upon residence in the Member State where it was claimed, 'residence' is defined in Regulation 883/2004 as the place where a person 'habitually resides'³⁹⁵ and that the issue had already been decided by the Court of Justice in *Swaddling*,³⁹⁶ where the Court was dealing with a special non-contributory cash benefit. This position is supported by the Commission, who are of the view that this is the sole test that may be applied to those claiming social security benefits.

The applicants argued that if the Court were to apply and follow the UK Supreme Court decision in *Patmaliece* then it was open to the Irish court to come to a different conclusion than that reached in *Patmaliece* on the radically differing factual matrix in the cases: the applicant in *Patmaliece* had never worked and had no intention of working, whereas, in *Genov* and *Gusa*, the applicants had been self-employed for three and four years, respectively, and were now actively seeking employment as PAYE 'workers'. The purpose of the right to reside test in the UK was, bluntly put, to prevent social welfare tourism. The applicants in *Genov* and *Gusa*, having been economically active and now jobseeker's, could not be placed into that category. In *Hrisca*, White J. considered the position of a formerly self-employed person with four years economic activity and came to the view that such a person was not a welfare tourist and that the facts were

³⁹⁴ European Commission, *Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits*, 29 September 2011. Available on <http://europa.eu/rapid/press-release_IP-11-1118_en.htm> accessed on 12 November 2011:

'EU social security coordination rules (EC Regulation EC 883/2004) concern social security benefits and not social assistance benefits. Under these rules, EU citizens have the same rights and obligations as nationals of the country where they are covered.'

³⁹⁵ Regulation 883/2004, art 1(j):

'... 'residence' means the place where a person habitually resides...'

³⁹⁶ Case C-90/97 *Swaddling* ECR I-1075.

indicative of habitual residence.³⁹⁷ The respondent authorities in *Patmalniece*³⁹⁸ accepted that the decision did not apply to the economically-active.³⁹⁹ The applicants in *Genov* and *Gusa* argued that excluding formerly self-employed persons from social welfare did not serve a legitimate aim, was not objectively justified or proportionate. The Court's attention was also drawn to the test espoused in *Gebhard*⁴⁰⁰ where the Court of Justice held that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil a number of conditions, including non-discrimination:

‘It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it...’⁴⁰¹

The Commission appear to have adopted the position that Article 4 of Regulation 883/2004 –and Article 21 of the TFEU– does not permit indirect discrimination.⁴⁰² Earlier Court of Justice case law –and indeed the Article

³⁹⁷ *Hrisca v Minister for Social Protection*, unreported, High Court, White J. 16 February 2012, at para 39:

‘Based on the facts put forward in the affidavits subject to the any challenge in the plenary hearing, that I have taken the view that the applicants are not what could be colloquially termed as welfare tourists. Mr. Hrisca came to Ireland to better himself. He has an employment history and, apart from this difficult issue of the right to reside, the five factors on the habitual resident categories would give an indication that Mr. Hrisca's centre of habitual residence is in Ireland.’

³⁹⁸ *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, Walker LJ at para 76.

³⁹⁹ *ibid.* at para 38

‘... The underlying purpose was said to be to safeguard the United Kingdom's social security system from exploitation by people who wished to come to this country not to work but to live off incomerelated benefits, while allowing those who come here genuinely to work to have access to them...’

⁴⁰⁰ Case C-55/94 *Gebhard* [1995] ECR I-04165.

⁴⁰¹ *ibid.* at para 37. This line of reasoning has been followed by the Court of Justice in *inter alia* Case C-212/97 *Centros* [1999] ECR I-01459; Case C-289/02 *AMOK* [2003] ECR I-15059.

⁴⁰² European Commission (n 394):

‘EU rules on the social security coordination (EC Regulation EC 883/2004) allow the UK to grant social benefits only to those persons who habitually reside in the UK, however Article

itself⁴⁰³ – supported this position.⁴⁰⁴ However, more recent case law adopts a different position.⁴⁰⁵

In *Genov* and *Gusa*, the compromise position adopted in *Patmalniece* was suggested to the Court. At the time of writing, final judgment⁴⁰⁶ –or a preliminary reference– is awaited from Hedigan J. in the *Genov* and *Gusa* cases and further cases are arising and likely to come before the courts in Ireland. The Commission’s position in the infringement procedure has now crystallised with a case being taken against the UK⁴⁰⁷ and a case with similar issues to those arising in *Gusa* and *Genov* has recently been referred to the Court of Justice for a preliminary ruling.⁴⁰⁸

4 of this Regulation prohibits indirect discrimination through the requirement for non-UK citizens to pass an additional right to reside test. Any discrimination in providing social security benefits (including non-contributory cash benefits) also constitutes an obstacle to free movement guaranteed by Article 21 of the Treaty.’

⁴⁰³ Regulation 883/2004, art 4:

‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’

⁴⁰⁴ Case C-7/75 *F* [1975] 00679, at paras 15-16:

‘Article 3 (1), supporting the fundamental principle of equality of treatment, provides that ‘subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State... It appears from this provision read in conjunction with Article 2 (1) that in the framework of the matters covered by the Regulation and in the absence of a specific provision to the contrary, the members of an employed person’s family must be allowed the benefit of the legislation of the State of their residence under the same conditions as the nationals of that State.’

⁴⁰⁵ Case C-124/99 *Borawitz* [2000] ECR I-7293.

⁴⁰⁶ Judgment, in favour of the respondent, was given on 12 July 2013. However, in light of the *Brey* Opinion and the Commission’s decision to bring a case against the UK, Hedigan J., upon the application of the applicants, agreed to hear further legal argument on the matter in October 2013, after the Court of Justice give judgment in the *Brey* case, expected in September 2013.

⁴⁰⁷ *Social security benefits: Commission refers UK to Court for incorrect application of EU social security safeguards* IP/13/475, 30/05/2013:

‘After several formal and informal contacts between the European Commission and the UK authorities, the Commission has decided to refer the United Kingdom to the EU’s Court of Justice because, in breach of EU law, it fails to apply the ‘habitual residence’ test to EU nationals who reside in the UK and claim social security benefits. Instead, the UK applies a so-called “right to reside” test, as a result of which EU citizens cannot receive specific social security benefits to which they are entitled under EU law such as child benefit.’

<http://europa.eu/rapid/press-release_IP-13-475_en.htm> accessed 12 July 2013.

⁴⁰⁸ Case C-333/13 *Dano* (not yet reported in ECR):

‘1. Do persons who do not wish to claim payment of any benefits of social security law or family benefits under Article 3(1) of Regulation (EC) No 883/2004 (1) but rather special non-contributory benefits under Article 3(3) and Article 70 of the Regulation fall within the scope *ratione personae* of Article 4 of Regulation (EC) No 883/2004? 2. If Question 1 is answered in the affirmative: Are the Member States precluded by Article 4 of Regulation (EC) No 883/2004, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of the Regulation which guarantee a level of subsistence,

One of the primary issues in these cases is the interaction between Regulation 883/2004 and Directive 2004/38 and how these provisions are applied by Member States. There is considerable confusion across the EU on this issue, as noted by van Overmeiren et al in a trESS⁴⁰⁹ report from 2011⁴¹⁰:

‘The Member States made clear that they were uncertain on how to apply both Regulation 883/2004 and Directive 2004/38, especially with regard to the different concepts of residence therein and to the relation between certain coordination rights and the conditions for legal residence set out in Directive 2004/38. Both agreed on the need for further analysis of this subject.’⁴¹¹

Clarity which must, ultimately, come from the Court of Justice, is urgently needed, as Member States, driven by economic considerations continue to interpret the law in a manner which serves to deny EU citizens their right to social welfare. Will the regulation prevail over the directive? In *Teixeira*,⁴¹² where the Court of Justice considered the effects of Article 7 of Directive 2004/38 on the application of Article 12 of Regulation 1612/68, the answer was both simple and logical:

‘...according to recital 3 in the preamble to Directive 2004/38, the aim of that directive is inter alia to simplify and strengthen the right of free movement and residence of all Union citizens... to make the application of Article 12 of Regulation No 1612/68 subject to

from excluding in full or in part European Union citizens in need from accessing those benefits which are provided to their own nationals who are in the same situation?’

⁴⁰⁹ Training and Reporting on Social Security.

⁴¹⁰ Filip Van Overmeiren (ed.), Eberhard Eichenhofer, Herwig Verschueren, *Analytical Study 2011 Social security coverage of non-active persons moving to another Member State* (trESS) at 3:

‘At the meeting of the Administrative Commission in October 2009, an earlier trESS Think Tank report, presenting a general view on the relationship between these instruments, was discussed and in the same year the Commission published a communication providing further guidance on the application of Directive 2004/38. This topic remained the centre of interest during the Belgian Presidency in 2010, which led to a note from the Secretariat and from the Presidency in the Administrative Commission in December 2010, clarifying the position of the Commission and the Member States respectively. The Commission made a clear distinction between the current legal situation on the one hand and the legitimacy of further discussion on possible future policy routes on the other hand.’

⁴¹¹ *ibid.*

⁴¹² Case C-480/08 *Teixeira* [2010] ECR I 1107.

compliance with the conditions set out in Article 7 of that directive would have the effect that the right of residence of children of migrant workers in the host Member State in order to commence or continue their education there and the right of residence of the parent who is their primary carer would be subject to stricter conditions than those which applied to them before the entry into force of that directive.’⁴¹³

2.11. The *Brey* Case

The Advocate General’s Opinion

The Court of Justice provided clarity on some of the issues discussed above in the *Brey*⁴¹⁴ case, where *compensatory supplement*⁴¹⁵ a special non-contributory cash benefit for pensioners paid in Austria was at issue. The case –naturally– attracted considerable interest amongst Member States, with seven Member States making written observations and six of those making oral submissions, including Ireland and the UK.⁴¹⁶

The Advocate General’s opinion has a distinctly ‘political’ dimension, which is acknowledged in the first paragraph, where EU citizenship rights are questioned in light of present-day economic difficulties.⁴¹⁷ This is problematic for two reasons: it is the legislature and not the Court of Justice who ought to react to ‘political’ situations and; Mr Brey relies upon Regulation 883/2004 rather than citizenship of the Union. Squarely before the Court of Justice was the question of the relationship between Regulation 883/2004 and Directive 2004/38 and, specifically, whether or not

⁴¹³ *ibid.* at para 60.

⁴¹⁴ Case C-140/12 *Brey* (not yet reported in the ECR).

⁴¹⁵ Regulation 883/2004, Annex X, where the payment is listed under ‘Austria’. Further, Case C-160/02 *Skalka* [2004] ECR I-5613, at para 23:

‘The Austrian compensatory supplement fulfils the criteria identified by the Court in its judgment in Case 313/86 *Lenoir* [1988] ECR 5391.’

⁴¹⁶ *Brey* Opinion (n 414), at para 20:

‘Written observations have been lodged by Mr Brey, by the German, Greek, Irish, Netherlands, Austrian, Swedish and UK Governments, as well as by the Commission. At the hearing on 7 March 2013, oral argument was presented by the German, Irish, Netherlands, Austrian, Swedish and UK Governments, and by the Commission.’

⁴¹⁷ *Brey* Opinion (n 414) at para 1:

‘The idea that a Union citizen could say ‘*civis europeus sum*’ and invoke that status against hardships encountered in other Member States was famously pioneered 20 years ago. (2) The present case raises the question whether that status can be relied upon today, against the economic difficulties of modern life.’

compensatory supplement was social assistance and thus governed by the Directive. All of the Member States who lodged observations submitted that compensatory supplement was social assistance.⁴¹⁸ Austria has placed compensatory supplement within the remit of Article 7 in their transposition of the Directive⁴¹⁹ to prevent inactive Union citizens becoming an undue burden on the Austrian Budget.⁴²⁰

The questions raised by the referring Austrian Court were supplemented by additional questions or issues raised by other Member States, notably the question of whether or not the pre-condition of lawful residence is compatible with both the Regulation and the Directive⁴²¹ and whether or not Mr Brey's situation was affected by the 'sufficient resources' provision⁴²² of Article 7 of Directive 2004/38. The Advocate General initially observed that the second line of questions should not be considered on the basis that the referring court did not raise them,⁴²³ but nonetheless went on to deal with those questions.⁴²⁴

⁴¹⁸ *Brey* (n 414), at para 23:

'All the governments which have lodged observations in the matter essentially rally behind that second line of argument.'

⁴¹⁹ Niederlassungs- und Aufenthaltsgesetz (NAG) (Settlement and Residence Act), Para 51(1)(2).

⁴²⁰ *Brey* (n 414) at para 13:

'...According to the referring court, the purpose of the amendment was to prevent a situation in which inactive Union citizens and members of their families can place an undue burden on the Austrian budget.'

⁴²¹ *ibid.* at para 25:

'...their observations address two other issues: (i) whether a requirement of lawful residence as a precondition for entitlement to the compensatory supplement is compatible not only with the Regulation but also with the Directive, and (ii) whether a person in Mr Brey's situation fulfils the requirement of sufficient resources laid down in Article 7(1)(b) of the Directive.'

⁴²² Directive 2004/38, Art 7(1)(b):

'...or...have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State..'

⁴²³ *Brey* (n 414) at paras 27-28:

'Since it has not referred any other questions to the Court – for instance, on the lawfulness of the residence requirement – there is no need to consider the arguments regarding other issues, which have been put forward by the Commission and the various Member States which have submitted observations... For the same reason, I would decline the proposal made by the Netherlands Government that the Court rule, additionally, on whether an economically inactive person who does not satisfy the requirements laid down in Article 7(1)(b) of the Directive may nevertheless be entitled to receive an allowance in the host Member State.'

⁴²⁴ *ibid.* at para 30:

'Nevertheless, I am aware that the outcome of these proceedings may have an impact on Mr Brey's right to reside in Austria. Accordingly, in case the Court decides to address issues outside the terms of the question referred, I will include further observations on this point in the final part of this Opinion.'

The first observation to be made is that, again, as in *Patmalniece*, an important legal point is being raised against a background of a weak factual scenario: Mr Brey is a retired German citizen, unlikely to be active again, with no past economic links to the host Member State, who is seeking a top-up on his German pension in Austria. Secondly, arguably, the additional line of questions raised by the other Member States is hypothetical and should not be considered by the Court of Justice, in particular the question concerning the right to reside. This question ought properly to be considered against a factual scenario where the right to reside is actually in issue –such as the live cases, *Genov* and *Gusa* which are before the Courts in Ireland.

The primary question before the Court was whether or not compensatory supplement was social assistance for the purpose of Directive 2004/38. Much of the legal argument in this respect appears to have centred upon comparison of the term with other Directives, namely Directive 2003/109⁴²⁵ (‘the Long-Term Residence Directive’) and Directive 2003/86⁴²⁶ on the right to family reunification. In the former, social assistance is defined as:

‘...at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care.’⁴²⁷

Directive 2003/86 further provides that the ‘modalities’ for granting such benefits are determined by national law.⁴²⁸ Special non-contributory cash benefits are also payable in accordance with each Member State’s legislation.⁴²⁹ Minimum income support is, in essence, social assistance, which in Ireland is Supplementary Welfare Allowance. In Ireland there is no ‘assistance’, as such, payable in respect of pregnancy –payments in respect of pregnancy is a social security benefit reliant upon contributions–

⁴²⁵ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 (OJ 2011 L 132, p. 1).

⁴²⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

⁴²⁷ Directive 2003/109, Preamble, recital 13.

⁴²⁸ *ibid.*

⁴²⁹ Regulation 883/2004, art 70(4).

Supplementary Welfare Allowance might be payable. Assistance in respect of illness is payable in Ireland as Disability Allowance, though there is a contributory version in the form of Illness Benefit. Parental assistance may or may not refer to Child Benefit, which falls squarely within Regulation 883/2004. Thus Ireland’s –and other Member States– reliance upon the provisions of Directive 2003/109, apparently in an effort to link social assistance with social security benefits, is questionable. It is also notable that the Court of Justice, in interpreting the provisions of Directive 2003/209 in *Kamberaj*⁴³⁰ expressly acknowledged the distinction between social assistance and social security.⁴³¹ Further, the Directive itself makes a clear distinction between social assistance and social security⁴³² –though Advocate General Wahl reads this in a different way.⁴³³ This raises some question mark over the efficacy of the Advocate General’s use of this Directive as a comparator. The same observation might be made in respect of the link identified between social assistance and social security identified by Advocate General Wahl in Article 8(4) of Directive 2004/38,⁴³⁴ in the premises that such a link is tenuous at best. However, this linking of the social assistance and social security benefits cannot be dismissed so easily and may have significant and serious ramifications for EU nationals seeking

⁴³⁰ Case C-571/10 *Kamberaj* (not yet reported in ECR).

⁴³¹ *ibid.* at para 83:

‘In that regard, it should be recalled that that provision states that Member States may limit the application of that principle in respect of social assistance and social protection to core benefits. Article 11(4) of Directive 2003/109 does not, by contrast, make it possible to derogate from that principle with regard to benefits falling under social security as defined by national law.’

⁴³² Directive 2003/109, art 11(1)(d):

‘Long-term residents shall enjoy equal treatment with nationals as regards: ...social security, social assistance and social protection as defined by national law...’

And, art 14(6):

‘This Chapter is without prejudice to the relevant Community legislation on social security with regard to third-country nationals.’

⁴³³ Case C-140/12 *Brey* (not yet reported in the ECR), at para 64:

‘Moreover, Article 11(1)(d) of the Long-Term Residence Directive does not distinguish between social security, social assistance and social protection.’

⁴³⁴ *ibid.* at para 37:

‘An analysis of the Directive reveals that one of its provisions –Article 8(4)– links the notion of ‘social assistance’ with that of ‘social security’. Under that provision, the amount considered to constitute ‘sufficient resources’ for the purposes of Article 7(1)(b) may not be higher than the threshold set for nationals of the host Member State to become eligible for social assistance, or, where that criterion is not applicable, higher than the minimum social security pension paid by the host Member State. In that situation, the minimum social security pension is used instead of social assistance as a yardstick and, consequently, to determine whether the Union citizen has sufficient resources. Thus, for the purposes of establishing whether a particular Union citizen has a right to reside in another Member State, the concepts of ‘social assistance’ and ‘social security’ overlap to a certain degree.’

to rely solely upon the provisions of Regulation 883/2004. Whether this extends beyond special non-contributory cash benefits –which are clearly at issue in *Brey*– is unclear. Advocate General Wahl’s Opinion states that:

‘...for the purposes of establishing whether a particular Union citizen has a right to reside in another Member State, the concepts of ‘social assistance’ and ‘social security’ overlap to a certain degree.’

This appears contrary to the finding of the Court of Justice in *Swaddling*, where the test for residence, for the purpose of Regulation 883/2004, was habitual residence, as noted above. Whilst it must be observed that *Swaddling* pre-dates Directive 2004/38, it post-dates the earlier Directives which Directive 2004/38 replaced. The Advocate General is of the view that the term ‘social assistance’ has a different meaning within the context of Directive 2004/38 and Regulation 883/2004, is ‘imprecise and broad’⁴³⁵ and that the three Directives 2004/38, 2003/109 and 2003/86:

‘...all share the common aim of regulating the right to reside... rooted in a common desire to protect the public purse.’

The Advocate General’s interim conclusion –which was strongly resisted by the Commission⁴³⁶– was that, notwithstanding the fact that compensatory supplement was a special non-contributory cash benefit, it constituted, nonetheless, social assistance for the purpose of Article 7 of Directive 2004/38⁴³⁷ and thus subject to a right to reside.⁴³⁸ Again, this will require a

⁴³⁵ *Brey* (n 414) at para 64:

‘All three directives indicate an imprecise and broad concept of ‘social assistance’.

Pennings (n 18), at 57, avers that the term social assistance is less clear than it seems at first sight.

⁴³⁶ *Brey* (n 414) at paras 21 and 45:

‘As the compensatory supplement in *Skalka* was held to be a special non-contributory benefit, it would follow that such a supplement does not constitute social assistance under the Regulation and, in consequence, cannot constitute social assistance under the Directive either. This view is supported by Mr Brey and the Commission... As mentioned above, the Commission and the referring court evoke the possibility of interpreting the Directive in line with the Regulation. It is claimed that this would lead to the compensatory supplement being excluded from the notion of ‘social assistance’, as it has been held to come within the scope of the Regulation.’

⁴³⁷ *Brey* (n 414) at para 71:

re-interpretation of *Swaddling*. The manner in which the Advocate General set aside the determination of the Court of Justice in *Skalka* is also questionable insofar as it was expressly held that the payment at issue in *Brey*, compensatory supplement, was governed solely by the co-ordinating provisions of Regulation 1408/71.⁴³⁹

Consideration was then given to the question of whether or not payment of the Compensatory Supplement amounted to an unreasonable burden on the Austrian social assistance system. The notion, found in German law,⁴⁴⁰ that there could be no recourse to social assistance was rejected by the Advocate General on the basis that the Directive expressly provided that recipients should not become an unreasonable burden⁴⁴¹ on Member States' social assistance schemes.⁴⁴² On the basis that Mr Brey had no links with Austria,

'Accordingly, as it serves to compensate for a lack of stable, regular and sufficient resources and not only to address exceptional or unforeseen needs, the complementary supplement must be held to be 'social assistance' under Article 7(1)(b) of the Directive.'

⁴³⁸ *Brey* (n 414) at para 80:

'That said, the Court has held in various circumstances that Member States may require lawful residence before granting social assistance benefits, provided that such a requirement complies with EU law. It is indeed legitimate for the national legislature to wish to ensure a genuine link between a claimant and a benefit, and the competent Member State. Moreover, Article 70(4) of the Regulation clearly states that special non-contributory cash benefits are provided in accordance with the legislation of the host Member State.'

⁴³⁹ Case C-160/02 *Skalka* [2004] ECR I-5613 at para 31:

'The answer to the question referred for a preliminary ruling by the Oberster Gerichtshof must therefore be that the provisions of Article 10a of Regulation No 1408/71 and those of Annex IIa thereto must be interpreted as meaning that the compensatory supplement, within the meaning of the GSVG, falls within the scope of that regulation and therefore constitutes a special non-contributory benefit within the meaning of Article 4(2a) of that regulation, so that the situation of a person who, after 1 June 1992, fulfils the conditions for the grant of that benefit is governed with effect from 1 January 1995, the date of the Republic of Austria's accession to the European Union, solely by the coordinating provisions laid down by Article 10a.'

⁴⁴⁰ *Brey* (n 414):

'At the outset, I would note that the German version of Article 7(1)(b) of the Directive uses the expression 'so dass sie ... keine Sozialhilfeleistungen des Aufnahmemitgliedstaats in Anspruch nehmen müssen'. This could be translated as 'so that they do not need to have recourse to social assistance benefits of the host Member State' and, accordingly, that provision appears to be framed in stricter terms in German than in several other language versions. It would seem to imply that no recourse at all may be had to the social assistance system of the host Member State.'

⁴⁴¹ Directive 2004/38, recital 10:

'Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence.'

Cf. Reliance upon this provision appears strange as it concerns only the first three months of residence.

⁴⁴² *ibid.* See Case C-578/08 *Chakroun* [2010] I-01839 at para 45:

'As Mrs Chakroun pointed out at the hearing, the concept of 'social assistance system of the Member State' is a concept which has its own independent meaning in European Union law and cannot be defined by reference to concepts of national law. In the light, in particular, of the differences existing between the Member States in the management of social assistance,

no appreciable period of residence and that the payment in question –though not disproportionate– was likely to be required for some time meant that he no longer met the requirement for lawful residence.⁴⁴³ However, in an important passage, the Advocate General stated that:

‘Were he to have forged a link to Austrian society, for instance, by having worked, resided and paid taxes there on a previous occasion, the situation would be different.’⁴⁴⁴

This passage may have ramifications for the Irish State in the context of the *Genov* and *Gusa* cases –provided, of course that they can overcome the finding in *Solovastru* where it was held that formerly self-employed persons no longer retain a right to reside– insofar as a clear distinction is being made between persons economically active and non-active. It is noteworthy that the Advocate General is attempting to straddle the middle ground in a similar manner to the Supreme Court in *Patmalniece*. The difficulty that arises in the *Brey* case is that some special non-contributory cash benefits are not social assistance, such as Jobseeker’s Allowance and are thus not governed by the provisions of Directive 2004/38. Can the Court of Justice sever some of these special non-contributory cash benefits or hold that some are governed by Directive 2004/38 and others not? Is this not a matter for the Union’s legislature? Indeed, arguably, such a change in the law is legislative in nature. Finally, on the facts of the *Brey* case, it was clearly open to the Austrian authorities to find that Mr Brey did not comply with the habitual residence test –as provided for and permitted within Regulation 883/2004.

Judgment of the Court of Justice in *Brey*

Judgment in *Brey* was delivered on 19 September 2013. The Court of Justice, to some extent, bowed to Member States pressure, rejecting the

that concept must be understood as referring to social assistance granted by the public authorities, whether at national, regional or local level.’

⁴⁴³ In those circumstances, it would indeed appear that Mr Brey no longer meets the requirements for lawful residence under Article 7(1)(b) of the Directive.

⁴⁴⁴ (n 414) at para 88.

European Commission's submission that special non-contributory cash benefits were excluded from the remit of Directive 2004/38 by virtue of their status under Regulation 883/2004.

'...the concept of 'social assistance system' as used in Article 7(1)(b) of Directive 2004/38 cannot, contrary to the Commission's assertions, be confined to those social assistance benefits which, pursuant to Article 3(5)(a) of Regulation No 883/2004, do not fall within the scope of that regulation.'⁴⁴⁵

Determining that Article 70 of Regulation 883/3004 was:

'...not intended to lay down the conditions creating the right to special non-contributory cash benefits. It is for the legislation of each Member State to lay down those conditions...'⁴⁴⁶

Further holding that, in principle, EU law did not prevent Member States making the granting of social security benefits conditional upon a right of residence,⁴⁴⁷ provided that such a requirement was consistent with EU law.⁴⁴⁸ Host Member State could impose 'legitimate restrictions'⁴⁴⁹ in connection with the grant of such benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an 'unreasonable burden'⁴⁵⁰ on the social assistance system of that Member State. However, Directive 2004/38 did not preclude nationals of other

⁴⁴⁵ *Brey* (n 414) at para 58.

⁴⁴⁶ Case C-140/12 *Brey* [2013] (not yet reported in the ECR) at para 41.

⁴⁴⁷ *ibid.*, at para 44.

'The Court has consistently held that there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State (see, to that effect, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraphs 61 to 63; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 32 and 33; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraphs 42 and 43; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 37; and Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 39).'

⁴⁴⁸ *Brey* (446) at para 46:

'However, it is important that the requirements for obtaining that right of residence – such as, in the case before the referring court, the need to have sufficient resources not to apply for the compensatory supplement – are themselves consistent with EU law.'

⁴⁴⁹ *ibid.* at para 57.

⁴⁵⁰ *Brey* (n 446).

Member States from receiving social security benefits in the host Member State⁴⁵¹ and in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure must take into account:

- (a) whether the person concerned is experiencing temporary difficulties;
- (b) the duration of residence of the person concerned;
- (c) his personal circumstances;
- (d) the amount of aid which has been granted to him;⁴⁵²
- (e) the principle of proportionality.⁴⁵³

Importantly, it was also held that mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State.⁴⁵⁴ The Court of Justice then considered Austria's legislation, noting that the mere fact that a national of another Member State who is not economically active has applied for a benefit was sufficient to preclude that person from receiving it, regardless of the duration of residence, the amount of benefit and the period for which it is available and regardless of the burden which the benefit places on the host Member State's social assistance system as a whole.⁴⁵⁵ In respect Austria's national law provision the Court held that:

‘Such a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, even

⁴⁵¹ *Brey* (n 446) at para 65:

‘First, it should be pointed out that there is nothing in Directive 2004/38 to preclude nationals of other Member States from receiving social security benefits in the host Member State (see, by analogy, *Grzelczyk* , paragraph 39).’

⁴⁵² *Brey* (n 446) at para 69.

⁴⁵³ *Brey* (n 446) at para 70:

‘Lastly, it should be borne in mind that, since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed narrowly (see, by analogy, *Kamberaj* , paragraph 86, and *Chakroun* , paragraph 43) and in compliance with the limits imposed by EU law and the principle of proportionality (see *Baumbast and R* , paragraph 91; *Zhu and Chen* , paragraph 32; and *Commission v Belgium* , paragraph 39).’

⁴⁵⁴ *Brey* (n 446) at para 75.

⁴⁵⁵ *Brey* (n 446) at para 76.

for the period following the first three months of residence referred to in Article 24(2) of Directive 2004/38, does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned.⁴⁵⁶

The Court ultimately determined that:

‘...EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38 – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.’⁴⁵⁷

It is submitted that on foot of the decision of the Court of Justice in *Brey*, the right to reside test, as it is applied both in Ireland and the UK, is incompatible with EU law insofar as it automatically excludes EU citizens from qualifying for social assistance without any assessment of their individual circumstances as set out in *Brey*.

⁴⁵⁶ *Brey* (n 446) at para 77.

⁴⁵⁷ *Brey* (n 446) at para 80.

Advocate General Wahl in *Brey* asserted that

‘The idea that a Union citizen could say ‘civis europeus sum’ and invoke that status against hardships encountered in other Member States was famously pioneered 20 years ago... The present case raises the question whether that status can be relied upon today, against the economic difficulties of modern life.’⁴⁵⁸

The Court of Justice in *Brey* formulated a test, premised upon extant case law and Directive 2004/38. In so doing, the have straddled the middle ground, providing a degree of protection for both the Union citizen and the Member States. It is a judgment of considerable significance and importance and represents another step in the progress of citizenship.

The judgment in *Brey* also has significant ramifications for Ireland in that every person who has been refused social welfare on the basis of failing to comply with the right to reside test will now be entitled to seek a statutory revision of that decision⁴⁵⁹ and, if successful in being awarded social welfare, may be entitled to arrears from the date of the decision.

The problems faced by claimants in Ireland in respect of substantive EU Treaty and secondary law provisions, in the area of social welfare rights, are not without precedent, Whyte⁴⁶⁰ refers to a series of Irish cases⁴⁶¹ – which eventually ended up before the Court of Justice⁴⁶² – concerning the implementation of Directive 79/7, the purpose of which was to bring about equal treatment for men and women in the area of social security. The

⁴⁵⁸ *Brey* (n 446) at para 1.

⁴⁵⁹ This is discussed in Chapter 3.

⁴⁶⁰ Gerard Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2000) at 141-152.

⁴⁶¹ *Hyland v Minister for Social Welfare* [1989] IR 624, *Cotter & McDermott v Minister for Social Welfare* [1987] ILRM 324. *Carberry v Minister for Social Welfare*, Barron J., unreported, High Court, 28 April 1989. *Emmott v Minister for Social Welfare* (Case 80/89 *Emmott* [1988] ECR 1601).

⁴⁶² Case C-286/85 *Cotter and McDermott* [1987] ECR 1453, Case 80/89 *Emmott* [1988] ECR 1601.

eventual resolution, by way of proper implementation of the Directive, had significant costs implications for Ireland.⁴⁶³

The term ‘social assistance’ was deemed to encapsulate all assistance introduced by public authorities⁴⁶⁴ and defined as a:

‘...benefit, which is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, is funded in full by the public authorities, without any contribution being made by insured persons.’⁴⁶⁵

2.12. Level of economic activity required to engage the Regulation

One of perhaps a number of residual issues left over from the foregoing discussion on Regulation 883/2004 is the question of precisely what level of economic activity is required for a person to be deemed a ‘worker’ for the purpose of the Regulation. This issue arose in *Kits van Heijningen*,⁴⁶⁶ where the applicant, a teacher, worked for two hours a day twice weekly, amounting to just four hours per week –the referring tribunal posed the following question: was this effective and genuine for the application of Community law? A second question was posed in the event of a positive answer to the first: was the legislation of the Member State in question only applicable when the applicant was actually employed? The Court of Justice did not deliberate upon the question of whether or not four hour’s work was effective and genuine. However, this was addressed by the Advocate General in his Opinion, where he stated that the referring tribunal was working on a false premise in its assumption that persons covered by Regulation 1408/71 were governed by the same rules applied by Treaty

⁴⁶³ Compensation measures, resulting from the *Emmott* case, cost €265m. See Whyte (n 460) at 151.

⁴⁶⁴ *Brey* (n 446) at para 61:

‘Accordingly, that concept must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State...’

⁴⁶⁵ *Brey* (n 446).

⁴⁶⁶ Case C-2/89 *Kits Van Heijningen* [1990] ECR 1755.

provisions to determine 'worker' status.⁴⁶⁷ Advocate General Tesouro acknowledged the requirement of effective and genuine activities for applicability of the Treaty provisions on workers.⁴⁶⁸ However, the Advocate General came to the view that this was not a requirement for applicability of the Regulation.⁴⁶⁹ That the Court of Justice shared this view implicitly is beyond doubt. It was held that the Regulation applied to any person insured under a social security scheme for the contingencies and on the conditions of the Regulation⁴⁷⁰ and that the absence of an exclusionary clause rendered the Regulation applicable irrespective of the number of hours worked:

'There is nothing in Article 1(a) or Article 2(1) of Regulation No 1408/71 which permits certain categories of persons to be excluded from the scope of the regulation on the basis of the amount of time they devote to their activities. Consequently, a person must be considered to be covered by Regulation No 1408/71 if he meets the conditions laid down in Article 1(a) in conjunction with Article 2(1) of the regulation, irrespective of the amount of time which that person devotes to his activities.'⁴⁷¹

In respect of the second question the Court of Justice held that the objective of the Regulation would be frustrated if it were only applicable during

⁴⁶⁷ *ibid.* Opinion of Mr Advocate General Tesouro, delivered on 22 February 1990, at para 10:

'However, it is evident from the way in which the question is worded that the Centrale Raad van Beroep is working on a false premiss in so far as it appears to assume that the persons covered by Regulation No 1408/71 are the same as those covered by Article 48 et seq. of the EEC Treaty.'

⁴⁶⁸ *Kits Van Heijningen* (n 466). at para 10:

'According to the case-law of the Court, (2) the existence of effective and genuine activities is a condition for the applicability of the provisions of the Treaty on the free movement of workers.'

⁴⁶⁹ *Kits Van Heijningen* (n 466) at para 11:

'However, there is nothing to suggest that such condition must also be met for the regulation at issue to be applicable.'

⁴⁷⁰ *Kits Van Heijningen* (n 466), at paras 8-9:

'The persons covered by Regulation No 1408/71 are specified in Article 2 of the regulation. Under Article 2(1), Regulation No 1408/71 applies in particular "to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States"... The expression "employed persons" used in Article 2(1) of Regulation No 1408/71 is defined in Article 1(a). It means any person who is insured under one of the social security schemes referred to in Article 1(a) for the contingencies and on the conditions mentioned in that provision.'

⁴⁷¹ *ibid.* at para 10.

actual employment.⁴⁷² There is no reason to believe that this reasoning would not apply equally to the self-employed, as the provisions relied upon by the Court apply to both workers and the self-employed, provided they are insured under national law in a Member State.

In the context of national law a ‘worker’, in the narrow sense of the meaning, does not become insured until he or she earns in excess of €38.00 per week⁴⁷³ –in Ireland this would require approximately four and a half hours per week on the basis of the minimum wage.⁴⁷⁴ Whereas a self-employed person does not become insured until he or she has a reckonable income of €96 per week –this may be earned during any time period from a little as an hour to as much as a week. Because the Regulation coordinates as opposed to harmonises, both the Union’s legislators and the Court of Justice refrain from determining what level of earnings are required to render a person insured. However, on the basis the decision of the Court of Justice in *Van Roosmalen*⁴⁷⁵ where it was held that the Regulation was ‘intended to guarantee to such persons the same protection as is accorded to employed persons,’⁴⁷⁶ it is arguable that requiring a self-employed person to earn twice what an employed person earns is incompatible with both the Regulation, Article 48 TFEU and other substantive Treaty provisions.

On the basis of national law, a person working in Ireland for four and a half hours per week thus comes within the scope of the Regulation, thereby

⁴⁷² *Kits Van Heijningen* (n 466), at para 14:

‘Article 13(2)(a) makes no distinction between full-time and part-time employment. Moreover, the objective which it pursues would be frustrated if it were to be considered that the legislation of the Member State in question was applicable only during the periods when the person concerned pursued his activity, and not during those periods when he did not.’

⁴⁷³ Section 90 of the Social Welfare (Consolidated Contributions and Insurability Contributions) Regulations 1996, (S.I. No. 312/1996) reg. 90, provides that a person is ‘ – not an insured contributor unless earning more than £30 per week.’

The Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 6) (Euro) Regulations 2001 amended £30 to €38.

⁴⁷⁴ National Minimum Wage Act 2000 (Section 11) (No. 2) Order 2011, S.I. No. 331/2011, art 2: €8.65 per hour.

⁴⁷⁵ Case C-300/84 *Van Roosmalen* [1986] ECR 03097.

⁴⁷⁶ *ibid.* at para 20:

‘Since Regulation No 1390/81 was adopted in order to achieve the same objectives as Regulation 1408/71, the concept of ‘self-employed person’ is intended to guarantee to such persons the same protection as is accorded to employed persons and must therefore be interpreted broadly.’

entitling that person to equal treatment with nationals. Any Irish national working for four and a half hours per week would be entitled to receive Jobseeker's Allowance –a special non-contributory cash benefit– in respect of days of unemployment, provided he or she was available for and seeking employment in respect of those days of unemployment. Is such a person a worker for the purpose of Directive 2004/38? Does the 'effective and genuine' test apply to the term 'worker' for the purpose of the Directive? Does such a person need to have the status of 'worker' for the purpose of the Directive? These are questions which are difficult to answer with any degree of certainty.

2.13. Article 45 Treaty on the Functioning of the European Union

The Treaty provisions, Article 45 TFEU (ex-Art 39 TEC) and its predecessors, and its anti-discrimination measures⁴⁷⁷ protecting the rights of 'workers', have been utilised by the Court of Justice to afford considerable levels of protection to those both seeking employment (Jobseekers),⁴⁷⁸ those in employment⁴⁷⁹ and those who are no longer employed.⁴⁸⁰ This latter provision is contingent upon secondary law, though, as will become clear later the absence of secondary provisions is not fatal. The term 'worker', though not defined in either Treaty or secondary legislation, has a community-wide meaning⁴⁸¹ and is interpreted broadly,⁴⁸² though self-

⁴⁷⁷ TFEU, art 45(2):

'Such freedom of movement 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.'

⁴⁷⁸ TFEU, art 45(3)(a)-(b):

'to accept offers of employment actually made... to move freely within the territory of Member States for this purpose...'

⁴⁷⁹ TFEU, art 45(3)(c):

'...to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action...'

⁴⁸⁰ TFEU, art 45(3)(d):

'...to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.'

⁴⁸¹ Case C-75/63 *Hoekstra* [1964] 00347 at para 1:

'...the term 'workers' in Articles 48 to 51 of the EEC Treaty, [has] a Community meaning...'

⁴⁸² Case C-53/81 *Levin* [1982] ECR 1035, at para 13:

employment, which is governed by separate Treaty provisions, is excluded⁴⁸³

As noted earlier, Directive 2004/38 makes provision for the retention of ‘worker’ status in two circumstances: employment periods of less than one year⁴⁸⁴ and more than one year,⁴⁸⁵ the former expressly providing that status is retained for six months, the latter, though not expressed, appears to permit the status to be retained indefinitely, though this question does not appear to have been determined by the Court of Justice and, in any event, after five years a right to Permanent Residence would arise, thereby negating the need to be a worker or retain that status.⁴⁸⁶

There is no question that a person in full-time employment meets the qualifying conditions for appropriate social security⁴⁸⁷ and social assistance⁴⁸⁸ payments in Ireland, whether this is by virtue of Regulation 883/2004, Directive 2004/38 or otherwise. Notwithstanding the legal issues arising from the right to reside requirement,⁴⁸⁹ a worker or, it is submitted, a person retaining that status would meet this requirement under Irish law by virtue of, respectively, regs. 6(2)(a)(i)⁴⁹⁰ and 6(2)(c)(i)-(iv)⁴⁹¹ of S.I. 656 of

‘In this respect it must be stressed that these concepts define the field of application of one of the fundamental freedoms guaranteed by the treaty and, as such, may not be interpreted restrictively.’

⁴⁸³ Case 66/85 *Lawrie-Blum* [1986] ECR 2121, at para 17:

‘The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.’

⁴⁸⁴ Directive 2004/38, art 7(3)(c):

‘...he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months...’

⁴⁸⁵ Directive 2004/38, art 7(3)(b):

‘... he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office...’

⁴⁸⁶ Directive 2004/38, art 16(1):

‘Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.’

⁴⁸⁷ By example, family benefits, such as child benefit.

⁴⁸⁸ Supplementary Welfare Allowance.

⁴⁸⁹ Social Welfare Consolidation Act 2005, s 246(6)(a) (as inserted by (as inserted by Social Welfare and Pensions Act (No. 2) 2009, s 15.

⁴⁹⁰ This is a transposition of Article 7(1)(a) of Directive 2004/38.

⁴⁹¹ This is a transposition of Article 7(3)(a)-(d) of Directive 2004/38.

2006 and would, in respect of Family Benefits⁴⁹² be exempt, under Regulation 883/2004, from the habitual residence conditions⁴⁹³ or, in respect of other entitlements, automatically meet the habitual residence conditions. Family Benefits are thus payable where the child of a worker lives in another EU Member State and even where the worker resides outside Ireland, provided the worker is in employment or self-employment in Ireland, usually as a frontier worker. This affords workers a considerable range of benefits, such as Child Benefit⁴⁹⁴ payable from Ireland, which, as already noted, may be far higher than the same benefit in the Member State where the children actually reside.

Of considerable significance, for the purpose of social security and, in particular, social assistance rights, a person in part-time employment is deemed to be a worker provided it involves the pursuit of genuine and effective activities and is not so small in scale so as to be regarded as purely marginal and ancillary⁴⁹⁵ –meaning, of an economic nature and remunerated⁴⁹⁶– even if the income is paid in kind,⁴⁹⁷ or below that required

⁴⁹² Regulation 883/2004, art 3(j). Family Benefits in Ireland include: Child Benefit, One Parent Family Payment, Guardian's Payment (Non-Contributory), Domiciliary Care Allowance.

⁴⁹³ Regulation 883/2004, art 67:

‘A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his/her pension.’

⁴⁹⁴ Social Welfare Consolidation Act 2005, s 219-223.

⁴⁹⁵ Case 58/81 *Levin v Straatssecretaris van Justitie* [1982] ECR 1035, at para 17:

‘...Part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.’

⁴⁹⁶ Paul Craig & Grainne De Burca, *EU Law, Text, Cases and Materials* (5th Edn., Oxford, 2011) at 722, citing Case C-268/99 *Jany v Straatssecretaris van Justitie* [2001] ECR-I 8615.

⁴⁹⁷ Case C-196/87 *Steymann v Staatsecretaris van Justitie* [1988] ECR 6159 at paras 11-12:

‘As regards the activities in question in this case, it appears from the documents before the Court that they consist of work carried out within and on behalf of the Bhagwan Community in connection with the Bhagwan Community's commercial activities. It appears that such work plays a relatively important role in the way of life of the Bhagwan Community and that only in special circumstances can the members of the community avoid taking part therein. In turn, the Bhagwan Community provides for the material needs of its members, including pocket-money, irrespective of the nature and the extent of the work which they do... In a case such as the one before the national court it is impossible to rule out a priori the possibility that work carried out by members of the community in question constitutes an economic activity within the meaning of Article 2 of the Treaty. In so far as the work, which aims to ensure a measure of self-sufficiency for the Bhagwan Community, constitutes an essential part of participation in that community, the services

for subsistence.⁴⁹⁸ In *Levin* the Court of Justice held that this could be supplemented with other income, in this case from members of his family or property, or the worker could simply accept the lower level of income.⁴⁹⁹ However, in *Kempf*⁵⁰⁰ the Court of justice went further and held that the worker's income could be subsidised by 'financial assistance'⁵⁰¹ drawn from public funds, in other words, social assistance. This seminal decision has its basis in the principle that 'worker' and 'activity as an employed person' have a community-wide meaning that cannot be diluted by individual Member States rules:

'That conclusion is, indeed, corroborated by the fact that, as the court held most recently in *Levin*, the terms 'worker' and 'activity as an employed person' for the purposes of community law may not be defined by reference to the national laws of the member states but have a meaning specific to community law. Their effect would be jeopardized if the enjoyment of rights conferred under the principle of freedom of movement for workers could be precluded by the fact that the person concerned has had recourse to benefits chargeable to public funds and created by the domestic legislation of the host state.'⁵⁰²

In light of the low threshold for economic activity set by the Court of Justice, EU citizens working and residing in other Member States, who, upon meeting that threshold, are then entitled to have their income

which the latter provides to its members may be regarded as being an indirect quid pro quo for their work.'

⁴⁹⁸ *Levin* (n 482) at para 17:

'The provisions of community law... also cover a national of a member state who pursues, within the territory of another member state, an activity as an employed person which yields an income lower than that which, in the latter state, is considered as the minimum required for subsistence ...'

⁴⁹⁹ *Levin*, (n 482) at para 17:

'Whether that person supplements the income from his activity as an employed person with other income so as to arrive at that minimum or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine.'

⁵⁰⁰ Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741.

⁵⁰¹ *ibid.* at para 16:

'The fact that he claims financial assistance payable out of the public funds of the latter member state in order to supplement the income he receives from those activities does not exclude him from the provisions of community law relating to freedom of movement for workers.'

⁵⁰² *Kempf* (n 500), at para 15.

subsidised by social welfare in the same way as would a national of that Member State as well as being entitled to Family Benefits.

The question of what is genuine and effective has given rise to much case law. A national court may ask of the Court of Justice whether a particular set of facts can give rise to a finding that the criteria is met⁵⁰³ and will give guidance⁵⁰⁴ on interpretation to enable the national court to decide the dispute.⁵⁰⁵ In *Kempf*, twelve hours music lessons per week were deemed sufficient. In *Raulin*⁵⁰⁶ a waitress under an on-call contract, during which she worked sixty hours in an eight month period –less than two hour per week on average– was not excluded, though the fact that she was on-call assisted her case.⁵⁰⁷ In other cases, albeit argued on other bases,⁵⁰⁸ it was not questioned by either the referring Court or the Court of Justice that persons working ten hours⁵⁰⁹ per week or eighteen hours⁵¹⁰ per week were workers.

⁵⁰³ Case C-196/87 *Steymann* [1988] ECR 6159, at para 8:

‘The first question seeks essentially to establish to what extent activities performed by members of a community based on religion or another form of philosophy as part of the activities of such a community may be regarded as economic activities within the meaning of the EEC Treaty.’

⁵⁰⁴ Joined cases C-51/96 and C-191/97 *Christelle Delière and François Pacquée*, [2000] I-02549, at para 50:

‘In the context of judicial cooperation between national courts and the Court of Justice, it is for national courts to establish and to evaluate the facts of the case (see in particular Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, paragraph 12) and for the Court of Justice to provide the national court with such guidance on interpretation as may be necessary to enable it to decide the dispute...’

⁵⁰⁵ *Kempf* (n 500) at para 12:

‘There is, however, no need to consider that question since the Raad van State, in the grounds of the judgment making the reference, expressly found that Mr Kempf’s work was not on such a small scale as to be purely a marginal and ancillary activity. According to the division of jurisdiction between national courts and the court of justice in connection with references for a preliminary ruling, it is for national courts to establish and to evaluate the facts of the case. The question submitted for a preliminary ruling must therefore be examined in the light of the assessment made by the Raad van State.’

⁵⁰⁶ Case C-357/89 *Raulin* 1992 ECR I-01027.

⁵⁰⁷ *ibid.* at para 14:

‘The national court may also take account, if appropriate, of the fact that the person must remain available to work if called upon to do so by the employer.’

In Case C-14/04 *Dellas* [2005] ECR I-10253 the Court of Justice held, at para 46, that:

‘...it is settled case-law that on-call duty performed by a worker where he is required to be physically present on the employer’s premises must be regarded in its entirety as working time within the meaning of Directive 93/104, regardless of the work actually done by the person concerned during that on-call duty.’

⁵⁰⁸ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

⁵⁰⁹ Case C-171/88 *Ingrid Rinner-Kuehn FWW Spezial-Gebaeudereinigung GmbH & Co. KG* [1989] ECR 02743 at para 16:

‘The reply to the question referred by the national court must therefore be that Article 119 of the EEC Treaty must be interpreted as precluding national legislation which permits employers to exclude employees whose normal working hours do not exceed 10 hours a

Directive 97/81 EC provides that part-time workers should not be discriminated against in respect of pay and other employment conditions. However, the Directive was not intended to create or impose social security rights or obligations, as is clear from the preamble:

‘...This Agreement relates to employment conditions of part-time workers recognizing that matters concerning statutory social security are for decision by the Member States.’⁵¹¹

The rights of part-time workers was addressed by the Court of Justice in the context of Regulation 1408/71 in *van Heijningen*⁵¹² where it was held that the Regulation made no distinction between those who were part-time or full-time employed:

‘Article 13(2)(a) makes no distinction between full-time and part-time employment . Moreover, the objective which it pursues would be frustrated if it were to be considered that the legislation of the Member State in question was applicable only during the periods when the person concerned pursued his activity, and not during those periods when he did not.’⁵¹³

Further, the Regulation could be relied upon on days of employment and unemployment.⁵¹⁴ Part-time frontier workers, however, are treated

week or 45 hours a month from the continued payment of wages in the event of illness, if that measure affects a far greater number of women than men, unless the Member State shows that the legislation concerned is justified by objective factors unrelated to any discrimination on grounds of sex.’

⁵¹⁰ Case C-102/88 *M. L. Ruzius-Wilbrink* [1989] ECR 04311, at para 7:

‘By decision of 15 October 1985, the defendant granted the plaintiff a disability allowance calculated, pursuant to Article 10(5) of the 1975 Law, on the basis of her average daily earnings in the year immediately prior to the onset of her disability, during which she worked on average only 18 hours a week.’

⁵¹¹ Directive 97/81, Preamble, para 3:

(See further joined Cases C-395/08 and C-396/08) *Tiziana Bruno, Massimo Pettini* (C-395/08), *Daniela Lotti, Clara Matteucci* (C-396/08), [2010] ECR I-05119.

⁵¹² Case C-2/89 *Bestuur van de Sociale Verzekeringsbank / Kits van Heijningen* [1990] ECR 1755.

⁵¹³ *ibid* at para 14.

⁵¹⁴ Case C-2/89 *Kits Van Heijningen* [1990] ECR 1755, at para 15:

‘Consequently, the reply to the second question must be that Article 13(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a person covered by that regulation who is employed part-time in the territory of a Member State is subject to the legislation of that

differently by the Regulation insofar as a full-time frontier worker, who becomes unemployed, is entitled to social welfare in his or her country of residence, whereas a part-time worker is entitled to social welfare in his or her place of employment.⁵¹⁵ The purpose of this differentiation is to protect the part-time worker⁵¹⁶ and is justified on the grounds that authorities in the part-time worker's place of employment are better placed to assist in finding additional employment which is compatible with the worker's existing part-time employment.⁵¹⁷

Whilst national criteria in respect of what constitutes the minimum number of hours are not determinative,⁵¹⁸ there is, however, no reason why an EU national working part-time could not argue that he or she was a 'worker' for the purpose of EU law and, separately, a worker under national law and entitled to social welfare under national law. This is particularly so in Ireland where the threshold for determining worker status and social welfare

State both on the days on which he pursues that activity and on the days on which he does not.'

⁵¹⁵ Regulation 883/2004, art 65(1):

'A person who is partially or intermittently unemployed and who, during his/her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State shall make himself/herself available to his/her employer or to the employment services in the competent Member State. He/she shall receive benefits in accordance with the legislation of the competent Member State as if he/she were residing in that Member State. These benefits shall be provided by the institution of the competent Member State.'

⁵¹⁶ Case C-444/98 *de Laat* [2001] ECR I-02229 at 34:

'However, the protection of workers which is the aim pursued by Article 71 of the Regulation would be enfeebled if a worker who, in a Member State other than the State of residence, remains employed by the same undertaking, but part-time, while remaining available for work on a full-time basis, were obliged to apply to an institution in his place of residence for help in finding additional work. The fact that he has passed from full-time employment to part-time employment by virtue of a new contract is in this respect irrelevant.'

⁵¹⁷ *ibid.* at para 35:

'More specifically, the institution of the place of residence would be considerably less well placed as compared with its counterpart in the competent Member State to assist the worker in finding additional employment on terms and conditions compatible with his part-time job since, in all likelihood, such employment would have to be in the territory of the competent Member State.'

⁵¹⁸ *Levin* (n 482) at para 10-11:

'In the absence of any provisions to that effect in community legislation, it is suggested that it is necessary to have recourse to national criteria for the purpose of defining both the minimum wage and the minimum number of hours ... that argument cannot, however, be accepted. As the court has already stated in its judgment of 19 march 1964 in case 75/63 *hoekstra (nee unger)* (1964) ecr 1977 the terms '' worker '' and '' activity as an employed person '' may not be defined by reference to the national laws of the member states but have a community meaning. If that were not the case, the community rules on freedom of movement for workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the community institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the treaty.'

entitlement appears to be lower than that which prevails under EU law. The Worker Protection (Regular Part-time Employees) Act 1991 defined a part-time worker as a person doing a minimum of 8 hours per week⁵¹⁹ –and this might be said to be broadly in line with the EU case law discussed above. However, this was repealed by The Protection of Employees (Part-time Work) Act 2001 which removed the 8 hour requirement, requiring merely ‘less than the normal hours of work’ of a comparable employee⁵²⁰ - these provisions protected seasonal workers,⁵²¹ while later statutory provisions protected continuity of service when part-time workers were laid off.⁵²² The Act of 2001 is, ostensibly, a transposition of Directive 97/81, which, as noted above, was not intended to create social welfare entitlements, leaving that to Member States. Ireland, however, has granted social welfare rights, under national law, to those who earn in excess of €38.00 per week.⁵²³ On the basis of national minimum wage requirements,⁵²⁴ this means that a person working four and a half hours per week is deemed to be an insured

⁵¹⁹ The Worker Protection (Regular Part-time Employees) Act 1991, s 1:

“regular part-time”, in relation to an employee under a relevant enactment, means an employee who works for an employer and who—(a) has been in the continuous service of the employer for not less than 13 weeks, and (b) is normally expected to work not less than 8 hours a week for that employer...’

⁵²⁰ The Protection of Employees (Part-time Work) Act 2001, s 1:

“part-time employee” means an employee whose normal hours of work are less than the normal hours of work of an employee who is a comparable employee in relation to him or her...’.

See further: The Department of Enterprise, Trade and Innovation’s Protection of Employees (Part-time Work) Act, 2001, Explanatory Booklet for Employers and Employees), at 20:

‘This Act repeals The Worker Protection (Regular Part-Time Employees) Act 1991, so that the threshold, which required that a part-time worker should be in the continuous service of the employer for not less than 13 weeks and should be normally expected to work not less than 8 hours per week for that employer, no longer applies.’

⁵²¹ *ESB v McDonnell* PTD 081.

⁵²² Section 9 of the Protection of Employees (Fixed Term Workers) Act 2003 applies the First Schedule of the Minimum Notice and Terms of Employment Acts 1973-2001, which provides that continuity of service shall not be affected by a lay-off.

⁵²³ Social Welfare Consolidation Act 2005, s 12(2):

‘Regulations may provide for including among employed contributors persons employed in any of the employments specified in Part 2 of Schedule 1’ Part 2 of Schedule 1 deals with Excepted Employments, section 5 of which refers to ‘Employment specified in regulations as being of inconsiderable extent’.

Section 90 of the Social Welfare (Consolidated Contributions and Insurability Contributions) Regulations 1996, (S.I. No. 312/1996) reg. 90, provides that a person is

‘ – not an insured contributor unless earning more than £30 per week.’

The Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 6) (Euro) Regulations 2001 amended ‘£30’ to ‘€38’.

⁵²⁴ The Department of Social Protection’s Pay Related Social Insurance (PRSI) Contribution Conditions provides that:

‘Workers paying Class A contributions are covered for all social welfare benefits’.

contributor for the purpose of the Social Welfare Consolidation Act 2005.⁵²⁵ This gives rise to an interesting question: can more favourable national law grant an EU national ‘worker’ status, where that status may not be met under EU law? It is submitted that the answer to this question must be affirmative, as it is a general principle of EU law – espoused in Treaty and secondary law – that Member States are entitled to grant more favourable conditions than those prevailing at EU level.

2.14. Regulation 1612/68

The rights granted by Article 45 TFEU and its predecessors were fleshed out in secondary law. One of the most important and earliest regulations governing this area was Regulation 1612/68,⁵²⁶ which has now been repealed, replaced and codified by Regulation 492/2011⁵²⁷ which also codifies relevant case law of the Court of Justice. Regulation 1612/68, as noted by Craig and De Burca,⁵²⁸ fleshed out the positive rights conferred by Article 45, granting rights not just to the ‘worker’ but also to the worker’s family. The most important of these rights, insofar as they relate to social welfare entitlements, are addressed, in turn, below. The Regulation is concerned with workers,⁵²⁹ therefore the self-employed are excluded from its personal scope,⁵³⁰ though Article 11 of Regulation 1612/68 –

⁵²⁵ Section 12 of the Social Welfare Consolidation Act 2005, defines ‘employed persons and insured contributors’ thus:

‘(a) subject to paragraph (b), every person who, being over the age of 16 years and under pensionable age, is employed in any of the employments specified in Part 1 of Schedule 1, not being an employment specified in Part 2 of that Schedule, shall be an employed contributor for the purposes of this Act, and (b) every person, irrespective of age, who is employed in insurable (occupational injuries) employment shall be an employed contributor and references in this Act to an employed contributor shall be read accordingly, and (c) every person becoming for the first time an employed contributor shall thereby become insured under this Act and shall thereafter continue throughout his or her life to be so insured.’

⁵²⁶ [1968] OJ L257/2, [1968] OJ Spec ED 475. Regulation 1612/68, art 42(2), now Regulation 492/2011, art 36(2) provides that:

‘This Regulation shall not affect measures taken in accordance with Article 48 of the Treaty on the Functioning of the European Union.’

⁵²⁷ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, p. 1–12.

⁵²⁸ See generally, Craig and De Burca (n 471) at 746-755.

⁵²⁹ Pennings (n 18) at 122.

⁵³⁰ Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, (2nd Edn. Cambridge, 2010) at 832. See further, joined cases C147/11 & 148/11 *Czop and Punakova* (not yet reported in ECR), at para 31:

subsequently repealed and subsumed into Directive 2004/38⁵³¹ – granted important rights to family members, including third country nationals, of the self-employed:

‘Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.’⁵³²

The term ‘jobseeker’ may be applied to post-active and pre-active workers, meaning, respectively, persons who were employed in another Member State and are now seeking employment and those who have entered a Member State for the purpose of seeking employment. Both categories attract protection under EU law and whilst there are unresolved issues as regards the protection afforded to post-active self-employed persons, no such questions arise in respect of ‘workers’ or those seeking work for the first time. In respect of this latter category,⁵³³ those who move in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 45 of the TFEU and Articles 2 and 5⁵³⁴ of Regulation No 1612/68.⁵³⁵ They do not benefit from the provisions

‘Moreover, the literal interpretation of that provision, according to which it applies only to employed persons, is supported both by the general scheme of Regulation No 1612/68, the legal basis for which is Article 49 of the EEC Treaty (subsequently, after amendment, Article 49 of the EC Treaty, which became, after amendment, Article 40 EC), and by the fact that Article 12 of Regulation No 1612/68 was reproduced not in Directive 2004/38, but in Regulation No 492/11 also governing freedom of movement for workers and based on Article 46 TFEU, which corresponds to Article 40 EC.’

⁵³¹ Directive 2004/38, art 23:

‘Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.’

⁵³² Regulation 1612/68, art 11.

⁵³³ See generally Craig and De Burca (n 496) at 745-746.

⁵³⁴ Regulation 1612/68, art 5:

‘A national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment’.

⁵³⁵ Case 316/85 *Lebon* [1987] ECR 2811, at para 25-26:

‘It is clear from the context that the fourth question seeks, in substance, to ascertain whether equal treatment with regard to social and tax advantages, which is laid down by Article 7 (2) of Regulation No 1612/68, also applies to persons who move in search of employment... It must be pointed out that the right to equal treatment with regard to social

of Article 7 of the Regulation, which are only enjoyed by those either in or formerly in employment in another Member State.⁵³⁶ Though not expressed in the Treaty, a right of residence for those seeking employment was held by the Court of Justice, in both the *Antonissen*⁵³⁷ and *Tsiotras*⁵³⁸ cases, to be inherent:

‘It should be noted at the outset that, in the context of freedom of movement for workers, Article 48 of the Treaty grants nationals of the Member States a right of residence in the territory of other Member States in order to pursue or to seek paid employment. As the Court indicated in Case C-292/89 *The Queen v The Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR 745, the right of residence which, in the latter case, is not expressly mentioned in the Treaty, is inherent in the principle of freedom of movement.’⁵³⁹

This right of residence may be limited in time. In the absence of Community provisions prescribing a period during which Community nationals who are seeking employment may stay in their territory, the Member States are entitled to lay down a reasonable period for this purpose, six months being deemed, by the Court of Justice, to be a reasonable period.⁵⁴⁰ However, if

and tax advantages applies only to workers. Those who move in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 48 of the EEC Treaty and Articles 2 and 5 of Regulation No 1612/68.’

⁵³⁶ *ibid.*, at para 27:

‘The answer to the fourth question must therefore be that the equal treatment with regard to social and tax advantages which is laid down by Article 7 (2) of Regulation No 1612/68 operates only for the benefit of workers and does not apply to nationals of Member States who move in search of employment.’

⁵³⁷ Case C-292/89 *Antonissen* [1991] ECR 745 at para 13:

‘It follows that Article 48(3) must be interpreted as enumerating, in a non-exhaustive way, certain rights benefiting nationals of Member States in the context of the free movement of workers and that that freedom also entails the right for nationals of Member States to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment.’

⁵³⁸ Case C-171/91 *Tsiotras* [1993] ECR I-2925.

⁵³⁹ *ibid.* at para 8.

See further Case C-258/04 *Ioannidis* [2005] I-08275, at para 21:

‘In this case, it must be borne in mind that nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC and therefore enjoy the right to equal treatment laid down in paragraph 2 of that provision.’

⁵⁴⁰ Case C-292/89 *Antonissen* [1991] ECR 745 at para 21:

‘In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that as laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their

after expiry of that period, the person concerned provides evidence that he or she is continuing to seek employment and that he has genuine chances of being engaged, he or she cannot be required to leave the territory of the host Member State.⁵⁴¹

The criteria for engaging Articles 2 and 5 of Regulation 1612/68 and the entitlement to Jobseekers Allowance or its national equivalent was set out by the Court of Justice in *Collins*,⁵⁴² where it was held that:

‘It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State...’⁵⁴³

The existence of such a link may be determined, in particular, by establishing that the person concerned has, for ‘a reasonable period’, in fact genuinely sought work⁵⁴⁴ in the Member State in question –this is very much in keeping with national legislation in Ireland where a claimant for Jobseeker’s Allowance must be available for and seeking employment.⁵⁴⁵ In practice, this permits the social welfare authorities in Member States to seek proof of actual job-seeking, in the form of job applications, acknowledgments and rejections. The question of what amount of time constitutes ‘a reasonable period’ of job-seeking remains to be determined.

occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardize the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State.’

⁵⁴¹ *ibid.* see further, Case C-344/95 *Commission v Belgium* [1997] ECR I 1035, para 17.

⁵⁴² Case C-138/02 *Collins* [2004] ECR I-2703.

⁵⁴³ *ibid.* at para 69.

⁵⁴⁴ *Collins* (n 542) at paras 69-70:

... The existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.’

⁵⁴⁵ Social Welfare Consolidation Act 2005, sec 141(4)(a) and (c):

‘...is capable of work, and... is genuinely seeking, but is unable to obtain, suitable employment.’

The question of whether or not the rights, granted to pre-active Jobseekers, to Jobseeker's Allowance or equivalent payments, by Regulation 1612/68, were affected or diluted by the provision of Directive 2004/38 –on the basis that Jobseeker's Allowance constituted 'social assistance'– was considered by the Court of Justice in joined cases *Vatsouras and Koupatantze*.⁵⁴⁶ Here, the Court of Justice reasserted the earlier case law and –on the basis of the right to equality of treatment and citizenship of the Union⁵⁴⁷ –roundly rejected the assertion that benefits of a financial nature which, under EU law, were intended to facilitate access to the labour market⁵⁴⁸ could be regarded as 'social assistance' for the purpose of Article 24(2) of Directive 2004/38.

The effect of what was Articles 2 and 5 of Regulation 1612/68 is that any citizen of the Union –with the exception of those new Member States who are subject to transitional measures⁵⁴⁹– may move from their own Member State to another in search of employment and enjoy the right to equal treatment as jobseekers. Directive 2004/38 affords further protection for pre-active jobseekers insofar as they cannot be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.⁵⁵⁰

For those employed or who were employed,⁵⁵¹ and their families, in another Member State extensive rights in respect of social welfare were derived

⁵⁴⁶ Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nurnberg 900* [2009] ECR I-04585.

⁵⁴⁷ *ibid.* at para 37:

'Furthermore, in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State (Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 63, and *Ioannidis*, paragraph 22).'

⁵⁴⁸ *Vatsouras* (n 546) at para 45:

'Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.'

⁵⁴⁹ Discussed in Chapter 2. The Treaty of Accession 2005 permitted derogations from Article 2 and 5 of Regulation 1612/68. In Ireland those derogations were applied up until 1 January 2012.

⁵⁵⁰ Directive 2004/38, art 14(4)(b).

⁵⁵¹ Case C-310/91 *Schmid* [1993] ECR I-3011, at para 21:

'According to Article 7 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been

from Regulation 1612/68, the most significant of which were derived from Article 7(2) which provided that workers shall enjoy the same social and tax advantages as national workers. The term ‘social advantage’ was problematic, early case law, as noted by Pennings,⁵⁵² giving it a restrictive interpretation in *Michel S*⁵⁵³ by relating it directly to employment and the workers themselves.⁵⁵⁴ However, in *Cristini*⁵⁵⁵ the Court of Justice took a broader view holding that Article 7(2) covered all social advantages whether or not attached to a contract of employment.⁵⁵⁶ The Court of Justice has consistently⁵⁵⁷ cited the later formulation found in *Hoeckx*⁵⁵⁸ where it was held that social advantages extended to:

‘...are all those 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 and whose extension to workers who are nationals of other member states therefore seems likely to facilitate the mobility of such workers within the community.’⁵⁵⁹

employed in that State (OJ, English Special Edition 1970 (II), p. 402), workers who, like Mr Schmid, were employed in the territory of a Member State retain the right to equality of treatment conferred by Regulation No 1612/68.’

⁵⁵² Pennings (n 18) at 126.

⁵⁵³ Case C-76/72 *Michel S* [1973] ECR 457.

⁵⁵⁴ *ibid.* at para 9:

‘However, the benefits referred to by the said article are those which, being connected with employment, are to benefit the workers themselves. Benefits reserved for the members of their families on the other hand, are excluded from the application of article 7.’

⁵⁵⁵ Case 32-75 *Cristini* [1975] ECR 01085.

⁵⁵⁶ *ibid.* at para 12:

‘In these circumstances the reference to ‘social advantages’ in article 7(2) cannot be interpreted restrictively. It therefore follows that, in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, whether or not attached to the contract of employment, such as reductions in fares for large families.’

⁵⁵⁷ Case C-310/91 *Schmid* [1993] ECR I-3011, at para 18:

‘According to the judgment in Case C-249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout* [1985] ECR 973, paragraph 20, “social advantages” should be interpreted as meaning all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community. This is so in the case of disability allowances.’

⁵⁵⁸ Case C-249/83 *Hoeckx* [1985] ECR 982.

⁵⁵⁹ *ibid.* at para 20.

This broad interpretation means that there is an overlap between Regulation 1612/68 and Regulation 883/2004 and Directive 2004/38, insofar as, as noted earlier, the term ‘social advantages’ has been interpreted by the Court of Justice as applying to both social security benefits and social assistance⁵⁶⁰ –though the rights granted under Reg. 1612/68 prevail over the derogations permitted by the Directive, as is clear from the decision of the Court of Justice in *L.N.*

‘As a derogation from the principle of equal treatment provided for in Article 18 TFEU, of which Article 24(1) of Directive 2004/38 is merely a specific expression, Article 24(2) must, according to the Court’s case-law, be interpreted narrowly and in accordance with the provisions of the Treaty, including those relating to citizenship of the Union and the free movement of workers (see, to that effect, Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I -4585, paragraph 44, and Case C-75/11 *Commission v Austria*, paragraphs 54 and 56)... Although Article 7(1)(c) of Directive 2004/38 does provide that a Union citizen is to have the right of residence on the territory of another Member State for a period of longer than three months if he is enrolled at a ‘private or public establishment’ within the meaning of that provision ‘for the principal purpose of following a course of study’, it does not however follow from that provision that a citizen of the Union who fulfils those conditions is thereby automatically precluded from having the status of ‘worker’ within the meaning of Article 45 TFEU.’⁵⁶¹

The effect of the overlap between the two regulations is that, for example, where the family member of a former worker cannot invoke⁵⁶² the

⁵⁶⁰ (n 18).

⁵⁶¹ Case C-46/12 *L.N.* (not yet reported in the ECR), at para 33 and 36.

⁵⁶² Case C-310/91 *Schmid* [1993] ECR I-3011 at paras 12-13:

‘According to Article 2(1) of Regulation No 1408/71, the provisions of the regulation apply "to employed or self-employed persons who are or who have been subject to legislation of one or more Member States and who are nationals of one of the Member States (...), as well as to the members of their families and their survivors". As the Court ruled in Case C-40/76 *Kermaschek v Bundesanstalt fuer Arbeit* [1976] ECR 1669, members of a worker's family can only claim derived rights under Regulation No 1408/71, that is rights acquired as the member of a worker's family... It follows that the dependent offspring of a migrant worker is not entitled, under Regulation No 1408/71, to a disability allowance provided for by national legislation as a right in person.

provisions of Regulation 1408/71, the Court of Justice will permit the family member to rely upon Regulation 1612/68 as a fall-back provision.⁵⁶³

The *Hoecx* interpretation also means that a multitude of social welfare payments –payable both as of right and on a discretionary basis⁵⁶⁴– are regarded as social advantages under Article 7(2), and protect family members in the ascending line.⁵⁶⁵ The following payments are covered: the grant of income guaranteed to old people, on the basis of *Castelli*:

‘As the court has held on many occasions (judgments of 31.5.1979 in case 207/78, *Even*, (1979) ECR 2019, and of 14.1.1982 in case 65/81, *Reina*, (1982) ECR 33), the concept of social advantage includes all 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 and the extension of which to workers who are nationals of other member states therefore seems suitable to facilitate their mobility within the community ". The effect of that definition, which has been consistently used by the court, is that the concept of social advantage includes the income guaranteed to old people by the legislation of a member state.’⁵⁶⁶

⁵⁶³ *ibid*, at para 17:

‘Since Regulation No 1612/68 applies in general to freedom of movement for workers, it may apply to the social advantages which, at the same time, come under the specific scope of Regulation No 1408/71 (Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817, paragraph 21).’

⁵⁶⁴ Case C-65/81 *Reina v Landeskreditbank Baden-Wurttemberg* [1982] ECR 33 at para 17: ‘However, it must be observed in that connection that the concept of " social advantage " referred to in article 7 (2) of the regulation encompasses not only the benefits accorded by virtue of a right but also those granted on a discretionary basis . In the latter case, the principle of equal treatment requires the benefits to be made available to nationals of other member states on the same conditions as those which apply to a state’s own nationals and on the basis of the same guidelines as those which govern the grant of the loans to the latter.’

⁵⁶⁵ Case 261/83 *Castelli v ONPTS* [1984] ECR 3199, at para 10: ‘By virtue of article 7(2) of Regulation no 1612/68 , a worker who is a national of a member state is to enjoy the same social and tax advantages as national workers. It follows from the judgments of 30 September 1975 (case 32/75, *Cristini*, (1975) ECR 1085) and of 16 December 1976 (case 63/76, *Inzirillo*, (1976) ECR 2057) that the equality of treatment provided for in article 7 of Regulation no 1612/68 is also intended to prevent discrimination against a worker's dependent relatives in the ascending line , such as the appellant in the main proceedings .’

⁵⁶⁶ Case 261/83 *Castelli v ONPTS* [1984] ECR 3199, at para 11.

A child-raising allowance –which is also covered by Regulation 883/2004 – on the basis of the *Sala* decision:

‘The answer to be given to the second and third questions is therefore that a benefit such as the child-raising allowance provided for by the BErzGG, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope *ratione materiae* of Community law as a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71 and as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.’⁵⁶⁷

An interest-free childbirth loan;⁵⁶⁸ study finance⁵⁶⁹ where it is applied for by the worker⁵⁷⁰ or directly by the descendant child⁵⁷¹ and a benefit guaranteeing a minimum means of subsistence on the basis of the *Hoeckx* decision :

⁵⁶⁷ Case C-85/96 *Martinez Sala* [1998] ECR I-2691, at para 28

⁵⁶⁸ Case C-65/81 *Reina* [1982] ECR 33, at para 13:

‘Consequently , childbirth loans such as those referred to by the national court satisfy in principle the criteria enabling them to be classified as social advantages to be granted to workers of all the member states without any discrimination whatever on grounds of nationality , in particular in view of their aim which is to alleviate , in the case of families with a low income , the financial burden resulting from the birth of a child .’

⁵⁶⁹ Case C-3/90 *Bernini* [1992] ECR I-1071) at para 29:

‘...study finance granted by a Member State to the children of workers constitutes for a migrant worker a social advantage within the meaning of Article 7(2) of Regulation No 1612/68...’

See further Case C-337/97 *Meeusen* [1999] ECR I-3289.

⁵⁷⁰ *ibid.* at para 25:

‘It follows from the judgment of the Court in Case 94/84 *ONEM v Deak* [1985] ECR 1873 that a migrant worker may rely on Article 7(2) of Regulation No 1612/68 in order to obtain social benefits provided for in the legislation of the host Member State in favour of the children of national workers (see paragraph 24 of the judgment). However, that benefit constitutes in favour of the migrant worker a social advantage within the meaning of that provision only where the worker continues to support his descendant (see the judgment in Case 316/85 *Centre Publique d' Aide Sociale de Courcelles v Lebon* [1987] ECR 2811, paragraph 13).’

⁵⁷¹ *Bernini* (n 569) at para 26:

‘The national court next wishes to know whether the child of the worker may, under Article 7(2) of Regulation No 1612/68 claim an independent right to study finance. It should be pointed out in that connection that it follows from the judgment in *Lebon*, cited above, that the dependent members of the family are the indirect beneficiaries of the equal treatment accorded to the migrant worker. Consequently, where the grant of financing to a child of a migrant worker constitutes a social advantage for the migrant worker, the child may itself rely on Article 7(2) in order to obtain that financing if under national law it is granted directly to the student.’

‘A benefit guaranteeing a minimum means of subsistence constitutes a social advantage within the meaning of Regulation No. 1612/68 which may not be denied to a migrant worker who is a national of another member state and is resident within the territory of the State paying the benefit, nor his family.’⁵⁷²

In Ireland this latter entitlement is known as Supplementary Welfare Allowance,⁵⁷³ which is discussed below under national law.

Article 12 of Regulation 1612/68⁵⁷⁴ provides that the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. The Court of Justice in *Baumbast* held that this granted an independent right of residence to the children of former workers, irrespective of the nationality of the child or the status of their parents.⁵⁷⁵ Moreover, it was held that, once the child's rights have been established under the regulation, the child's parents, who no longer retain a right to reside in the host Member State, then derive a right to reside from the child⁵⁷⁶ on the basis of the respect for

⁵⁷² Case C-249/83 *Hoeckx* [1985] ECR 973 at para 22.

⁵⁷³ Social Welfare Consolidation Act 2005, s 189. See further, Department of Social Protection, Operational Guidelines, Supplementary Welfare Allowance:

‘Article 7 (2) of EEC Regulation 1612/68 provides that an EEA worker who is a national of a Member State shall enjoy the same social and tax advantages as national workers. This includes social benefits guaranteeing the minimum means of subsistence (which in Ireland means SWA), which means that they will be treated the same as a national worker. Accordingly, on the basis of the principle of equal treatment as outlined, workers from other EEA countries should be treated in the same way as national (Irish) workers in determining entitlement to SWA.’

⁵⁷⁴ Now Regulation 492/2011, art 10.

⁵⁷⁵ Case C-413/99 *Baumbast and R* [2002] ECR I-7091, at para 63:

‘In the light of the foregoing, the answer to the first question must be that children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation No 1612/68. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard.’

⁵⁷⁶ *ibid.* at para 73:

‘The right conferred by Article 12 of Regulation No 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. To refuse to grant permission to remain to a parent who is the

family life pursuant to Article 8 of the European Convention on Human Rights.⁵⁷⁷ The Court of Justice, however, went further and held that, even if this were not so, a Member State national had a right of residence based solely upon his citizenship of the Union:

‘As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC.’⁵⁷⁸

Whilst social welfare rights do not appear to have been at issue in *Baumbast*, where the applicant was self-sufficient, they were, however, in the more recent case of *Teixeira*,⁵⁷⁹ where the applicant, a Portuguese national, was denied the right to housing assistance on the basis that she had no right of residence for the purpose of Articles 7(1), 7(3) or 16 of Directive 2004/38.⁵⁸⁰ The applicant, nonetheless, argued that she could rely upon Article 12 and the reasoning applied in *Baumbast*, whereas the UK, the respondent State, asserted that the advent of the Directive presupposed a requirement of lawful residence for the purpose of Article 12.⁵⁸¹ This argument was rejected by the Court of Justice on the basis that there was

primary carer of the child exercising his right to pursue his studies in the host Member State infringes that right.’

⁵⁷⁷ *Baumbast* (n 575), at para 72:

‘Moreover, in accordance with the case-law of the Court, Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention. That requirement is one of the fundamental rights which, according to settled case-law, are recognised by Community law...

⁵⁷⁸ *Baumbast* (n 575), at para 84.

⁵⁷⁹ Case C-480/08 *Teixeira* [2010] ECR I-1107.

⁵⁸⁰ *ibid.* at para 27:

‘Before that court, Ms Teixeira accepted that she had no right of residence under Article 7(1) of Directive 2004/38, that she did not satisfy the conditions set out in Article 7(3) of that directive for her to be regarded as having retained the status of worker, and that she did not have a right of permanent residence under Article 16 of that directive.’

⁵⁸¹ *Teixeira* (n 579) at para 31:

‘The respondents in the main proceedings submit that Directive 2004/38 now defines the conditions governing the right of residence in the Member States of citizens of the Union and members of their families, so that the exercise of any right of residence, even if it derives from Article 12 of Regulation No 1612/68, presupposes that the persons concerned satisfy the conditions for residence set out in that directive. Since Ms Teixeira herself admits that she does not satisfy the conditions which Articles 7 and 16 of that directive impose on the right of residence, the London Borough of Lambeth was right to conclude that she had not acquired such a right and could not therefore claim housing assistance.’

nothing to suggest that the legislature had intended to alter or limit the scope of Article 12, when adopting the Directive,⁵⁸² moreover, that the Directive was intended to be consistent with *Baumbast*⁵⁸³ and therefore could not have the effect of making the conditions stricter than those prevailing prior to the entry into force of the Directive:

‘...In circumstances such as those of the main proceedings, to make the application of Article 12 of Regulation No 1612/68 subject to compliance with the conditions set out in Article 7 of that directive would have the effect that the right of residence of children of migrant workers in the host Member State in order to commence or continue their education there and the right of residence of the parent who is their primary carer would be subject to stricter conditions than those which applied to them before the entry into force of that directive.’⁵⁸⁴

The consequence of which is that where a child resides with his or her parents, though not necessarily commencing their education at that point,⁵⁸⁵ in a Member State when one of the parents resided there as a worker⁵⁸⁶—this provision does not apply to the self-employed⁵⁸⁷— the child, once in

⁵⁸² *Teixeira* (n 579) at para 56:

‘On this point, there is nothing to suggest that, when adopting Directive 2004/38, the legislature intended to alter the scope of Article 12 of that regulation, as interpreted by the Court, so as to limit its normative content from then on to a mere right of access to education.’

⁵⁸³ *Teixeira* (n 579) at para:

‘That interpretation is confirmed by the fact that the travaux préparatoires to Directive 2004/38 show that it was designed to be consistent with the judgment in *Baumbast* and R (COM(2003) 199 final, p. 7).’

⁵⁸⁴ *Teixeira* (n 579) at para 60.

⁵⁸⁵ *Baumbast* (n 575) at para 76:

‘The child’s right of residence in that State in order to attend educational courses there, in accordance with Article 12 of Regulation No 1612/68, and consequently the right of residence of the parent who is the child’s primary carer, cannot therefore be subject to the condition that one of the child’s parents worked as a migrant worker in the host Member State on the date on which the child started in education.’

⁵⁸⁶ *Baumbast* (n 575) at para 52:

‘It is settled case-law that Article 12 of Regulation No 1612/68 requires only that the child has lived with his or her parents or either one of them in a Member State while at least one of them resided there as a worker (Case 197/86 *Brown* [1988] ECR 3205, paragraph 30, and *Gaal*, paragraph 27).’

⁵⁸⁷ Joined cases C-147/11 & C-148/11 *Czop and Punakova* (not yet reported in the ECR), at para 40:

‘...Article 12 of Regulation No 1612/68 must be interpreted as conferring on the person who is the primary carer of a migrant worker’s or former migrant worker’s child who is attending educational courses in the host Member State a right of residence in that State, although that provision cannot be interpreted as conferring such a right on the person who is the primary carer of the child of a person who is self-employed...’

education, thereafter retains a right to reside,⁵⁸⁸ from which the parents then in turn derive a right to reside which may continue beyond the child reaching the age of majority, provided the parent's presence is required by their child.⁵⁸⁹ This entitles the parents to social welfare in the form of housing assistance on the basis of *Teixeira* and, it is submitted, any other forms of social welfare to which such a person would be lawfully entitled, as the parent's entitlement to be in the host State is not contingent upon the parent having sufficient resources.⁵⁹⁰ There was, however, a limitation identified in *Teixeira*:

‘Article 12 of Regulation No 1612/68 must be interpreted as meaning that it grants rights only to a child who has lived with his parents or either one of them in a Member State whilst at least one of his parents resided there as a worker. It cannot therefore create rights for the benefit of a worker's child who was born after the worker ceased to work and reside in the host State.’⁵⁹¹

Whilst the decision of the Court of Justice was undoubtedly disappointing for the respondent Member State, who, not unreasonably, sought to rely upon Directive 2004/38, the reasoning of the Court of Justice in *Teixeira* is, nonetheless, impeccable: rights extant on the coming into force of the

⁵⁸⁸ In case C-200/02 *Chen* [2004] ECR I-09925, the Court of Justice, at para 20, had already held that a child had a right to reside which was not contingent upon reaching the age of majority:

‘Contrary to the Irish Government’s contention, a young child can take advantage of the rights of free movement and residence guaranteed by community law... free movement of persons cannot be made conditional upon attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally... refusal to allow the parent... who is a carer... a right of residence, to reside with that child in the host member state would deprive the child’s right of residence of any useful effect.’

⁵⁸⁹ Case C-480/08 *Teixeira* [2010] ECR I-1107 at para 86:

‘Although children who have reached the age of majority are in principle assumed to be capable of meeting their own needs, the right of residence of a parent who cares for a child exercising the right to education in the host Member State may nevertheless extend beyond that age, if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education.’

⁵⁹⁰ *ibid.* at 70:

‘The answer to Question 2(b) is therefore that the right of residence in the host Member State of the parent who is the primary carer of a child exercising the right to pursue his or her education in accordance with Article 12 of Regulation No 1612/68 is not conditional on that parent having sufficient resources not to become a burden on the social assistance system of that Member State during the period of residence and having comprehensive sickness insurance cover there.’

⁵⁹¹ Case C-197/86 *Browne* [1988] ECR 3205, at para 5.

Directive remain unaffected by the Directive unless expressed to be so affected. This brings us neatly to the provisions of Directive 2004/38.

2.15. Directive 2004/38

Directive 2004/38 does not restrict social security benefits which are within the material scope of Article 3 of Regulation 883/2004. However, as is clear from the decision in *Brey*⁵⁹² special non-contributory cash benefits are within the scope of Directive 2004/38. Article 24(2) of the Directive permits Member States to derogate from the principle of equal treatment in respect of social assistance:

‘By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b)...’

The circumstances in which Member States may derogate from the principle of equal treatment have, as noted above, been heavily circumscribed by the Court of Justice in *Brey*. National law which automatically excludes EU citizens from entitlement to social assistance is not compatible with EU law. Member States must engage in an assessment of the personal circumstances of claimants and, it is submitted, Member States must pay social assistance to claimants until such time as they become an unreasonable burden on the host Member State. It is also important to note that Article 24(2) only allows derogation from the principle of equal treatment to:

‘Union citizens other than workers, self-employed persons, persons who retain such status and members of their families who reside within the territory of the host Member State...’⁵⁹³

It is perfectly clear from the case law, discussed herein, that Member States regard the Directive as a shield to protect, and restrict access to, their social

⁵⁹² Case C-140/12 [2013] *Brey* (not yet reported in the ECR).

⁵⁹³ *ibid.* at para 56.

welfare systems and in some instances this may be legitimate in the sense that the Union is not yet a social union and EU citizens do not have a right to move from one Member State to another to seek better or higher social welfare entitlements in the same way as one might move to seek better pay and conditions of employment. In Advocate General Geelhoed's Opinion in *Trojani*,⁵⁹⁴ which has been cited and relied upon in the UK cases on the right to reside test,⁵⁹⁵ it was noted that:

'The difference in treatment now has a more pragmatic basis. So long as social security systems have not been harmonised in terms of the level of benefits, there remains a risk of social tourism, ie moving to a Member State with a more congenial social security environment. And that is certainly not the intention of the EC Treaty, which to a considerable extent leaves responsibility for social policy in the hands of the Member States. The Community legislature has acted on the assumption that an economic migrant will not claim any subsistence allowance in the host Member State.'⁵⁹⁶

This view, however, has also been heavily circumscribed by the decision of the Court of Justice in *Brey*. Furthermore, the Directive, in any event, does provide significant protection in some areas. Prior to addressing these, it is useful to consider the meaning of 'social assistance'.

Any payment connected to one of the contingencies listed in Article 3 of Regulation 883/2004⁵⁹⁷ is unlikely to be deemed social assistance. Equally any payment not connected is likely to be social assistance –this was confirmed by the Court of Justice in *Hoeckx*,⁵⁹⁸ where the question before

⁵⁹⁴ (n 260).

⁵⁹⁵ *Abdirahman & Others v Secretary of State for Work and Pensions* [2007] EWCA Civ 657, *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA 1310, *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, *Patmalniece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621.

⁵⁹⁶ Case C-456/02 *Trojani* [2004] ECR I-7573, Advocate General's Opinion, at para 17.

⁵⁹⁷ Regulation 883/2004, art 3:

'(a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; (j) family benefits.'

⁵⁹⁸ Case C-249/83 *Hoeckx* [1985] ECR 982, at para 10:

the Court of Justice was whether or not the payment in question constituted social security or social assistance. It was held that a ‘general social benefit’ which guaranteed a ‘minimum means of subsistence’ could not be categorised as a social security benefit:

‘It follows that an allowance like the one at issue, being a general social benefit, cannot be classified under one of the branches of social security listed in article 4 (1) of regulation no 1408/71 and therefore does not constitute a social security benefit within the specific meaning of the regulation... It must therefore be stated in answer to question (1) that a social benefit guaranteeing a minimum means of subsistence in a general manner such as that provided for by the Belgian law of 7 August 1974 does not fall within the material scope of regulation no 1408/71 of the council of 14 June 1971, as defined by article 4 (1) and (2) of that regulation.’⁵⁹⁹

The most recent pronouncement from the Court of Justice on social assistance is found in *Brey*, where it was held that:

‘Accordingly, that concept must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State.’⁶⁰⁰

Article 3 of Regulation 2004/38 refers to ‘benefits’ and this term, though widely used in respect of all types of social welfare payments including assistance, properly refers to social security benefits. The test for

‘Under article 4 (1) of regulation no 1408/71, the regulation is to apply to all legislation of the member states concerning the branches of social security listed in article 4 (1) (a) to (h), whereas article 4 (4) states that the regulation is not to apply, inter alia, to ‘social and medical assistance’.

⁵⁹⁹ *ibid.* at paras 14-15.

⁶⁰⁰ *Brey* at para 61.

categorisation, as noted by Pennings,⁶⁰¹ was originally set out in the *Frilli*⁶⁰² judgment, where the difficulty in distinguishing between social security and social assistance was highlighted⁶⁰³ particularly where the payment fulfilled a dual function⁶⁰⁴ –in *Newton*⁶⁰⁵ the Court of Justice held that, where categorisation could go either way, entitlement was contingent upon the claimant’s status.⁶⁰⁶ In *Frilli* it was held that a guaranteed income has affinities with social assistance, ‘in particular where it prescribes need as an essential criterion for its application and does not stipulate any requirement as to periods of employment, membership, or contribution...’,⁶⁰⁷ social security benefits on the other hand are payable without any individual and discretionary assessment of personal needs to recipients on the basis of a legally defined position.⁶⁰⁸ An individual assessment of the claimant’s

⁶⁰¹ Pennings (n 18) at 59.

⁶⁰² Case C-1/72 *Frilli* [1973] CMLR 386.

⁶⁰³ *ibid.* at para 13:

‘Although it may seem desirable, from the point of view of applying the regulation, to establish a clear distinction between legislative schemes which come within social security and those which come within assistance, it is possible that certain laws, because of the classes of persons to which they apply, their objectives, and the detailed rules for their application, may simultaneously contain elements belonging to both the categories mentioned and thus defy any general classification.’

See further Case C-356/89 *Newton* [1991] ECR I-3017.

⁶⁰⁴ *Frilli* (n 573) at para 15:

‘Taking into account the wide definition of the range of recipients, such legislation in fact fulfils a double function; it consists on the one hand in guaranteeing a subsistence level to persons wholly outside the social security system, and on the other hand in providing an income supplement for persons in receipt of inadequate social security benefits.’

⁶⁰⁵ Case C-356/89 *Newton* [1991] ECR I-3017.

⁶⁰⁶ *ibid.* at paras 16-19:

‘In particular, legislative provisions of a Member State of the kind in issue in the main proceedings cannot be regarded as falling within the field of social security within the meaning of Article 51 of the Treaty and Regulation No 1408/71 in the case of persons who have been subject as employed or self-employed persons exclusively to the legislation of other Member States... If such legislative provisions were to be regarded, in the case of such persons, as falling within the field of social security within the meaning of Article 51 of the Treaty and Regulation No 1408/71 the stability of the system instituted by national legislation whereby Member States manifest their concern for the handicapped persons residing in their territory could be seriously affected... Regulation No 1408/71 does not establish a common system of social security but lays down rules coordinating the different national social security schemes with a view to ensuring freedom of movement for workers. Consequently, although the provisions of that regulation must be construed in such a manner as to secure the attainment of that objective, they cannot be interpreted in such a way as to upset the system instituted by national legislation of the kind in issue in the main proceedings... The reply to the first question asked by the Social Security Commissioner must therefore be that in the case of persons who are or have been subject as employed or self-employed persons to the legislation of a Member State, an allowance provided for under the legislation of that Member State which is granted on the basis of objective criteria to persons suffering from physical disablement affecting their mobility and to the grant of which the persons concerned have a legally protected right must be treated as an invalidity benefit within the meaning of Article 4(1)(b) of Regulation No 1408/71.’

⁶⁰⁷ *Frilli* (n 573) at para 14.

⁶⁰⁸ Case C- 66/92 *Accardi* 1985 ECR 982 at para 14:

personal needs is a characteristic feature of social assistance.⁶⁰⁹ On the basis of the foregoing, in Ireland, Supplementary Welfare Allowance,⁶¹⁰ which is one of the main social welfare payments in the State, may be deemed to be social assistance.⁶¹¹ In contrast, Jobseeker's Benefit⁶¹² is a social security payment, as it is payable, irrespective of the means of the claimant provided he or she is unemployed, on the basis of contributions paid in respect of prior employment. Jobseeker's Allowance⁶¹³ falls between social assistance and social security, having the characteristics of both and, therefore, is a special non-contributory cash benefit covered by Regulation 883/2004.

Directive 2004/38 consolidated earlier Directives, which contained similar provisions to those contained within Directive 2004/38. Consequently, case law, addressing the provisions of the older Directives, remains relevant. The Directive only permits Member States to restrict access to social assistance to those who become an unreasonable burden on the host State's social assistance system. As a consequence, as noted above, the 'right to reside' test applied in Ireland pursuant to Irish legislation⁶¹⁴ is incompatible with EU law as regards social assistance.⁶¹⁵ In *Trojani* it was held that, whilst the right to reside was conferred directly⁶¹⁶ by Article 21 TFEU,⁶¹⁷ it was not

'The Court has also often stated that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see in particular *Commission v Luxembourg*, paragraph 29).

⁶⁰⁹ Case C-78/91 *Hughes* [1992] ECR I-4839, at para 17:

'...an individual assessment of the claimant's personal needs, which is a characteristic feature of social assistance...'

See further, Case 187/73 *Callemeyn* [1974] ECR 553, paras 7 and 8) and *Accardi* (n 579) at para 15.

⁶¹⁰ Social Welfare Consolidation Act 2005, s 189.

⁶¹¹ Department of Social Protection, *Operational Guidelines, Supplementary Welfare Allowance*.

⁶¹² Social Welfare Consolidation Act 2005, Part 2, Chapter 12.

⁶¹³ Social Welfare Consolidation Act 2005, Part 3, Chapter 2.

⁶¹⁴ Social Welfare Consolidation Act 2005, s 246(5).

⁶¹⁵ The European Commission appears to accept this. European Commission, Social security coordination: *Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits*, 29 September 2011, at 2:

'The EU directive on the free movement of EU citizens (Directive 2004/38/EC) allows for restrictions of access to social assistance only, but it cannot restrict the access to social security benefits (including special non-contributory cash benefits). In the absence of any such explicit derogation, the principle of equal treatment ensures that EU citizens may not be treated differently from the nationals of a Member State.'

⁶¹⁶ Case C-456/02 *Trojani* [2004] ECR I-7573 at para 31:

unconditional, being subject to limitations and conditions laid down by the Treaty and secondary measures,⁶¹⁸ the latter which must be applied proportionately.⁶¹⁹ The secondary measure at issue in *Trojani*, Article 1 of Directive 90/364 –now replaced and repealed by Directive 2004/38– required, as does Directive 2004/38, that those who wished to enjoy the right to reside in another Member State have sufficient resources and sickness insurance. In *Trojani* the applicant, who, having applied for social assistance, could not comply with the sufficient resources requirement, could not rely upon Article 21 TFEU and the secondary measure was held to be proportionate.⁶²⁰ The Court of Justice, however, accepted that a social assistance payment fell within the scope of the Treaty⁶²¹ and provided a person was lawfully resident on some other basis, he or she could rely upon the right to equal treatment pursuant to Article 18 TFEU. However, the host Member State may take measures to remove such a person, on the basis of their having recourse to social assistance, though this could not be an automatic measure.⁶²² In the earlier case of *Grzelczyk* the Court of Justice,

‘It must be recalled that the right to reside in the territory of the Member States is conferred directly on every citizen of the Union by Article 18(1) EC (see Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 84).

⁶¹⁷ Ex-Art 18 TEC.

⁶¹⁸ *Trojani* (n 616) at para 32:

‘That right is not unconditional, however. It is conferred subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect.’

⁶¹⁹ Case C-413/99 *Baumbast and R* [2002] ECR I-7091, at para 91:

‘However, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued...’

⁶²⁰ *Trojani* (n 616) at para 36:

‘In those circumstances, a citizen of the Union in a situation such as that of the claimant in the main proceedings does not derive from Article 18 EC the right to reside in the territory of a Member State of which he is not a national, for want of sufficient resources within the meaning of Directive 90/364. Contrary to the circumstances of the case of *Baumbast and R* (paragraph 92), there is no indication that, in a situation such as that at issue in the main proceedings, the failure to recognise that right would go beyond what is necessary to achieve the objective pursued by that directive.’

⁶²¹ *Trojani* (n 616) at para 42:

‘First, as the Court has held, a social assistance benefit such as the *minimex* falls within the scope of the Treaty (see Case C-184/99 *Grzelczyk* [2001] ECR I-6193, in particular paragraph 46).’

⁶²² *Trojani* (n 616) at para 45:

‘It should be added that it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure (see, to that effect, *Grzelczyk*, paragraphs 42 and 43).’

as noted by Craig and De Burca,⁶²³ considered the provisions of the earlier Directives and, noting that beneficiaries must not become an ‘unreasonable burden’ on the host Member State –which also applies under Directive 2004/38⁶²⁴– considered this as an indication that a reasonable burden ought to be borne by Member States,⁶²⁵ particularly where the difficulties may be temporary.⁶²⁶ The Court of Justice in *Brey* has, by relying upon the aforementioned case law and the provisions of Directive 2004/38, implicitly held that a right to reside exists until such time as a person becomes an unreasonable burden on the host State.

Under Directive 2004/38 an EU national may reside for three months without any restriction⁶²⁷ but is not entitled to social assistance during that period.⁶²⁸ For residence for periods in excess of three months one must be a worker or self-employed⁶²⁹ or retain such status,⁶³⁰ or have sufficient resources and comprehensive sickness insurance.⁶³¹ The ‘sufficient resources’ requirement might appear to have ruled out social assistance for the non-economically active. However, again, the unreasonable burden test would apply as is clear from *Brey*.

⁶²³ (n 496) at 839.

⁶²⁴ Directive 2004/38, recital 16.

⁶²⁵ Case C-184/99 *Grzelczyk* [2001] ECR I-6193, at para 44:

‘Whilst Article 4 of Directive 93/96 does indeed provide that the right of residence is to exist for as long as beneficiaries of that right fulfil the conditions laid down in Article 1, the sixth recital in the directive’s preamble envisages that beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State. Directive 93/96, like Directives 90/364 and 90/365, thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.’

⁶²⁶ *ibid* at para 45:

‘Furthermore, a student’s financial position may change with the passage of time for reasons beyond his control. The truthfulness of a student’s declaration is therefore to be assessed only as at the time when it is made.’

⁶²⁷ Directive 2004/38, art 24(2):

‘By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence.’

⁶²⁸ Directive 2004/38, recital 10:

‘Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.’

⁶²⁹ Directive 2004/38, art 7(1)(a).

⁶³⁰ Directive 2004/38, art 7(3).

⁶³¹ Directive 2004/38, art 7(1)(b).

The other tension points, of course, concern the *level*, discussed above, and *duration* of economic activity required to *obtain* the status of a worker or self-employed person, which is addressed below in the section dealing with Establishment and, where such activity ceased, the *retention* of such status.

In addressing the question of *duration*, it is important to note that Directive 2004/38 does not specify any minimum duration in order to *obtain* worker status, merely that in order to *retain* the status –which presupposes obtaining it in the first place– one must be temporarily unable to work as the result of an illness or accident;⁶³² or be in duly recorded involuntary unemployment after having been employed for more than one year and having registered as a job-seeker with the relevant employment office;⁶³³ or be in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and having registered as a job-seeker with the relevant employment office, in this case, the status of worker shall be retained for no less than six months⁶³⁴ or; embarking on vocational training, which unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.⁶³⁵ *Duration*, for the purpose of assisting national Courts in determining whether or not a threshold has been met, has been considered by the Court of Justice in a number of cases: in *Ninni-Orasche*⁶³⁶ the applicant, who was employed for two and a half-month,⁶³⁷ was deemed to have obtained the status of worker⁶³⁸ and; in *Vatsouras*,⁶³⁹ where the referring Court did not consider that the applicant

⁶³² Directive 2004/38, art 7(3)(a).

⁶³³ Directive 2004/38, art 7(3)(b).

⁶³⁴ Directive 2004/38, art 7(3)(c).

⁶³⁵ Directive 2004/38, art 7(3)(d).

⁶³⁶ Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187.

⁶³⁷ *ibid.* at para 10:

‘From 6 July to 25 September 1995, Mrs Ninni-Orasche was employed in Austria for a fixed term as a waitress authorised to act as cashier in an Austrian catering company...’

⁶³⁸ *Ninni-Orasche* (n 636) at para 25:

‘In the light of that case-law, it must be held that the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 48 of the Treaty.’

⁶³⁹ Joined cases C-22/08 and C-23/08 *Vatsouras and Koupatantz* [2009] ECR I-04585.

was a worker⁶⁴⁰ on the basis that he had completed barely more than a month's employment,⁶⁴¹ the Court of Justice applied the case law governing this area⁶⁴² and determined that a short duration of employment could not exclude that employment from the scope of Article 45⁶⁴³ of the TFEU⁶⁴⁴ and that it was open to the referring Court to make a determination that the applicant obtained the status of worker,⁶⁴⁵ which could, in turn, be retained for a period of at least six months on the basis of Directive 2004/38.⁶⁴⁶ This question arose in the UK in *Barry v Southwark London Borough Council*⁶⁴⁷ where the Court of Appeal considered whether two weeks⁶⁴⁸ full-time work was sufficient for the applicant to obtain the status of 'worker'. Arden LJ. held that the term 'worker' had a wide interpretation⁶⁴⁹ and he distinguished

⁶⁴⁰ *ibid.* at para 24:

'As is apparent from the orders for reference, the questions referred are based on the premiss that, at the time material to the main proceedings, Mr Vatsouras and Mr Koupatantze did not have the status of 'worker' within the meaning of Article 39 EC.'

⁶⁴¹ *Vatsouras* (n 639) at para 25:

'The referring court found that the 'brief minor' professional activity engaged in by Mr Vatsouras 'did not ensure him a livelihood' and that the activity pursued by Mr Koupatantze 'lasted barely more than one month'.

⁶⁴² Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paras 16 and 17, and Case C-228/07 *Petersen* [2008] ECR I-06989, paras 45, Case 344/87 *Bettray* [1989] ECR 1621, paras 15, and Case C-10/05 *Mattern and Cikotic* [2006] ECR I-3145, para 22, Case 53/81 *Levin* [1982] ECR 1035, paras 15 and 16, and Case C-317/93 *Nolte* [1995] ECR I-4625, paras 19, Case 139/85 *Kempf* [1986] ECR 1741, paras 14.

⁶⁴³ Ex-Art 39 TEC.

⁶⁴⁴ *Vatsouras* (n 639) at 29:

'Furthermore, with regard to the duration of the activity pursued, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 39 EC (see Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 16, and Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 25).

⁶⁴⁵ *ibid.* at para 30:

'It follows that, independently of the limited amount of the remuneration and the short duration of the professional activity, it cannot be ruled out that that professional activity, following an overall assessment of the employment relationship, may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 39 EC.'

⁶⁴⁶ *Vatsouras* (n 616) at para 31:

'Were the referring court to reach such a conclusion in regard to the activities pursued by Mr Vatsouras and Mr Koupatantze, the latter would have been able to retain the status of workers for at least six months, subject to compliance with the conditions laid down in Article 7(3)(c) of Directive 2004/38. The national court alone is responsible for factual assessments of this kind.'

⁶⁴⁷ *Barry v Southwark London Borough Council* [2008] EWCA Civ 1440.

⁶⁴⁸ *ibid.* at para 1:

'By a decision dated 4 July 2007, the review officer of the respondent, the London Borough of Southwark ("Southwark"), pursuant to s 202 of the Housing Act 1996 ("the 1996 Act"), determined that the appellant, Mr Barry, a citizen of the Netherlands and thus a citizen of the European Union, was not a "worker" for the purpose of Community law for a period of two weeks in July 2006 in which he worked as a steward at the All England Tennis Championships at Wimbledon. This was the only employment that he had undertaken in the relevant six month period.'

⁶⁴⁹ *Barry* (n 647), Arden LJ., at para 17, held that:

an ancillary relationship from an employment relationship, holding that duration was a consideration but was not conclusive:

‘The duration of the employment is, however, a factor to be taken into account. The duration of the work in the relevant period is not, however, a conclusive factor in deciding whether a person is a "worker" for Community law purposes (see Ninni-Orasche at [25])...’⁶⁵⁰

Arden LJ. held that, on the basis of the employment relationship, the not inconsiderable sum paid to the applicant and the fact that deductions were made meant that the applicant had obtained the status of worker:

‘The work which Mr Barry performed was in any event of economic value since, if he had not performed that service, the Wimbledon championships would have to have employed someone else to fulfil his duties. It was not ancillary to any other relationship between Mr Barry and the Wimbledon championships. It was not marginal because it was a role for which the Wimbledon Championships was prepared to pay a not insignificant sum as remuneration. The Wimbledon championships made deductions from his pay on the same basis as if he were any other employee.’⁶⁵¹

Llyod LJ. adopted the same reasoning:

‘Applying the general criteria indicated in that passage, during the two weeks in question ("a certain period of time") Mr Barry was a person who "performs services for and under the direction of another person in return for which he receives remuneration". He provided "a service of some economic value" to his employer, since otherwise he would

‘In my judgment, it is clear that Community law gives the term "worker" a very wide interpretation. This can be seen from Levin and Lawrie-Blum v Land Baden-Wurttemberg, Case 66/85.’

⁶⁵⁰ *ibid.* at para 20.

⁶⁵¹ *Barry* (n 647) at para 23.

not have received remuneration of £830 (gross) for his work during the two weeks.⁶⁵²

The issue arose in Ireland in 2013 in *S v Minister for Social Protection*,⁶⁵³ where the applicant, a Romanian national who had been employed for four weeks, was denied social welfare on the basis that his work was on such a small scale as to be regarded as purely marginal and ancillary. The applicant obtained leave in the High Court for Judicial Review of the decision and the case was conceded by the respondent some weeks later, with the applicant being granted social welfare for six months. Of interest to future accession Member States, case law on the earlier Directive governing free movement rights for workers, Directive 68/360, now replaced and repealed by Directive 2004/38, requires the worker to have been employed as an EU citizen, post-accession in order to obtain and retain worker status, unless otherwise provided for by the Act of Accession.⁶⁵⁴ In respect of the most recent Treaty of Accession, 2005, governing the accession of Romania and Bulgaria,⁶⁵⁵ provision was, arguably,⁶⁵⁶ made to cover such circumstances. However, even this was contingent upon the person, having been employed pre-accession, being employed on the date of accession.⁶⁵⁷

Retention of ‘worker’ status, for those who worked for less than a year, is straightforward as Directive 2004/38 expressly provides that such status

⁶⁵² *ibid.* Llyod LJ., at para 40.

⁶⁵³ 2013 Judicial Review.

⁶⁵⁴ Case C-171/91 *Tsiotras* [1993] ECR I-2925, at paras 11-12:

‘Those provisions show that the right of residence conferred by Community law on workers who are nationals of the Member States and who are unemployed in the host Member State presupposes that those workers have previously been employed in the host Member State in the exercise of the right of freedom of movement... Moreover, there is no provision in the Act of Accession of the Hellenic Republic to the Community, or in secondary legislation, which treats a post occupied by a national of that Member State before its accession to the Community in the same way as a post occupied by a national of a Member State under the provisions of Community law on freedom of movement for workers. Consequently, a Greek national in the situation described by the court of reference has no right to stay under Article 48(3)(c) of the Treaty and Article 7 of Directive 68/360.’

⁶⁵⁵ For a comprehensive discussion on the Treaty of Accession 2005 see Chapter 2.

⁶⁵⁶ The provisions are properly concerned with access to the labour market.

⁶⁵⁷ Annex VII, Treaty of Accession 2005, art 2:

‘Romanian nationals legally working in a present Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.’

shall be retained for six months.⁶⁵⁸ If clarification of this was required it was provided by the Court of Justice in *Vatsouras*.⁶⁵⁹ How long is status retained for where the worker has worked for more than twelve months? The Directive is silent in this regard. Was it the intention of the legislature to grant what would effectively be an indefinite⁶⁶⁰ right to reside for those who worked for more than 12 months? Directive 68/360 EEC, may give some guidance, Article 7(1) of which provided that residency rights may not be withdrawn because of temporary illness or involuntary unemployment⁶⁶¹ – this provision is now found in Article 7(3) of Directive 2004/38. Article 7(2) of Directive 68/360 provided that where the worker had been involuntarily unemployed for more than 12 months the period of residence may be restricted to 12 months.⁶⁶² Article 7 was considered by the Court of Justice in *Tsiostras*:

‘The right of a national of a Member State to reside for the purpose of employment in another Member State is recorded by the residence permit issued in accordance with Article 4 of Directive 68/360. Pursuant to Article 7(1) of that directive, the fact that a person with such a right is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office, is not to lead to the withdrawal of the residence permit. Under Article 7(2), however, when the residence permit is renewed for the first time, the period of validity may be restricted to not less than twelve months where the

⁶⁵⁸ Directive 2004/38, art 7(3)(b).

⁶⁵⁹ *Vatsouras* (n 639), at para 31:

‘Were the referring court to reach such a conclusion in regard to the activities pursued by Mr Vatsouras and Mr Koupatantze, the latter would have been able to retain the status of workers for at least six months, subject to compliance with the conditions laid down in Article 7(3)(c) of Directive 2004/38. The national court alone is responsible for factual assessments of this kind.’

⁶⁶⁰ After five years lawful residence there is a right to permanent residence -Directive 2003/38, art 16.

⁶⁶¹ Directive 68/360, art 7(1):

‘A valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office.’

⁶⁶² *ibid.* art 7(2):

‘When the residence permit is renewed for the first time, the period of residence may be restricted, but not to less than twelve months, where the worker has been involuntarily unemployed in the Member State for more than twelve consecutive months.’

worker has been involuntarily unemployed in the host Member State for more than twelve consecutive months.’⁶⁶³

The residence permit, under this older Directive, however, was granted for five years where the employment lasted more than twelve months⁶⁶⁴ and could not be withdrawn because of subsequent unemployment.⁶⁶⁵ On this basis, a worker, having been employed for in excess of twelve months, would retain his or her status for a period of at least two years. Under the provisions of Directive 2004/38, a worker, having been lawfully resident for a period of five years, is then entitled to Permanent Residence,⁶⁶⁶ one of the benefits of which is that the right to reside conditions no longer apply.⁶⁶⁷ It is noteworthy that the Commission takes the view that the new provision contained within Article 16 ‘builds on the right to remain’.⁶⁶⁸ On the basis of the foregoing it would appear that employment for a duration of in excess of one year grants considerable rights to workers. This contention finds further support in the preamble of Directive 2004/38, which provides that the purpose of the Directive was to ‘strengthen the right of free movement

⁶⁶³ Case C-171/91 *Tsiotras* [1993] ECR I-2925, at para 10.

⁶⁶⁴ Directive 68/360, art 1:

‘The residence permit: (a) must be valid throughout the territory of the Member State which issued it; (b) must be valid for at least five years from the date of issue and be automatically renewable.’

⁶⁶⁵ Case C-325/09 *Dias* [2011] I-06387 at para 52:

‘In addition, the only provision of Directive 68/360 which referred to the withdrawal of the residence permit, namely Article 7(1) of that directive, confirms the existence of an inherent link between that permit and the citizen’s already existing right of residence. Like the right of residence of a worker which, as with the status of worker itself, was not lost solely because its holder was no longer in employment, either because he was temporarily unable to work as a result of illness or accident or because he was involuntarily unemployed, this being duly confirmed by the competent employment office, that provision also did not allow the valid residence permit of a worker who was in such a situation to be withdrawn.’

See further: Case C-39/86 *Lair* [1988] ECR 3161, at para 34:

‘...Secondly, Council Directive 68/360/EEC... prohibits Member States in certain circumstances from withdrawing a residence permit from a worker solely on the ground that he is no longer in employment .’

⁶⁶⁶ Directive 2004/38, art 16(1):

‘Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there.’

⁶⁶⁷ *ibid.*:

‘This right shall not be subject to the conditions provided for in Chapter III.’

⁶⁶⁸ European Commission, Free movement and residence of Union citizens within the European Union (Oct. 2004), art 16:

‘New :Chapter IV introduces the right of permanent residence for all Union citizens and their family members. This right builds on the “right to remain” already foreseen by existing *acquis* for workers and self-employed persons and extends it to all beneficiaries of this Directive.’

and residence of all Union citizens.⁶⁶⁹ The same preamble, however, raises a note of caution by its reference to beneficiaries not becoming an ‘unreasonable burden’ on Member States.⁶⁷⁰ The first point to be made in this respect is that it solely relates to social assistance, therefore it cannot, it is submitted, be applied to social security benefits –though clearly the Advocate General in *Brey* takes a different view.⁶⁷¹ Secondly, whilst a person who becomes an unreasonable burden on the social welfare system of a Member State may not be automatically expelled⁶⁷² and jobseekers – whether this refers to post-active or pre-active jobseekers is unclear– may not be expelled except on the grounds of public policy or public security.

One final point of note is that retention of status of worker under Directive 2004/38 appears to be conditional upon the unemployment being involuntary⁶⁷³ –which may include termination of a short-term contract.⁶⁷⁴ This requirement, presumably, applies equally to social welfare entitlements. Where maintenance grants are at issue, the employment must not have been ancillary to the studies.⁶⁷⁵ The purpose of this provision is to protect Member States’ social welfare systems from abuse. Whilst the rules within Directive 2004/38 governing the right to reside beyond three months are restrictive, they are counter-balanced by the low threshold applied by the Court of Justice in respect of obtaining and retaining the status of worker.

⁶⁶⁹ Directive 2004/38, recital 3.

⁶⁷⁰ Directive 2004/38, recital 16.

⁶⁷¹ Discussed above.

⁶⁷² *Trojani* (n 616).

⁶⁷³ Directive 2004/38, art 7(3).

⁶⁷⁴ Case C 413/01 *Ninni-Orasche* [2003] ECR I 13187, it was held that a person who had worked for a period of two and a half months in the territory of another member State can obtain the status of a worker and that the fact that the work was fixed term did not mean that the person was ‘voluntarily’ unemployed.

⁶⁷⁵ Case C-197/86 *Brown* [1988] ECR 3205, at para 4-5:

‘A grant awarded for maintenance and for training with a view to the pursuit of university studies leading to a professional qualification constitutes a social advantage which may be claimed pursuant to Article 7 (2) of Regulation No 1612/68 by a national of another Member State who has undertaken, in the host State, after having engaged in an occupation in that State, studies which are linked, by virtue of their subject-matter, with the previous occupation... It cannot, however, be inferred that a national of a Member State is entitled to a grant for studies by virtue of his status as a worker where it is established that he acquired that status exclusively as a result of his being accepted for admission to university to undertake the studies in question. The employment relationship, which is the only basis for the rights deriving from Regulation No 1612/68, is in such circumstances merely ancillary to the studies to be financed by the grant.’

See Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrick Wyatt, *Wyatt and Dashwood’s European Union Law*, (Hart Publishing, 2011), at 506.

An interesting question arises as regards the interaction of the right to reside, habitual residence and the retention of status of worker: can a person who has a right to reside on the basis of retaining his or her status of worker then be refused social assistance on the basis of not meeting the habitual residence conditions? Certainly, on the basis of Irish law, habitual residence, upon which the payment of social assistance in the form of Supplementary Welfare Allowance⁶⁷⁶ is contingent,⁶⁷⁷ must be considered after a right to reside has been established. In practice, where worker status is retained, the Department of Social Protection will side-step the habitual residence requirement.⁶⁷⁸ It is submitted that this is correct approach as EU law does not require habitual residence –which is a requirement for social security under Regulation 883/2004– for the purpose of social assistance, the right to which, whilst contingent upon lawful residence, is governed by Regulation 492/2011 (formerly Regulation 1612/68) and Directive 2004/38, neither of which makes the payment of social assistance contingent upon habitual residence. Consequently, the qualifying requirement within Irish legislation of habitual residence in respect of Supplementary Welfare Allowance, may, it is submitted, be contrary to EU law.

2.16. Self-employment and Social Welfare Rights

⁶⁷⁶ Social Welfare Consolidation Act 2005, s 189.

⁶⁷⁷ Social Welfare Consolidation Act, s 192:

‘A person shall not be entitled to an allowance (other than an allowance under *sections 201 and 202*) under this Chapter unless he or she is habitually resident in the State at the date of the making of the application for the allowance.’

⁶⁷⁸ Department of Social Protection, *Operational Guidelines, Supplementary Welfare Allowance*:

‘An EEA national who is engaged in genuine and effective employment in Ireland is regarded as a migrant worker under EC law and does not need to satisfy the HRC for the purpose of any claim to SWA. A person who has been so employed and retains his or her "worker" status in accordance with *Regulation 1612/68* as amended by *Directive 2004/38* (transposed into Irish legislation by *S.I. 656/06*) continues to be protected by this provision. This means that EEA nationals who have been employed since arriving in Ireland may be entitled to SWA, even if they do not satisfy the HRC for Jobseeker's Allowance or one of the other payments subject to the condition. Such persons should therefore be advised to enquire with their local Designated Person as to their possible entitlement to SWA as a migrant EU worker.’

Available on <<http://www.welfare.ie/en/Pages/Supplementary-Welfare-Allowance-Scheme-SWA.aspx>> accessed 1 June 2013.

The right to establishment⁶⁷⁹ is governed by separate Treaty provisions⁶⁸⁰ to those of workers and treated as such by the Court of Justice.⁶⁸¹ Prior to the coming into force of Directive 2004/38 the rights of the self-employed were also determined by separate Directives, with the important exception of Regulations 1408/71 which applied equally to workers and the self-employed.⁶⁸²

There is no doubt remaining as to the extent of the right to reside, post-employment, for those who are workers in the narrow sense of the meaning. The reasons for this are two-fold: secondary law, primarily in the form of Regulation 1612/68, was better developed for and only applied to workers⁶⁸³ which in turn led to greater clarity in respect of the rights of workers, as evidenced by the extensive case law discussed above. The self-employed, on the other hand, did not have an equivalent Regulation, as a consequence of which the case law dealing with the self-employed, as regards social welfare rights, is far less well developed. The absence of secondary law, of course, is not fatal or conclusive of there being no rights and, historically, EU nationals could rely directly upon the provisions of the Treaty,⁶⁸⁴ even where there was legislation which was not in force during the relevant period.⁶⁸⁵ As a consequence, much of the earlier case law is framed around

⁶⁷⁹ See generally: Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrick Wyatt, *Wyatt and Dashwood's European Union Law*, (Hart Publishing, 2011) at 531-554; Josephine Steiner, Lorna Woods and Christian Twigg-Flesner, *EU Law*, (9th Edn. OUP, 2006) at 448-462 and; Craig & De Burca (n 461) at 770-788.

⁶⁸⁰ Treaty on the Functioning of the European Union, art 49-55.

⁶⁸¹ Case C-53/95 *Kemmler* [1996] ECR I-00703, at para 8:

‘Furthermore, according to the order for reference, Mr Kemmler is not an employed person but a self-employed person with professional establishments in both Frankfurt and Brussels. His situation is not therefore covered by Articles 48 and 51 of the Treaty, which concern the free movement of workers...’

⁶⁸² *Van Roosmalen* (n 328-329).

⁶⁸³ *Czop and Punakova* (n 366-369).

⁶⁸⁴ Case C-53/95 *Kemmler* [1996] ECR I-00703, at para 6:

‘That article requires the abolition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. It is settled case-law that that is a directly applicable rule of Community law. Member States were therefore under the obligation to observe that rule even though, in the absence of Community legislation on social security for self-employed persons, they retained competence to legislate in this field (Stanton, paragraph 10).’

See further Case C-81/87 *Daily Mail* ECR 3483 at para 15; Case C-1/93 *Halliburton Services* [1994] ECR I-1137 para 16; Case C-254/97 *Baxter and others* [1999] ECR I-4809, para 11, in *Wyatt & Dashwood* (n 653) at 535.

⁶⁸⁵ Case 143/87 *Stanton* [1988] ECR 3877, at para 7:

substantive Treaty provisions –Steiner et al aver that the absence of secondary law gave added importance to the principle of non-discrimination.⁶⁸⁶ Many academics now question the historic distinction between the workers and the self-employed: Steiner et al,⁶⁸⁷ on the basis that the coming into force of Directive 2004/38 –Article 24 of which provides that all Union citizens, including the self-employed, residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State; Chalmers et al on the basis that the rights of workers and the self-employed have been assimilated by both EU legislators and the Court of Justice, partially premised upon citizenship of the Union⁶⁸⁸ and similar interpretation given to Treaty provisions.⁶⁸⁹

These views must be tempered by decisions such as *Czop and Punakova*,⁶⁹⁰ where the Court of Justice held that Article 12 of Regulation 1612/68 does not apply to the self-employed, suggesting that whatever rights have been preserved solely for workers will not be extended by the Court of Justice to the self-employed. This, for example, suggests that a person entering the Irish state for the purpose of setting up a business could not rely upon the provisions of Regulation 492/2011, which guarantees equal treatment to

‘A Community scheme for self-employed persons was introduced by Council Regulation No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Council Regulation No 1408/71 (Official Journal 1981, L 143, p.1). According to Article 2 of that regulation, no rights are acquired thereunder in respect of a period prior to the date of its entry into force . It appears from Article 4 that the regulation entered into force only on 1 July 1982, that is to say, after the period relevant to the main proceedings (1979 to 1980). The regulation is therefore not applicable to the dispute and the question put by the national court is correct in referring only to the relevant Treaty provisions.’

⁶⁸⁶ Josephine Steiner, Lorna Woods and Christian Twigg-Flesner, *EU Law*, (9th Edn. OUP, 2006) at 453.

⁶⁸⁷ *ibid.*

⁶⁸⁸ Chalmers (n 530) at 832:

‘...both workers and the self-employed are EU citizens, and this fact has been used in recent years by both the court of Justice and the EU legislators to assimilate their rights.’

⁶⁸⁹ *ibid.* at 832. Further, Chalmers avers that:

‘...Articles 45 and 49 are being interpreted in a similar manner, and using the same concepts and limits.’

See further, Case 48-75 *Royer* [1976] ECR 497, where it was held, at para 12, in respect of free movement of workers, establishment (self-employment) and services, that:

‘Nevertheless comparison of these different provisions shows that they are based on the same principles both in so far as they concern the entry into and residence in the territory of member states of persons covered by community law and the prohibition of all discrimination between them on grounds of nationality.’

⁶⁹⁰ Joined cases C-147/11 & C-148/11 *Czop and Punakova* (not yet reported in ECR).

jobseekers, for the purpose of obtaining Jobseeker's Allowance for a six months period, such as would be guaranteed to a worker seeking employment. A jobseeker, entering a host Member State for the purpose of seeking employment is excluded from social assistance.⁶⁹¹ Would then the putative self-employed person be able to claim Supplementary Welfare Allowance on the basis of the right to equal treatment under Article 24(2)? This would almost certainly depend upon whether or not he or she actually obtained the status of a self-employed person. Workers obtain that status from relatively limited economic activity, as noted above. It would appear that, similarly, a limited degree of economic activity may suffice for obtaining the status of self-employed person for the purpose of Directive 2004/38: in *Deliege*⁶⁹² the Court of Justice, as noted by Steiner et al, 'borrowed' jurisprudence from the sphere of workers:

'As regards more particularly the first of those concepts, according to settled case-law (Donà, cited above, paragraph 12, and Case 196/87 Steymann v Staatssecretaris van Justitie [1988] ECR 6159, paragraph 10), the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the Treaty... However, as the Court held in particular in Levin (paragraph 17) and Steymann (paragraph 13), the work performed must be genuine and effective and not such as to be regarded as purely marginal and ancillary.'⁶⁹³

This view was restated later in *Jany*.⁶⁹⁴ Although not referred to in either case, in the much earlier case of *Van Roosmalen*, the Court of justice, had defined the meaning of the term 'self-employed' in the context of

⁶⁹¹ Directive 2004/38, art 24(2):

'By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b)...

⁶⁹² Joined cases C-51/96 and C-191/97 *Deliege* [2000] I-02549.

⁶⁹³ *ibid.* at paras 53-54.

⁶⁹⁴ Case C-268/99 *Jany* [2001] ECR-I 8615, at para 33:

'According to settled case-law, the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the EC Treaty (now, after amendment, Article 2 EC), provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary.'

Regulations 1408/71 and 1390/81. The Court of Justice recalled that the term ‘employed person’, in the context of workers, was a term of Community law which must be interpreted broadly⁶⁹⁵ and held that the extension, by Regulation 1390/81, of Regulation 1408/71 to self-employed persons⁶⁹⁶ guaranteed to self-employed persons the same protection accorded to workers and required a broad interpretation to its meaning:⁶⁹⁷

‘The expression ‘self-employed person’... applies to persons who are pursuing or have pursued, otherwise than under a contract of employment or by way of self-employment in a trade or profession, an occupation in respect of which they receive income permitting them to meet all or some of their needs...’⁶⁹⁸

The approach of the Court of Justice in *Van Roosmalen* is similar to that adopted in the case law addressing the rights of part-time workers such as *Levin*, although there is no explicit statement such as was made in respect of workers in *Kempf*, in respect of the self-employed being permitted to make up a short-fall in their income by way of social welfare. This though, arguably, is not necessary as a self-employed person is entitled to equal

⁶⁹⁵ Case C-300/84 *Van Roosmalen* [1986] ECR 03097, at para 20:

‘With regard to the interpretation of the expression ‘self-employed person’, it must first be pointed out that initially the provisions of Regulation no 1408/71, adopted for the implementation of article 51 of the treaty, applied only to those who were term ‘employed person’. According to the established case-law of the court, ‘employed person’ is a term of community law rather than national law and must be interpreted broadly, having regard to the objective of Article 51, which is to contribute towards the establishment of the greatest possible freedom of movement for migrant workers, an objective which is one of the foundations of the community.’

⁶⁹⁶ *ibid.* at para 19:

‘In the preamble to Regulation no 1390/81 the council stated that freedom of movement for persons was not confined to employed persons but also extended to self-employed persons in the framework of freedom of establishment and the freedom to provide services and that coordination of the social security schemes applicable to self-employed persons was necessary to achieve one of the objectives of the community; consequently, in that regulation it extended the general scope of Regulation no 1408/71 to self-employed persons and members of their family.’

⁶⁹⁷ *Van Roosmalen* (n 695), at para 20:

‘Since Regulation no 1390/81 was adopted in order to achieve the same objectives as regulation no 1408/71, the concept of ‘self-employed person’ is intended to guarantee to such persons the same protection as is accorded to employed persons and must therefore be interpreted broadly.’

⁶⁹⁸ *ibid.* at para 21. See further Case C-268/99 *Aldona Malgorzata Jany* [2001] ECR Page I-08615 at para 37:

‘...the expression economic activities as self-employed persons... its ordinary meaning of economic activities carried on by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his own personal responsibility.’

treatment with nationals of the host Member State under both Regulation 883/2004⁶⁹⁹ and Directive 2004/38⁷⁰⁰ and is therefore entitled to the same social security benefits and social assistance granted to nationals.

Under both EU and national law the earning threshold to trigger social welfare entitlements for workers is relatively low, in respect of the latter as low as €38 per week, as noted above.⁷⁰¹ Whilst the terms ‘worker’ and ‘self-employed’ are Community terms, it is noteworthy that Regulation 883/2004 measures the status by reference to national Member States’ own legislation, insofar as the worker or self-employed person must be insured under national law.⁷⁰²

Domestic legislation in Ireland provides that those with reckonable income of €5,000 per annum, equating to €96.15 per week, are defined as self-employed⁷⁰³ –this figure was €3,174 per annum, or €61.03 weekly until 1 January 2011.⁷⁰⁴ Whilst this sum is above the threshold set for workers under national law, it probably equates roughly to the level of economic activity demanded at EU level for workers. As with workers,⁷⁰⁵ self-employment, for the purpose of EU law, is not, strictly speaking, contingent

⁶⁹⁹ Regulation 883/2004, art 4.

⁷⁰⁰ Directive 2004/38, art 24.

⁷⁰¹ (n 448).

⁷⁰² Regulation 883/2004, art 1(b):

‘activity as a self-employed person’ means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists...’

⁷⁰³ Social Welfare Consolidation Act 2005, s 20(1)(a) provides that:

‘every person who, being over the age of 16 years and under pensionable age (not being a person included in any of the classes of person specified in Part 3 of Schedule 1) who has reckonable income or reckonable emoluments, shall be a self-employed contributor for the purposes of this Act regardless of whether the person is also an employed contributor...’

Schedule 1, Part 3, Paragraph 3 excepts those earning less than a prescribed sum, which is prescribed in the Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 (S.I. No. 312 of 1996), reg. 92 (as amended by the Social Welfare (Consolidated Contributions and Insurability) (Amendment) Regulations (S.I. No. 684 of 2010), reg. 6:

‘Prescribed level of income for excepted self-employed contributor.

6. Article 92 (amended by article 4 of the Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 6) (Euro) Regulations, 2001 (S.I. No. 613 of 2001) of the Principal Regulations is amended by substituting “€5,000” for “EUR 3,174”.’

⁷⁰⁴ Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 (S.I. No. 312 of 1996), reg. 92.

⁷⁰⁵ See *Steymann* (n 503).

upon remuneration in the form of a wage or direct payment for the activity. This was confirmed by the Court of Justice in *Van Roosmalen*.⁷⁰⁶

‘It is not necessary that the self-employed person should receive remuneration as a direct reward for his activity. It is sufficient if he receives, in respect of that activity, income which permits him to meet all or some of his needs even if that income is supplied, as in this case, by third parties benefiting from the services of a missionary priest.’⁷⁰⁷

There is an important distinction under national law in respect of the level of social insurance contributions payable by workers and the self-employed: whilst both pay similar levels of Pay Related Social Insurance (PRSI) the employer pays an additional 10.75% PRSI in respect of the worker. As a consequence, the PRSI payable in respect of a worker is greater than that of a self-employed person. The self-employed pay Class ‘S’ contributions, while most workers pay Class A. Thus the self-employed are excluded from entitlement to ‘benefits’ which are contingent upon Class A contributions such as Jobseeker’s Benefit and other ‘benefits’⁷⁰⁸ which are not means tested and paid as of right premised upon social insurance contributions. The exception to this general rule is that Maternity Benefit is now⁷⁰⁹ payable to the self-employed. This important development was brought about by persistent calls from the European Parliament to the Commission to strengthen protection for the self-employed.⁷¹⁰ Earlier legislation, in the

⁷⁰⁶ *Van Roosmalen* (n 669)

⁷⁰⁷ *ibid.* at para 22:

⁷⁰⁸ Jobseeker's benefit, Illness benefit, Health and safety benefit, Maternity benefit, Adoptive benefit, Invalidity pension Widow's, Widower's or surviving civil partner's (contributory) Pension, Guardian's payment (contributory), State pension (transition), State pension (contributory), Bereavement grant, Treatment benefit Occupational injuries benefit, Carer's benefit.

⁷⁰⁹ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, p. 1–6, art 8:

‘The Member States shall take the necessary measures to ensure that female self-employed workers and female spouses and life partners referred to in Article 2 may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks.’

In force since 4 August 2010.

⁷¹⁰ Directive 2010/41, recital 4:

‘The European Parliament has consistently called on the Commission to review Directive 86/613/EEC, in particular so as to boost maternity protection for self-employed women and to improve the situation of spouses of self-employed workers.’

form of Directive 86/613EEC⁷¹¹ was weak and granted no enforceable rights, merely proving that:

‘Member States shall undertake to examine whether, and under what conditions, female self-employed workers and the wives of self-employed workers may, during interruptions in their occupational activity owing to pregnancy or motherhood, - have access to services supplying temporary replacements or existing national social services, or- be entitled to cash benefits under a social security scheme or under any other public social protection system.’⁷¹²

The Union’s legislature has also acted recently, amending Regulation 883/2004, to provide additional protection to self-employed frontier workers, who find themselves in a situation where they are unemployed and yet entitled to no social security benefits in the Member State of residence, which is normally the competent Member State. The amendment will allow for entitlement in the Member State of last self-employment.⁷¹³ Under Regulation 883/2004, where a person is self-employed in two Member States he or she shall be subject to the legislation of the Member State of residence.⁷¹⁴

See further, resolution of Parliament 21 February 1997 OJ C 85, 17.3.1997, p. 186.

⁷¹¹ Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood OJ L 359, 19.12.1986 P. 56 –58.

⁷¹² *ibid.*, art 8.

⁷¹³ Reg. 465/2012 inserts a new provision, article 65a, into Regulation 883/2004:

‘By way of derogation from Article 65, a wholly unemployed person who, as a frontier worker, has most recently completed periods of insurance as a self-employed person or periods of self-employment recognised for the purposes of granting unemployment benefits in a Member State other than his/her Member State of residence and whose Member State of residence has submitted notification that there is no possibility for any category of self-employed persons to be covered by an unemployment benefits system of that Member State, shall register with and make himself/herself available to the employment services in the Member State in which he/she pursued his/her last activity as a self-employed person and, when he/she applies for benefits, shall continuously adhere to the conditions laid down under the legislation of the latter Member State. The wholly unemployed person may, as a supplementary step, make himself/herself available to the employment services of the Member State of residence.’

This appears to be a response to the finding of the Court of Justice in Case C-443/11 *Jeltes* (not yet reported in the ECR).

⁷¹⁴ Case C-340/94 *De Jaeck* [1997] ECR I-461, at para 11:

‘Article 13(1), the first article in Title II of the regulation, which concerns the determination of the legislation applicable, provides that, subject to Article 14c, persons to whom the regulation applies are to be subject to the legislation of a single Member State only. Thus, according to Article 14a(2) of the regulation, a person who is normally self-employed in the

Other than Maternity Benefit, self-employed persons are entitled to a more limited range of social welfare payments,⁷¹⁵ although they enjoy an equal right with workers to the payment of Child Benefit, which as noted above, is a ‘family benefit’ for the purpose of Regulation 883/2004.

The historic distinction between workers and the self-employed is, however, as noted by Wyatt et al,⁷¹⁶ important in relation to migrants from new Member States, given that fundamental free movement rights granted to workers may be denied to new Member States under transitional arrangements.⁷¹⁷ This renders the Treaty rights, granted to the self-employed, stand-alone and apart, from those provisions governing workers. This can have very significant consequences when social welfare entitlements are at stake, as seen in the discussion above on the *Solovastru* and *Hrisca* cases and brings into stark contrast once again, the absence of an equivalent for the self-employed of Article 7(2) of Regulation 1612/68.

2.17. Charter of Fundamental Rights of the European Union

Charter Articles have the same status as substantive Treaty provisions,⁷¹⁸ without extending those rights,⁷¹⁹ and are justiciable only where EU law is being implemented.⁷²⁰ In *Ahmed*⁷²¹ the Court of Justice confirmed both the scope and limitations of the Charter:

territory of two or more Member States is to be subject to the legislation of the Member State in whose territory he resides.’

⁷¹⁵ Widow's, widower's or surviving civil partner's (contributory) pension, Guardian's payment (contributory), State pension (contributory), Adoptive benefit and Bereavement grant, Child Benefit.

⁷¹⁶ (n 653) at 553.

⁷¹⁷ Romania and Bulgaria were subject to such restrictions from 1 January 2007 to 31 December 2012. See Chapter 3 for a comprehensive discussion on transitional measures.

⁷¹⁸ TFEU, art 6(1):

‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.’

⁷¹⁹ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391-4071, art 51(2):

‘The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’

⁷²⁰ *ibid.* art 51:

‘It must be recalled that the fundamental rights guaranteed in the legal order of the European Union, including the Charter, are applicable in all situations governed by European Union law, but not outside such situations’⁷²²

Article 34(1) of the Charter expressly recognizes the right to social security benefit:

‘The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.’

Article 34(3) recognizes the right to social assistance:

‘In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.’⁷²³

However, these provisions are subject to the proviso that persons seeking to invoke them must have an entitlement to social security benefits, social and housing assistance in accordance with Union and national law⁷²⁴ and may only be relied upon by persons residing and moving legally within the Union:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.’

⁷²¹ Case C-45/12 *Radia Hadj Ahmed* (not yet reported in the ECR).

⁷²² *ibid.* at para 56. See further Case C-617/10 *Åkerberg Fransson* [2013] (not yet reported in the ECR).

⁷²³ (n 719), art 34.

⁷²⁴ *ibid.*

‘Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.’⁷²⁵

In *Kamberaj*⁷²⁶ the Court of Justice, while holding that Member States must comply with the rights and observe the principles provided for under the Charter, including those laid down in Article 34, nonetheless, placed significant emphasis on national law when addressing the provision of a housing benefit:

‘Since both Article 11(1)(d) of Directive 2003/109 and Article 34(3) of the Charter refer to national law, it is for the referring court, taking into account the integration objective pursued by that directive, to assess whether housing benefit such as that provided for under the provincial law falls within one of the categories referred to in Article 11(1)(d), the Autonomous Province of Bolzano arguing that that is not the case.’⁷²⁷

O’Leary notes that Article 51⁷²⁸ distinguishes between rights and principles and that the reference to national and Union in Article 34 and others Articles reflects this distinction, suggesting that Article 34 is more akin to a principle.⁷²⁹ Craig & De Burca’s description of the Charter as a ‘creative distillation’⁷³⁰ of pre-existing rights appears apt as it draws on a number of existing provisions.⁷³¹ Cornelissen avers that the Charter ‘enshrines’ rights

⁷²⁵ (n 719), art 34(2).

⁷²⁶ Case C-571/10 *Kamberaj* (not yet reported in ECR).

⁷²⁷ *ibid.* at para 81.

⁷²⁸ Charter (n 719), art 51(1):

‘...They shall therefore respect the rights, observe the principles...’

⁷²⁹ O’Leary, Siofra, *Solidarity and Citizenship Rights in EU Law and the Welfare State*, In *Search of Solidarity*, De Burca, Grainne, Ed. (Oxford, 2005) at 50.

⁷³⁰ Craig & De Burca (n 496).

⁷³¹ Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02):

‘The principle set out in Article 34(1) is based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community Charter on the rights of workers. The Union must respect it when exercising the powers conferred on it by Articles 153 and 156 of the Treaty on the Functioning of the European Union. The reference to social services relates to cases in which such services have been introduced to provide certain advantages but does not imply that such services must be created where they do not exist. ‘Maternity’ must be understood in the same sense as in the preceding Article. Paragraph 2 is based on Articles 12(4) and 13(4) of the European Social Charter and point 2 of the Community Charter of the Fundamental Social Rights of Workers and reflects the rules arising from Regulation (EEC)

that are already recognised.⁷³² The Charter, however, is now widely referred to and cited in case law of the Court of Justice,⁷³³ though it appears to have been referred to in less than a dozen social security cases to date. Advocate General Bot referenced the Charter in *da Silva Martins*⁷³⁴ where the care needs of the elderly were being addressed. The Advocate General utilised the Charter to buttress rights granted by Regulation 1408/71:

‘With regard to elderly persons reliant on care, I think that the pursuit of those objectives is of very particular importance. Indeed, as now enshrined in Article 25 of the Charter of Fundamental Rights of the European Union, the elderly have the right to lead a life of dignity and independence.’⁷³⁵

Similarly, in *Flemish Government*,⁷³⁶ Advocate General Sharpston utilised the Charter when addressing the non-discrimination clause in Article 3(1) of Regulation 1408/71, holding that:

‘The importance of non-discrimination is underscored by the Charter of fundamental rights of the European Union...’⁷³⁷

In *Dano*,⁷³⁸ the question being posed by the referring Court concerns the extent of a Member State’s obligations under the Charter:

‘May the provision of non-contributory benefits which guarantee a level of subsistence for European Union citizens, outside acute emergencies, be limited to the provision of the necessary funds to return to their home State or do Articles 1, 20 and 51 of the Charter of

No 1408/71 and Regulation (EEC) No 1612/68. Paragraph 3 draws on Article 13 of the European Social Charter and Articles 30 and 31 of the revised Social Charter and point 10 of the Community Charter. The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union.’

⁷³² (n 47) at 60.

⁷³³ It is referenced in excess of 1600 cases (see curia.europa.eu).

⁷³⁴ Case C-388/09 *da Silva Martins* [2011] ECR I-05737.

⁷³⁵ *ibid.* at para 77.

⁷³⁶ Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-01683.

⁷³⁷ *Ibid.* at para 147.

⁷³⁸ Case C-333/13 *Dano* (not yet reported in ECR).

Fundamental rights require further payments which enable permanent residence?⁷³⁹

Here the referring Court is engaging Charter provisions on dignity⁷⁴⁰ and equality.⁷⁴¹ In *Jeltes*,⁷⁴² one of the first cases where the Court of Justice interpreted provisions of Regulation 883/2004, the referring Court engaged Article 17 of the Charter:

‘The referring court asks whether, in such a situation, in order to avoid a restriction on the freedom of movement for workers, the transitional provisions of Article 87(8) of Regulation No 883/2004, Article 17 of the Charter of Fundamental Rights of the European Union concerning the right of property and the principles of legal certainty or of the protection of legitimate expectations must be interpreted as meaning that the workers concerned may continue to receive unemployment benefit from the State where they were last employed.’⁷⁴³

In *PPU J McB*⁷⁴⁴ the Court of Justice firmed up on the connection and interaction of EU law and the European Convention on Human Rights:

‘Moreover, it follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR.’⁷⁴⁵

Article 7 of the Charter, by example, guarantees the same rights as afforded by Article 8(1) of the ECHR. As a consequence, Article 7 must be interpreted in light of the case law of the European Convention on Human Rights governing Article 8. Of further note, recital 31 of the preamble of Directive 2004/38 provides that the Directive respects the fundamental

⁷³⁹ *ibid.*

⁷⁴⁰ Charter (n 719), art 1:

‘Human dignity is inviolable. It must be respected and protected’

⁷⁴¹ Charter (n 719), art 20:

‘Everyone is equal before the law’

⁷⁴² Case C-443/11 *Jeltes* (not yet reported in the ECR).

⁷⁴³ *ibid.* at para 46.

⁷⁴⁴ Case C-400/10 *PPU J McB* [2010] ECR I-08965.

⁷⁴⁵ *ibid.* at para 53.

rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

The Charter is being actively engaged in legal argument in national Courts, by Advocates General and the Court of Justice, galvanizing and strengthening extant rights.

3. National Law

Notwithstanding the supremacy and overarching reach of EU law, national law remains relevant, particularly in the context of Regulation 883/2004, which, as noted above, *coordinates* rather than *harmonises* and thus not only respects national social security legislation⁷⁴⁶ but requires that its conditions are met in both form and substance.⁷⁴⁷ Therefore, those wishing to apply for Jobseeker's Allowance on the basis of either Regulation 883/2004, as a post-active worker or for the same allowance, but as a pre-active Jobseeker, under Regulation 492/2011 (formerly 1612/68), will have to meet the Irish qualifying conditions, principally:

‘(a) is capable of work, and... (c) is genuinely seeking, but is unable to obtain, suitable employment.’⁷⁴⁸

⁷⁴⁶ In Case C-296/09 *Baesen* [2010] I-12829, at para 24:

‘Furthermore, the Court has held that the terms ‘employed person’ and ‘self-employed person’ mentioned in Articles 1(a) and 2(1) of Regulation No 1408/71 refer to the definitions given to them by Member States’ social security legislation, regardless of the nature of the activity for the purposes of employment law (de Jaeck, paragraph 19).’

⁷⁴⁷ C-225/10 *Garcia* (not yet reported in the ECR) at para 44:

‘According to similarly established case-law of the Court, the recognition of such a right requires that the interested person should fulfil all the conditions, as to both form and substance, imposed by the national legislation of that State in order to be able to exercise that right, which may in some cases include the condition that a prior application must have been made for the payment of such benefits.’

See further: Case 153/84 *Ferraioli* [1986] ECR 1401, para 14; Case C-117/89 *Kracht* [1990] ECR I-2781, para 11; and Case C-119/91 *McMenamin* [1992] ECR I-6393 para 26.

⁷⁴⁸ Social Welfare Consolidation Act 2005, s 141:

‘(1) Subject to this Act, a person shall be entitled to unemployment assistance in respect of any week of unemployment where—(a) the person has attained the age of 18 years and has not attained pensionable age, (b) the person proves unemployment in the prescribed manner, and (c) the person's weekly means, subject to subsection (2)(d), do not exceed the amount of unemployment assistance... (4) For the purposes of this Chapter, a day shall not be treated in relation to any person as a day of unemployment unless on that day, the person— (a) is capable of work, and... (c) is genuinely seeking, but is unable to obtain, suitable employment.’

This is entirely in accordance with both Regulations and Article 34 of the Charter of Fundamental Rights.⁷⁴⁹ This, of course, is subject to the proviso that EU citizens must be accorded equal treatment with host Member State nationals.⁷⁵⁰

Despite some academic commentary to the contrary⁷⁵¹ there is, it is submitted, little doubt that entitlement to social welfare, for the purpose of Irish law, is found not in the Constitution but in statute. That social welfare is a creature of statute is perfectly clear from the decision of the Supreme Court in *Minister for Social Community & Family Affairs v Scanlon*,⁷⁵² where Fennelly J.,⁷⁵³ in response to the respondent's assertion that he enjoyed a constitutional property right to social welfare,⁷⁵⁴ held that:

‘It is an entitlement created by statute... I cannot identify any constitutional right to retain the benefit... The right to receive benefits in the first place... derive from the statute and do not partake of the nature of a property right.’

Even Article 45 of the Constitution, which deals with principles of social policy which are not cognizable by the courts,⁷⁵⁵ only expressly refers to supporting the infirm, the widow, the orphan, and the aged.⁷⁵⁶ Social welfare might, during the golden era of constitutional interpretation in the

⁷⁴⁹ Charter of Fundamental Rights of the European Union (2012) OJ C 326, 26.10.2012, p. 391-407, art 34 (n 719).

⁷⁵⁰ Regulation 883/2004, art 3, Directive 2004/38, art 24(2).

⁷⁵¹ Mel Cousins, *Social Security Law in Ireland*, (Wolters Kluwer, 2010) at 24-28.

⁷⁵² *Minister for Social Community & Family Affairs v Scanlon* [2001] IESC 1, where the Court ordered the continued payment of Back-to-Education Allowance, on the basis that the applicants had a legitimate expectation that it would continue as originally envisaged.

⁷⁵³ With Keane C.J., Denham J., Murray J., McGuinness J. concurring.

⁷⁵⁴ *Scanlon* (n 752):

‘Dr Forde also argued that the respondent enjoyed a property right in the benefits he had received...’

⁷⁵⁵ Constitution of Ireland, art 45:

‘The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.’

⁷⁵⁶ Constitution of Ireland, art 45.4.1:

‘The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.’

1960's and 1970's, have just about squeezed into Article 40(3)⁷⁵⁷ as an unenumerated personal right or at least found protection under extant unenumerated rights such as the right to life and bodily integrity.⁷⁵⁸ In the context of the Constitution social welfare is, to all intent and purpose, a socio-economic right,⁷⁵⁹ and such rights are not justiciable before the courts in Ireland,⁷⁶⁰ in the absence of an express statutory provision.⁷⁶¹ The Constitutional Review Group in their 1996 report was strongly of the view that social welfare entitlements were essentially political policy matters which were the responsibility of elected representatives and not the judiciary, who could not, in any event, determine objectively what level of need was appropriate to overcome poverty.⁷⁶² A different view, albeit in extreme circumstances, was taken by the majority in the Court of Appeal in the UK in *Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants*⁷⁶³ where regulations, which if upheld, would,

⁷⁵⁷ Constitution of Ireland, art 40(3)(2):

'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.'

⁷⁵⁸ Constitutional Review Group Report 1996 at para 12(6):

'...it is obviously important that no one should be allowed to fall below a minimum level of subsistence so as to suffer from a lack of food, shelter or clothing. If this should ever happen, despite the social welfare system, the Constitution appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity.'

Available on <<http://archive.constitution.ie/reports/crg.pdf>> accessed on 30 May 2013.

⁷⁵⁹ *Ibid.* at para 12(3).

⁷⁶⁰ *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. at 195:

'I am sure that the concept of justice which is to be found in the Constitution embraces the concept that the nation's wealth should be justly distributed (that is the concept of distributive justice), but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts.'

⁷⁶¹ *Sinnott v. Minister for Education* [2001] 2 I.R. 545:

'It is hardly necessary to point out that a case based on a duty to provide services imposed by statute would avoid the difficulties of principle described in *O'Reilly v. Limerick Corporation* and elsewhere. It is clearly not possible to say, in the abstract, whether other difficulties might await a specific case, but the enforcement of duties imposed by the legislature is obviously an exercise of a different kind to the devising or inferring of such duties without legislative intervention.'

⁷⁶² (n 758) at para 12(1)-(6). See further comments of Dr Gerard Hogan, then SC, quoted in *T.D. and Others v The Minister for Education & Ors* [2001] 4 IR at 259 where he considered the possibility of socio-economic rights coming to enjoy constitutional protection as a result of a possible referendum:

'But if this happens, let us also be under no illusion about one key consequence of such a change: it will mean a further significant transfer of power from the elected branches of government to an unelected judiciary which is already by the standards of most western democracies extremely powerful.' (The Irish Times, 14th July, 2001)

⁷⁶³ *Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* [1996] EWCA Civ 1293. To similar effect see *R (Limbuella) v. Secretary of State for the Home Department* [2006] 1 AC 396.

ostensibly, have left asylum-seekers destitute, were struck down on the basis that parent legislation could not have intended it be so⁷⁶⁴ and because the effect of the regulations would leave asylum-seekers without the most basic means of subsistence.⁷⁶⁵ In an extraordinary passage, Browne LJ held that:

‘...the Regulations necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention of Human Rights to take note of their violation.’⁷⁶⁶

In support of this, Browne LJ cited Lord Ellenborough, C.J. in *R v Inhabitants of Eastbourne*⁷⁶⁷, a case more than two centuries old, where it was held that in the absence of national law the law of humanity compelled the State to afford foreign nationals relief.⁷⁶⁸ Whilst the *Welfare of Immigrants* case was concerned with third country national asylum-seekers, who were not permitted to work, it nonetheless evidences a willingness on the part of the Courts in the UK to set a basis minimum standard below which the State will not be permitted to go. Would nationals of the UK not be afforded similar minimum protection, if draconian legislation, removing

⁷⁶⁴ *ibid*:

‘Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution.’

See: Ilias Trispiotis, *Socio-economic Rights: Legally Enforceable or just Aspirational?* Opticon1826, Issue 8, Spring 2010 at 6. Available on <http://www.ucl.ac.uk/opticon1826/archive/issue8/articles/Article_Laws_-_Ilias__Social_equality__Publish_.pdf> accessed on 31 May 2013.

⁷⁶⁵ *Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* (n 763):

‘But the effect of the regulations upon the vast majority will be to leave them without even the most basic means of subsistence. The stark question that has therefore to be answered is whether regulations which deprive a very large number of asylum seekers of the basic means of sustaining life itself have the effect of rendering their ostensible statutory right to a proper consideration of their claims in this country valueless in practice by making it not merely difficult but totally impossible for them to remain here to pursue those claims. For all the reasons stated by Lord Justice Simon Brown, with which I agree entirely, the answer to the question, when it is so expressed, can only, in my view, be yes.’

⁷⁶⁶ *Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* (n 763).

⁷⁶⁷ (1803) 4 East 103.

⁷⁶⁸ *ibid*:

‘As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving.’

existing social welfare entitlements, was enacted? Whether such largesse would be extended to EU national social welfare claimants who could not meet the EU and national criteria for social welfare is debatable. Primarily, because, unlike asylum-seekers, they are, for the most part, permitted to work, have free movement rights in 28 Member State countries and, ultimately, may return to their own Member State. The asylum-seeker, on the other hand, must remain in the first jurisdiction in which he or she arrives and has none of the aforementioned free movement rights, pending the determination of his or her refugee status. Anecdotally, the approach of the Department of Social Protection in Ireland where an EU national is deemed to have exhausted their entitlement to remain in the State, is to grant exceptional needs payments⁷⁶⁹ for a short period –usually no more than a month or two– particularly where there are families and children involved and thereafter to offer to repatriate the family to their own Member State. It is, in a sense, harsh. However, it, arguably, meets that minimum standard which was espoused in the *Welfare of Immigrants* case.

Given the right to equal treatment, to social security benefits set down in Regulation 883/2004⁷⁷⁰ and to social assistance, set down in Directive 2004/38,⁷⁷¹ the question of where the right to social welfare is derived from under national law is perhaps less important for EU citizens moving to Ireland than to a Member State's own nationals, as the right to these entitlements is pre-determined by EU law. A minimum level of social welfare has not been set by the Union's legislature or the Court of Justice, as this would require some form of harmonisation of social welfare across the Union. But what if a Member State granted no social welfare or granted it at such an insufficient level that it was contrary to human dignity, as protected by Article 1⁷⁷² of the Charter of Fundamental Rights? The position in

⁷⁶⁹ Social Welfare Consolidation Act 2005, s 201 and 202.

⁷⁷⁰ Regulation 883/2004, art 3.

⁷⁷¹ Directive 2004/38, art 24(2).

⁷⁷² 'Human dignity is inviolable. It must be respected and protected.'

Greece suggests that the answer is in the negative. Papadopoulos and Roumpakis⁷⁷³ aver that:

‘Conditions for the unemployed have also deteriorated in recent years. Unemployment benefits in Greece have for decades remained very low in comparison to European averages with eligibility criteria strictly linked to previous employment records, thus excluding first entrants and the young unemployed or those with poor contribution record... While unemployment benefit (currently at €461.5per month) is still well below the poverty line, lasts for a maximum of one year and has no follow-up benefits for the long-term unemployed...’⁷⁷⁴

However, broadly speaking, Ireland’s statutory social welfare scheme is generous, providing a significant number of social welfare payments, in respect of children,⁷⁷⁵ the unemployed,⁷⁷⁶ carer’s,⁷⁷⁷ the disabled,⁷⁷⁸ those requiring care,⁷⁷⁹ the sick, the elderly,⁷⁸⁰ housing supplements,⁷⁸¹ and general social welfare,⁷⁸² which may be categorised as contributory and non-contributory. The principle statute governing these rights is the Social Welfare Consolidation Act 2005. Caution is required when consulting this Act as it has been substantially amended⁷⁸³ and, because of this, requires a consolidation,⁷⁸⁴ even though it is not yet a decade old. Virtually all of the payments –with the exception of urgent case⁷⁸⁵ and exceptional needs⁷⁸⁶

⁷⁷³ Theodoros Papadopoulos and Antonios Roumpakis, *The Greek welfare state in the age of austerity: anti-social policy and the politico-economic crisis* "Special issue on financial crisis, Social Policy Review, (with T.Papadopoulos), expected June 2012 (with T.Papadopoulos)." at 203.

⁷⁷⁴ *ibid.* at 214.

⁷⁷⁵ Social Welfare Consolidation Act 2005, Part 4: Child Benefit.

⁷⁷⁶ Social Welfare Consolidation Act 2005, Part 3, Chapter 2, Jobseeker’s Allowance and; Part 2, Chapter 3, Jobseeker’s Benefit.

⁷⁷⁷ Social Welfare Consolidation Act 2005, Part 3, Chapter 8, Carer’s Allowance.

⁷⁷⁸ Social Welfare Consolidation Act 2005, Part 3, Chapter 10: Disability Allowance.

⁷⁷⁹ (n 777).

⁷⁸⁰ Social Welfare Consolidation Act 2005, Part 2, Chapters 15-16, Old Age (Contributory) Pension and Retirement Pension.

⁷⁸¹ Social Welfare Consolidation Act 2005, s 198, Rent Supplement.

⁷⁸² Social Welfare Consolidation Act 2005, s 189, Supplementary Welfare Allowance.

⁷⁸³ Amendments are available on www.irishstatutebook.ie under ‘Legislation Directory,’

⁷⁸⁴ There has been two previous consolidations: Social Welfare Consolidation Act 1981 and Social Welfare Consolidation Act 1993.

⁷⁸⁵ Social Welfare Consolidation Act 2005, s 201-202

‘The Executive or deciding officer may, in any case where the Executive or deciding officer considers it reasonable, having regard to all the circumstances of the case, so to do,

payments, which are discretionary– are payable as of right, provided the qualifying criteria are fulfilled. For the EU national it is not quite as straightforward and many of the qualifying conditions will have to be read in light of individual circumstances. Supplementary Welfare Allowance,⁷⁸⁷ under national law, is couched in very broad terms and was held in *McLoughlin*⁷⁸⁸ to grant a ‘vested right’ to anyone in the State whose means are insufficient to meet his or her needs.⁷⁸⁹ The criteria referred to in the Act and in *McLoughlin*, are ‘subject to the Act’⁷⁹⁰. The Act, of course, as is clear from the discussion above on the right to reside, places additional demands upon non-citizen, EU nationals –despite the fact that Supplementary Welfare Allowance is a social assistance payment for the purpose of EU law⁷⁹¹– and, consequently, is only payable where the claimant can establish entitlement under Directive 2004/38,⁷⁹² be that as a worker,⁷⁹³ self-employed⁷⁹⁴ or person retaining that status⁷⁹⁵ or a family member⁷⁹⁶ of such persons –or on the basis of permanent residence.⁷⁹⁷

determine or decide that supplementary welfare allowance shall be paid to a person by way of a single payment to meet an exceptional need...’

⁷⁸⁶ Social Welfare Consolidation Act 2005, s 202(1):

‘Nothing in section 190 , 191 , 193 or 198 shall prevent the payment of supplementary welfare allowance in an urgent case and, in determining or deciding whether an allowance is payable by virtue of this section and the amount or nature of the allowance, the Executive or deciding officer shall not be bound by anything contained in sections 195 to 198 and Part 4 of Schedule 3 or in any regulations made under this Chapter which appears to the Executive or deciding officer inappropriate in the circumstances of the case.’

⁷⁸⁷ Social Welfare Consolidation Act 2005, s 189:

‘Subject to this Act, every person in the State whose means are insufficient to meet his or her needs and the needs of any qualified adult or qualified child of the person shall be entitled to supplementary welfare allowance.’

⁷⁸⁸ *The State (James McLoughlin) v The Eastern Health Board, The Minister for Social Welfare and the Attorney General* [S.C. No. 288 of 2006].

⁷⁸⁹ *ibid.* per Finlay CJ.: at para:

‘I find no reason to alter the view which I expressed in *The State (Kershaw) v. Eastern Health Board* [1985] I.L.R.M. 235 that the combined effect of ss. 199, 200 and 209 of the Act of 1981 is to give a vested right to any person in the State whose means are insufficient to meet his needs (as both are defined and provided for in ss. 207 and 208 of the Act) to a supplementary allowance consisting of either an increase in the existing supplementary allowance or, in the case of a person not in receipt of any supplementary allowance, an allowance granted to be in addition to their means otherwise arising.’

⁷⁹⁰ (n 787).

⁷⁹¹ *Hoecx* (n 558).

⁷⁹² Transposed into Irish law as S.I. 656 of 2006.

⁷⁹³ Directive 2004/38, art 7(1)(a).

⁷⁹⁴ *ibid.*

⁷⁹⁵ Directive 2004/38, 7(3). However, in respect of self-employed persons, see discussion above on *Solovastru* and *Tilianu* cases.

⁷⁹⁶ Directive 2004/38, art 7(1)(d).

⁷⁹⁷ Directive 2004/36, art 16.

The status of worker and self-employed, as noted above, is conditional upon a very low earning threshold under both EU and national law, but nonetheless demands some minimum level of economic activity. Equally, the status, at least for workers, is retained on the basis of limited duration of employment, as low as two weeks. For those without status or have lost status, Member States must apply the *Brey* test, discussed above. However, a person whose intention was to obtain employment and who genuinely sought employment would be entitled to Jobseeker's Allowance for at least six months –provided they met the qualifying criteria of being available for and actively seeking work. This right would not apply to new Member States who are the subject of transitional measures, such as Romania and Bulgaria,⁷⁹⁸ where Member States derogated from Articles 1-6 of Regulation 1612/68.

Many of the statutory provisions contained within the Social Welfare Consolidation Act 2005 are supplemented by regulations, of which there are in excess of one thousand listed on the Irish Statute Book website,⁷⁹⁹ a good example being the regulations governing the provision of Rent Supplement,⁸⁰⁰ a payment made to those whose housing needs cannot be met by the local authorities. This payment cannot be made where either the claimant or his or her spouse is in full-time employment⁸⁰¹ –which is defined as more than 30 hours work per week.⁸⁰² This is rarely problematic for workers, whose working time is easily calculated. However, considerable difficulties arise in respect of the self-employed, as the Department of Social Protection appears to operate a policy of deeming those who are in part-time self-employment to be in full-time self-employment, irrespective of the number of hours being worked. This is contrary to statute and may be incompatible with EU law. The question of

⁷⁹⁸ From 1 January 2007 to 1 January 2012.

⁷⁹⁹ www.irishstatutebook.ie

⁸⁰⁰ Social Welfare (Consolidated Supplementary Welfare Allowance) Regulations 2007, (S.I. No. 412/2007).

⁸⁰¹ Social Welfare Consolidation Act 2005, s 198(6):

‘A person shall not be entitled to a supplement referred to in subsection (5), during any period, where that person or his or her spouse, is engaged in remunerative full-time work.’

⁸⁰² (n 801), art 6(3):

‘A person shall be regarded as being engaged in remunerative full-time work where he or she is so engaged for not less than 30 hours per week.’

housing rights for the self-employed was addressed by the Court of Justice in *Commission v Italy*,⁸⁰³ where it was held that the Treaty provisions demanded that the self-employed person be treated equally with equivalent competing self-employed nationals on the basis that it would otherwise be an obstacle to the pursuit of Establishment. The reasoning is interesting as it utilises the economic activity to secure the social right.

The issue of housing rights for the part-time self-employed was due to come before the High Court in Ireland in *P v Minister for Social Protection*⁸⁰⁴ where the applicant, who is Romanian national, was denied Rent Supplement on the apparent basis of her spouse's part-time self-employment being automatically deemed to constitute full-time work for the purpose of the regulation –however, the case was settled in the applicant's favour. It remains noteworthy that the majority of EU citizens issuing proceedings against the Minister for Social Protection are Romanian nationals, the treatment of whom is addressed in Chapter 2.

For those relying upon Regulation 883/2004, different considerations arise. It is possible, for example, for a person moving from one Member State to another to qualify for Jobseeker's Benefit,⁸⁰⁵ on the basis of the aggregation rule, provided he or she has sufficient social insurance contributions in the first Member State. Those contributions would, of course, have to equate, in terms of time and numbers, to the requirements under Irish law.

An unemployed EU national who retains the status of worker is entitled to relatively generous social welfare provisions in Ireland. A family with four

⁸⁰³ Case C-63/86 *Commission v Italy* [1988] ECR 00029 at paras 16-17:

'If complete equality of competition is to be assured, the national of a member state who wishes to pursue an activity as a self-employed person in another member state must therefore be able to obtain housing in conditions equivalent to those enjoyed by those of his competitors who are nationals of the latter state . Accordingly, any restriction placed not only on the right of access to housing but also on the various facilities granted to those nationals in order to alleviate the financial burden must be regarded as an obstacle to the pursuit of the occupation itself... That being so, housing legislation, even where it concerns social housing, must be regarded as part of the legislation that is subject to the principle of national treatment which results from the provisions of the treaty concerning activities as self-employed persons.'

⁸⁰⁴ [2013] Judicial Review.

⁸⁰⁵ Social Welfare Consolidation Act 2005, s 61.

children on Jobseeker's Allowance would receive €431.40 weekly,⁸⁰⁶ plus Rent Supplement of up to €925 monthly⁸⁰⁷ and Child Benefit of €530 monthly.⁸⁰⁸ This equates to €39,892.80, tax-free. Whilst this appears to be a very significant sum, it is, crucially, no more than an Irish citizen would receive in the same circumstances.

Whilst the criteria for the majority of social welfare payments is contained within statute and regulations derived from the parent statute, the Department of Social Protection publishes operational guidelines for most payments. These guidelines are no more than an explanation, written in layman's terms, by the Department of the rules. In *State (Kershaw) v Eastern Health Board*⁸⁰⁹ it was held that guidelines are a proper and valid administrative act:

'Insofar therefore as the Circular issued on his behalf on the 22nd June 1983 forms advice and guidance to Health Boards carrying out the National Fuel Scheme it is clearly a proper and valid administrative Act.'⁸¹⁰

Guidelines, however, are not law –and should not be read as such– and cannot be utilised to restrict or usurp rights contained within statute or regulations nor unlawfully fetter the discretion of a deciding officer:

'Insofar however in the Paragraph which I have quoted, it purports to exclude absolutely from the discretion of the Deciding Officer whether on the initial application or on appeal concerned with applications for Supplementary Social Welfare Allowances the

⁸⁰⁶ Being €188 adult rate, €124.80, qualified adult and €29.80, for each dependent child. Department of Social Protection, *Jobseeker's Allowance, Operational Guidelines*, Available on [http://www.welfare.ie/en/Pages/1057 Jobseekers-Allowance.aspx](http://www.welfare.ie/en/Pages/1057%20Jobseekers-Allowance.aspx) accessed on 31 May 2013.

⁸⁰⁷ Department of Social Protection, *Rent Supplement, Operational Guidelines*, these rates vary depending upon the number of children and the local authority area in which the claimant is residing. Available on <http://www.welfare.ie/en/Pages/Rent-Supplement.aspx> accessed on 31 May 2013.

⁸⁰⁸ Department of Social Protection, *Child Benefit, Operational Guidelines*, available on <http://www.welfare.ie/en/Pages/Child-Benefit.aspx> accessed on 30 June 2013.

⁸⁰⁹ *State (Kershaw) v Eastern Health Board* [1985] ILRM 235.

⁸¹⁰ *ibid.* at 239. See Cousins (n 751) at 41-42.

discretion to grant such an allowance to a person in receipt of Unemployment or Disability Benefit or Unemployment Assistance, it seems to me to be ultra vires the Minister.⁸¹¹

Administrative guidelines may, however, create enforceable rights⁸¹² and give rise to a legitimate expectation.⁸¹³

4. European Convention on Human Rights

The ECHR has been incorporated into Irish law at a sub-constitutional level⁸¹⁴ in the form of the European Convention on Human Rights Act 2003.

⁸¹¹ *State (Kershaw) v Eastern Health Board* [1985] ILRM 235 at 239:

‘There then follows the portion of the circular upon which, I am satisfied, the decisions both on the application and on appeal were based and it is as follows - "Persons on short term Social Welfare payments (e.g. Unemployment and disability benefits and unemployment assistance) are excluded from the Scheme."... Insofar however in the Paragraph which I have quoted, it purports to exclude absolutely from the discretion of the Deciding Officer whether on the initial application or on appeal concerned with applications for Supplementary Social Welfare Allowances the discretion to grant such an allowance to a person in receipt of Unemployment or Disability Benefit or Unemployment Assistance, it seems to me to be ultra vires the Minister.’

⁸¹² *Latchford v Minister for Industry* [1950] IR 33 at 42:

‘In the exercise of this delegated power the Minister for Supplies has prescribed the conditions in the notices he issued to bakers, including the plaintiff Company. The conditions made by the Minister for Supplies might have been so framed as to make it a condition of obtaining payment in any particular period that the claimant should not be convicted of any offence in connection with the sale of bread; or the conditions might expressly have made payment a matter absolutely within the discretion of the Minister; or a condition might have been stated giving the Minister power to withhold payment of subsidy in any case where there was a conviction in respect of an offence in connection with the sale of bread. After having made and published the conditions on which payment of subsidy would be made, the Minister can alter these conditions from time to time or withdraw them: but, until altered or withdrawn, the conditions apply, and persons who have complied with the published conditions are entitled to claim that they have qualified for payment of subsidy.’

See Gerard Hogan and David Morgan, *Administrative Law in Ireland*, (4th Edn, Roundhall, 2010) at 307.

⁸¹³ *Power v Minister for Social and Family Affairs* [2007] 1 IR 278:

‘I consider that the respondent herein issued a statement or adopted a position amounting to a specific promise or representation, express or implied, as to how it would act in respect of an identifiable area of its activity. Furthermore, through the booklet and other material exhibited, the representation was conveyed to an identifiable group of persons, namely those individuals who had entered, obtained the benefit of the scheme, and who were in third level education by the time the decision challenged in these proceedings was adopted. The representation formed part of the transaction definitively entered into by persons who commenced third level education on the basis of representations contained in the booklet. It was reasonable for the first applicant to conclude that the respondent would abide by the representation to the extent that it would be unjust to permit the respondent to resile therefrom.’

Cousins (n 751) at 36-40.

⁸¹⁴ *S. [a minor] & Ors v MJELR & Ors* [2010] IEHC 31, per Hogan J. at 6:

In the absence of such a constitutional amendment, the Oireachtas must therefore be taken to have intended that recourse to the ECHR would operate at sub-constitutional level as

The provisions of the Act of 2003 require that every organ of the State shall perform its functions in a manner compatible with the Convention,⁸¹⁵ failing which, provided there is loss or damages and no other remedy in damages available, a claimant may seek damages –up to a year⁸¹⁶ or more⁸¹⁷ after the contravention– in respect of a breach of the Act.⁸¹⁸ Courts, in interpreting statute or a rule of law, must do so in a manner compatible with the Convention⁸¹⁹ and must take into account decision of the European Court of Human Rights.⁸²⁰ It is open to a Court to grant a declaration of incompatibility⁸²¹ but only where there is no other adequate and available legal remedy. In *S*⁸²² it was held that:

‘It follows that this Court is not permitted by statute to grant a declaration of incompatibility unless it is clear that “no other legal remedy is adequate and available.” This accordingly requires the

form of supplementary protection in the - hopefully rare - event that the Constitution’s protections fell short of the standards required by the ECHR itself.’

⁸¹⁵ ECHR Act 2003, s 3(1):

‘Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions.’

⁸¹⁶ ECHR Act 2003, s 3(5)(a):

‘Proceedings under this section shall not be brought in respect of any contravention of subsection (1) which arose more than 1 year before the commencement of the proceedings.’

⁸¹⁷ ECHR Act 2003, 3(5)(b):

‘The period referred to in paragraph (a) may be extended by order made by the Court if it considers it appropriate to do so in the interests of justice.’

⁸¹⁸ ECHR Act 2003, s 3(2):

‘A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.’

⁸¹⁹ ECHR Act 2003, s 2(1):

‘In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.’

⁸²⁰ ECHR Act 2003, s 4:

‘Judicial notice shall be taken of the Convention provisions and of—(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights... and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.’

⁸²¹ ECHR Act 2003, s 5(1):

‘In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of *section 2*, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as “a declaration of incompatibility”) that a statutory provision or rule of law is incompatible with the State’s obligations under the Convention provisions.’

See by example: *Foy v An t-Ard Chláraitheoir & Ors* [2007] IEHC 470.

⁸²² *S. [a minor] & Ors v MJELR & Ors* [2010] IEHC 31, per Hogan J.

Court - if necessary of its own motion - to ascertain whether such a remedy is adequate and available. Putting this another way, it means that the Court cannot contemplate granting a declaration of incompatibility unless it is clear that the applicant has exhausted his or her remedies available in domestic law in general and constitutional law in particular.⁸²³

An award of damages for breach has a practical and immediate effect, such as occurred in *O'Donnell*⁸²⁴ whereas a Declaration of incompatibility does not, as noted by Murray CJ. in *McD. v. L.*⁸²⁵ affect the law in question and any benefit is discretionary and extra judicial.⁸²⁶ This is in stark contrast to a declaration of unconstitutionality, which amounts to a 'judicial death certificate'⁸²⁷ for the impugned section of an Act.

So to what extent, if any, does the Convention⁸²⁸ protect social welfare payments? There is no express reference to social welfare in the Convention. However, the European Court of Human Rights held, in *Gaygusuz*,⁸²⁹ that social welfare is a 'pecuniary right' under Article 1 of Protocol 1.⁸³⁰ The decision gave rise to some ambiguity, as at paragraph 39 of the judgment, the Court appeared to link entitlement to emergency assistance to prior contributions:

'It follows that there is no entitlement to emergency assistance where such contributions have not been made.'

⁸²³ *ibid.* at 9.

⁸²⁴ *O'Donnell (a minor) & Ors v South Dublin County Council* [2007] IEHC 204: 'On the basis of the plaintiffs' claim as formulated, the only remedy which the court can provide for the breach it has found of article 8 of the Convention is an award of damages. The only evidence which has been adduced which would go towards measuring the damages is that the cost of the Pemberton mobile home of the type provided for Bernard. The evidence is that a similar mobile home would cost €58,000 today.'

⁸²⁵ *McD v L & Another* [2009] IESC 81.

⁸²⁶ *ibid.*

'Other than the making of a declaration of compatibility any benefit to a claimant is discretionary and extra judicial. The declaration does not affect the validity or enforcement of any statutory provision or rule of law.'

⁸²⁷ Henchy J. in *Murphy v Attorney General* [1982] I.R. 241 at 307.

⁸²⁸ See generally: Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Thompson 2008).

⁸²⁹ *Gaygusuz v Austria* (1996) 23 EHRR 364.

⁸³⁰ *ibid.* at para 41:

'The Court considers that the right to emergency assistance - in so far as provided for in the applicable legislation - is a pecuniary right for the purposes of Article 1 of Protocol No. 1.'

whereas at paragraph 41 it was stated that:

‘That provision (P1-1) is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions".’

This ambiguity led, on the one hand, to a line of European Court of Human Rights case law and European Commission of Human Rights decisions⁸³¹ which made an important distinction between contributory and non-contributory social welfare, insofar as the former were deemed possessions for the purpose of Protocol 1, while the latter was not, and on the other hand, a separate line of authority that held the opposite.⁸³² The ambiguity in *Gaygasuz* was acknowledged by the European Court of Human Rights in *Stec*⁸³³ and, on the basis that benefits are funded in a large variety of ways including by way of general taxation,⁸³⁴ the Court held that:

‘In conclusion, therefore, if any distinction can still be said to exist in the case-law between contributory and non-contributory benefits for

⁸³¹ The ECtHR in *Stec v United Kingdom* (2005) 41 EHRR SE 295, noted, at para 35, that: ‘Most of the decisions after *Gaygasuz* stated that non-contributory benefits were not “possessions” (see for example, *Szrabjet and Clarke v. the United Kingdom*, nos.27004/95 and 27011/95, Commission decision of 23 October 1997; *Carlin v. the United Kingdom*, no. 27537/95, Commission decision of 3 December 1997; *Coke and Others v. the United Kingdom*, no. 38696/97, Commission Decision of 9 September 1999; *Stawicki v. Poland*, (dec.), no. 47711/99, 10 February 2000; *Jankovic v. Croatia* (dec.), no.43440/98, 12 October 2000; *Kohls v. Germany* (dec.), no. 72719/01, 13 November 2003; *Kjartan Asmundsson v. Iceland*, no. 60669/00, judgment of 12 October 2004; and the Chamber judgment of 20 June 2002 in *Azinas v. Cyprus*, no. 56679/00, §§ 32-34.’

⁸³² *ibid.* at 46:

‘In other cases, however, the Court held that even a welfare benefit in a non-contributory scheme could constitute a possession for the purposes of Article 1 of Protocol No. 1 (see *Buchen v. the Czech Republic*, no. 36541/97, § 46, 26 November 2002; *Koua Poirrez v. France*, no. 40892/98, § 42, ECHR 2003-X; *Wessels-Bergervoet v. the Netherlands*, no. 34462/97, ECHR 2002-IV; *Van den Bouwhuijsen and Schuring v. the Netherlands*, (dec.), no. 44658/98, 16 December 2003).’

⁸³³ *Stec v United Kingdom* (2006) 43 EHRR 1017, at para 46:

‘The Grand Chamber accepts that the *Gaygasuz* judgment was ambiguous on this important point. This is reflected in the fact that two distinct lines of authority subsequently emerged in the case-law of the Convention organs.’

⁸³⁴ *ibid.* at para 50:

‘Benefits are funded in a large variety of ways: some are paid for by contributions to a specific fund; some depend on a claimant’s contribution record; many are paid for out of general taxation on the basis of a statutorily defined status... it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No. 1. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through the payment of tax.’

the purposes of the applicability of Article 1 of Protocol No. 1, there is no ground to justify the continued drawing of such a distinction.’⁸³⁵

However, for the purpose of the rights that might accrue under the Convention to EU citizens moving to another Member State, it is noteworthy that, in an earlier paragraph in *Stec*, the European Court of Human Rights held that:

‘Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.’⁸³⁶

All of the applicants in *Stec* appear to have been British citizens, consequently, there were no questions raised regarding a right to reside or habitual residence. However, in the substantive hearing in *Stec* the ECtHR, while stating that there was no right under the Protocol to acquire property and that contracting parties were entirely free to choose whether or not have in place a scheme, nonetheless held that schemes must comply with Article 14 of the Convention.⁸³⁷ Article 14, which is not a stand-alone provision,⁸³⁸ prohibits discrimination on ‘any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status – ‘other status’, as noted

⁸³⁵ *Stec* (n 833) at para 53.

⁸³⁶ *Stec* (n 833) at 51:

‘In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid—subject to the fulfilment of the conditions of eligibility—as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.’

⁸³⁷ *Stec v United Kingdom* (2006) 43 EHRR 1017 at 53:

‘Finally, since the applicants complain about inequalities in a welfare system, the Court underlines that Article 1 of Protocol No. 1 does not include a right to acquire property. It places no restriction on the Contracting States’ freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see the admissibility decision in the present case, §§ 54-55, ECHR 2005-X).’

⁸³⁸ *Sahin v Germany* (Application no. 30943/96), 8 July 2003, at 85:

‘Article 14 only complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions.’

by Cousins,⁸³⁹ includes homelessness. The ECtHR considered Article 14 in *Larkos*⁸⁴⁰ and held that:

‘As to the scope of the guarantee provided under Article 14, the Court recalls that according to its established case-law a difference in treatment is discriminatory if “it has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”.’⁸⁴¹

However, it was also held that contracting parties enjoyed a certain margin of appreciation:

‘Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.’⁸⁴²

In *Koua Poirrez*,⁸⁴³ the ECtHR addressed the claim by a profoundly disabled third country national to an allowance for disabled adults. The applicant was refused on the basis of nationality and his adoptive parent failed to establish a right to the payment, pursuant to EU law, before the Court of Justice, on the basis that having never worked anywhere other than France, there was no exercise of free movement.⁸⁴⁴ The ECtHR held that

⁸³⁹ Mel Cousins, *The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?* 118 (2009) 16 *Journal of Social Security Law*, at 125.

⁸⁴⁰ *Larkos v. Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I.

⁸⁴¹ *ibid.*

⁸⁴² *Larkos* (840) at para 29:

⁸⁴³ *Koua Poirrez v. France*, no. 40892/98, § 42, ECHR 2003-X.

⁸⁴⁴ Case C-206/91 *Koua Poirrez* [1992] I-06685 at paras 10-14:

‘Articles 7 and 48 of the Treaty may be invoked only where the case in question comes within the area to which Community law applies, which in this case is that concerned with freedom of movement for workers... Similarly, the regulations adopted to implement those provisions cannot be applied to cases which have no factor linking them with any of the situations governed by Community law and all elements of which are purely internal to a single Member State... Consequently, Community legislation regarding freedom of movement for workers cannot be applied to the situation of workers who have never exercised the right to freedom of movement within the Community... That being so, a member of the family of a worker who is a national of a Member State cannot rely on Community law in order to claim one of the social security advantages granted to migrant workers and members of their families, when the worker of whose family he is a member has never exercised the right to freedom of movement within the Community... It is clear

there would have to be weighty reasons⁸⁴⁵ for discrimination, finding for the applicant on the basis of the absence of objective and reasonable justification.⁸⁴⁶ In *Niedzwiecki*⁸⁴⁷ the ECtHR held that Child Benefit was protected within Article 8,⁸⁴⁸ which then brought Article 14 into play. However, of considerable significance, the applicant in *Koua Poirrez* was legally resident in France.⁸⁴⁹ In *Gaygasuz* the applicant was lawfully resident in Austria⁸⁵⁰ and the only basis for the refusal was his lack of Austrian citizenship⁸⁵¹ and in *Niedzwiecki* the applicant was also lawfully resident, albeit initially on a temporary basis.⁸⁵²

In the context of Regulation 883/2004 and social security benefits, the habitual residence requirement is applicable to all persons in the State, citizens included, consequently, it cannot be said that it is discriminatory for the purpose of Article 14. Having to comply with the provisions of Directive

from the findings of fact made by the national court that the applicant's adoptive father is a French national, has always resided in France and has never worked outside the territory of that Member State.'

⁸⁴⁵ *Koua Poirrez* (n 843) at para 46:

'However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention (see *Gaygasuz*, cited above, p. 1142, § 42).'

⁸⁴⁶ *Koua Poirrez* (n 843) at para 49:

'The Court therefore finds the arguments advanced by the Government unpersuasive. The difference in treatment regarding entitlement to social benefits between French nationals or nationals of a country having signed a reciprocity agreement and other foreign nationals was not based on any "objective and reasonable justification.'

⁸⁴⁷ *Niedzwiecki v. Germany* (Application no. 58453/00) Judgment, 25 October 2005

⁸⁴⁸ *ibid.*, at para 31:

'By granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision (see, mutatis mutandis, *Petrovic*, cited above, § 30). It follows that Article 14 – taken together with Article 8 – is applicable.'

⁸⁴⁹ *Koua Poirrez* (843) at para 47:

'In the instant case, the Court notes in the first place that the applicant was legally resident in France.'

⁸⁵⁰ *ibid.* at para 46:

'The Court notes in the first place that Mr Gaygasuz was legally resident in Austria and worked there at certain times (see paragraph 10 above), paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals.'

⁸⁵¹ *Koua Poirrez* (843) at para 47:

'It observes that the authorities' refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality as required by section 33 (2) (a) of the 1977 Unemployment Insurance Act (see paragraph 20 above).'

⁸⁵² *Niedzwiecki* (n 847) at para 9:

'In November 1989 the applicant obtained a provisional residence permit (*Aufenthaltsurlaubnis*). In January 1991, following an amendment of the Aliens Act, he was issued with a limited residence title for exceptional purposes (*Aufenthaltsbefugnis*). This residence title was renewed every two years, the last time in January 1995 until January 1997. In April 1997 the applicant obtained an unlimited residence permit (*Aufenthaltsberechtigung*).'

2004/38, in respect of entitlement to social assistance, does not discriminate against any particular nationality but merely requires that those seeking to access social assistance comply with EU and national law. However, it is submitted that the statutory provision⁸⁵³ in Ireland, which wholly exclude asylum-seekers from Child Benefit, is, on the basis of the *Niedzwiecki* – where it was held that discrimination premised upon the degree of lawful residence was not permitted– incompatible with the ECHR. This important legal point awaits the appropriate case. Equally, albeit in a different context, the transitional provisions provided for in the Treaty of Accession 2005, which permitted Member States to restrict access to their labour markets in respect of Bulgarian and Romanian nationals, may also be incompatible with the ECHR –this point in discussed in Chapter 2, section 4.4.

In *Pancenko*⁸⁵⁴ where the applicant complained of socio-economic problems,⁸⁵⁵ it was held that:

‘The Court recalls first that the Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living.’

However, the European Court of Human Rights appears to recognise that Article 3 could be engaged in certain circumstances, where it attained a minimum level of severity.⁸⁵⁶ In the context of lawful residence, it is

⁸⁵³ Social Welfare Consolidation Act 2005, s 246(7) (as inserted by Social Welfare And Pensions (No. 2) Act 2009:

‘The following persons shall not be regarded as being habitually resident in the State for the purpose of this Act:(a) a person who has made an application under section 8 of the Act of 1996 and where the Minister for Justice, Equality and Law Reform has not yet made a decision as to whether a declaration under section 17 of the Act of 1996 will be given in respect of such application...’

⁸⁵⁴ *Pancenko v. Latvia* (dec.), no. 40772/98, 28.10.1999.

⁸⁵⁵ *ibid*, at para 2:

‘Under the above provisions the applicant also complains about her socio-economic problems in Latvia, including her indebtedness for communal charges in respect of her flat, unemployment, absence of free medical assistance or financial support from the State to ensure proper subsistence.

⁸⁵⁶ *Pancenko* (n 854) at para 2:

‘To the extent that this part of the application relates to Article 3 of the Convention, which prohibits torture or inhuman or degrading treatment, the Court observes, on the basis of the

noteworthy that the European Court of Human Rights did not consider whether or not Article 3 had been engaged during the period in which the legality of the applicant's residence was in question, referring only to her 'present conditions'⁸⁵⁷ –at which point the applicant was lawfully resident.⁸⁵⁸

The non-economically active EU national moving to another Member State who cannot establish a right to social security under Regulation 883/2004 or social assistance under Directive 2004/38 is highly unlikely to find succour within the Convention, though *Koua Poirrez*, where the applicant failed at the Court of Justice and yet succeeded at the European Court of Human Rights, illustrates the additional protections found within the Convention, with the proviso of lawful residence.

Other Instruments

Apart from the ECHR, the Council of Europe has also adopted a number of binding⁸⁵⁹ charters which are, in part, directed towards the creation, enhancement and protection of social welfare rights. The European Social Charter 1961⁸⁶⁰ requires contracting parties to maintain a system of social security⁸⁶¹ at a satisfactory level⁸⁶² and to progressively enhance those

applicant's submissions, that her present living conditions do not attain a minimum level of severity to amount to treatment contrary to the above provision of the Convention (see, *mutatis mutandis*, the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp. 60-72, §§ 150-187).

⁸⁵⁷ *ibid.*

⁸⁵⁸ (n 854) at para 2:

'She further complains that, although since 22 April 1999 she has had the status of a permanent resident of Latvia, she is denied the right to compensation for pecuniary and non-pecuniary damage suffered as a result of the authorities' refusal throughout 1995-1999 to acknowledge the validity of her claims to be recognised as a permanent resident of Latvia.

⁸⁵⁹ European Social Charter 1961, preamble:

'The Contracting Parties undertake, as provided for in Part III, to consider them-selves bound by the obligations laid down...'

⁸⁶⁰ Ratified by Ireland 4 November 2000, available on <http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp> accessed 6 July 2013.

⁸⁶¹ European Social Charter, art 12(1):

'...to establish or maintain a system of social security...'

⁸⁶² *ibid.* art 12(2):

'...to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security...'

levels.⁸⁶³ Ireland, with its relatively progressive treatment of social welfare, appears to be compliant with these requirements. There is also a European Code on Social Security 1964, which requires signatories to provide bi-annual⁸⁶⁴ reports⁸⁶⁵ on the application of the code and whose application is supervised by the Committee of Ministers⁸⁶⁶ which produces its report on compliance⁸⁶⁷ and, where Contracting parties are not in compliance, they are ‘invited’ to take measures to ensure compliance⁸⁶⁸ –Ireland is, on the basis of the most recent report, substantially in compliance with the code.⁸⁶⁹

Ireland is also a contracting party⁸⁷⁰ to the European Convention on Social and Medical Assistance, which guarantees equal treatment to social assistance to those lawfully present in the State.⁸⁷¹ The rights are accorded to nationals of other contracting parties⁸⁷² and refugees⁸⁷³ –this would appear to exclude third country national asylum-seekers. This Convention

⁸⁶³ (n 861), art 12(3):

‘...to endeavour to raise progressively the system of social security to a higher level...’

⁸⁶⁴ European Code on Social Security 1964, art 76.

⁸⁶⁵ European Code on Social Security 1964, art 74(1):

‘Each Contracting Party shall submit to the Secretary General an annual report concerning the application of this Code. This report shall include: full information concerning the laws and regulations by which effect is given to the provisions of this Code covered by the ratification...’

⁸⁶⁶ *ibid.* art 75:

‘After consulting the Consultative Assembly, if it considers it appropriate, the Committee of Ministers shall, by a two-thirds majority in accordance with Article 20, paragraph d, of the Statute of the Council of Europe, decide whether each Contracting Party has complied with the obligations of this Code which it has accepted.’

⁸⁶⁷ Council of Europe, Resolution CM/ResCSS(2012)20 on the application of the European Code of Social Security by Ireland (Period from 1 July 2010 to 30 June 2011) (Adopted by the Committee of Ministers on 14 November 2012 at the 1154th meeting of the Ministers’ Deputies).

⁸⁶⁸ European Code on Social Security 1964, art 75(2):

‘If the Committee of Ministers considers that a Contracting Party is not complying with its obligations under this Code, it shall invite the said Contracting Party to take such measures as the Committee of Ministers considers necessary to ensure such compliance.’

⁸⁶⁹ *ibid.* issues were raised in respect of the qualifying period for sickness benefits.

⁸⁷⁰ Ratified by Ireland on 31 March 1954.

⁸⁷¹ European Convention on Social and Medical Assistance, 1954:

‘Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance (hereinafter referred to as “assistance”) provided by the legislation in force from time to time in that part of its territory.’

⁸⁷² *ibid.*

⁸⁷³ Protocol, European Convention on Social and Medical Assistance, 1954.

has been referred to recently in a German case, involving the rights of Romanian nationals residing in Germany.⁸⁷⁴

5. Conclusion

Social security law is coordinated not harmonised, thus conditions must be met in both form and substance, certainly in respect of Regulation 883/2004. That does not mean that Member States can make up their own rules for the purpose of denying EU citizens in those member States their lawful entitlements, as EU nationals are entitled to equality of treatment with host State nationals, unless otherwise provided for within the Regulation. The rights which are set out in *inter alia* Regulation 883/204, Directive 2004/38 and Regulation 492/2011 are real and tangible and may be relied upon. A parent lawfully employed in this State, whose children reside in another Member State, is entitled to Family Benefits in respect of those children. The overarching right is steadfast, what is left to the Member State is the sum payable and setting the qualifying conditions.

The Court of Justice in *Brey* clarified aspects of the interaction between Regulation 883/2004 and Directive 2004/38. Special non-contributory cash benefits, found in the Regulation, which are deemed to be social assistance, are governed by the Directive. However, there was a sting in the tail for Member States: the Court of Justice held that the sufficient resources provisions contained with the Directive did not automatically bar the payment of social assistance and devised a test for Member States

⁸⁷⁴ Spiegel, Jan 30 2013, By Maximilian Popp, *One for All?: German Court to Decide on EU Benefits Case*:

‘...Lazarinka R. brought a case against the city of Stuttgart. Her lawyer argued that, since Romania and Bulgaria joined the European Union in 2007, EU law obligates Germany to grant nationals from the bloc's other member states the same social welfare payments as its own nationals. Germany's Federal Social Court, in Kassel, is now considering the case. In fact, Germany was among the 17 signatories of the 1953 European Convention on Social and Medical Assistance, which established the principle of equal treatment through the Council of Europe, an international organization fostering cooperation between European countries on human rights, democracy and legal standards. In other words, nationals of all the countries that have ratified the convention are entitled to the same social and medical assistance as that available to a signatory country's own nationals. But Germany changed its law in 2006, preventing immigrants from within the EU from applying for Hartz IV as soon as they arrived in Germany. Then, in 2010, its Federal Social Court decided that nationals of all the countries that have signed the convention have a right to social assistance.’

Available on <<http://www.spiegel.de/international/germany/german-court-to-rule-on-right-of-eu-nationals-to-german-social-welfare-a-880383.html>> accessed 15 March 2013.

encompassing an examination of the personal circumstances of a claimant and the application of the principle of proportionality to determine whether or not the claimant has become an unreasonable burden on the host Member State. *Brey* is concerned with those who do not or no longer have worker status. As a consequence, it does not affect the rights of those who retain the status of worker or self-employed person. It is submitted that *Brey* sounds the death knell for the right to reside test in both the UK and Ireland, insofar as it automatically excludes EU nationals from social assistance entitlements and is thus incompatible with EU law. This raises serious question marks over the UK judgments in *Tilianu*,⁸⁷⁵ *Kaczmarek*⁸⁷⁶ *Abdirahman*⁸⁷⁷ and *Patmaliece*⁸⁷⁸ and in Ireland, the judgment in *Solovastru*,⁸⁷⁹ where the right to reside test was found to be compatible with EU law.

The Court of Justice has set the threshold for economic activity at such a low level that almost anyone willing to engage in a minimum level of economic activity will be entitled to equal treatment in respect of both social security and social assistance. Those having or retaining the status of worker or self-employed person in a host Member State enjoy significant social security and social assistance rights.

Many areas addressed in this Chapter may be said to be beyond any doubt, such as, for example, the rights of those EU nationals who are in part-time employment in another Member State and the rights accorded to the children of formerly employed persons by regulation and the Court of Justice in *Teixeira*.⁸⁸⁰ There are, however, a number of areas which urgently require clarity, in particular, the thorny question of whether or not formerly self-employed persons retain any status following cessation of self-employment. *Brey*⁸⁸¹ grants them certain rights, but not the same rights as a former worker retaining that status.

⁸⁷⁵ (n 273).

⁸⁷⁶ (n 264).

⁸⁷⁷ (n 257).

⁸⁷⁸ (n 236).

⁸⁷⁹ (n 340).

⁸⁸⁰ (n 312).

⁸⁸¹ (n 24).

Ireland, despite the serious economic conditions which still prevail today, retains a strong social welfare ethos. This, undoubtedly, is partially down to the present Minister for Social Protection, whose own outlook is care-based. Whether the sums of social welfare paid to individuals in this State can be sustained in the long-term remains to be seen.⁸⁸² Yet it is difficult to see how this can be remedied against a poor economic back-drop and high unemployment. Our notional parents of four children, discussed above –be they Irish or EU citizens from another Member State– who are entitled to just under €40,000 per annum, tax-free, or €769.00 weekly in social welfare payments, may not be encouraged to take a position of employment where this leaves them with less money than is available on social welfare. Such a scenario, of course, is all too real as the persons in question would have to earn substantially more than the social welfare payment to cover PRSI contributions and Income Tax in order to achieve the same net sum. These are, of course, socio-economic issues, rather than legal issues and would only impinge upon EU law, and indeed, national law, were the present rates to be reduced to such an extent as to leave EU citizens destitute.

Social welfare entitlements for those moving within the Union have grown exponentially since the first Treaty in 1951 when Member States simply had to ‘endeavour to settle among themselves’⁸⁸³ social security arrangements to ensure that labour mobility was not limited. The Union, in spite of the assertion that it never had competence in the area of social security, has made significant strides since 1951. In 1957 the, then, Community was given competence to legislate in this area.⁸⁸⁴ The TFEU expanded the term ‘migrant worker’ to include the self-employed⁸⁸⁵ and other beneficiaries.

⁸⁸² At the time of writing, August 2013, cuts, to the Department of Social Protection, of €440 million were being mooted, [www.thejournal.ie: *Burton will look to protect core welfare payments*](http://www.thejournal.ie/burton-will-look-to-protect-core-welfare-payments), 5 July 2013:

‘Reports last week suggested that the Social Protection budget, the largest in all of the Government departments, would have been cut by €440 million, but Burton said that the real figure will be ‘far south’ of that and defended her Government’s job creation record.’

Available on <<http://www.thejournal.ie/burton-will-look-to-protect-core-welfare-payments-979653-Jul2013/>> accessed 8 August 2013.

⁸⁸³ Treaty establishing the European Coal and Steel Community, 1951, art 69.

⁸⁸⁴ Treaty establishing the Economic Community 1957, art 51.

⁸⁸⁵ Treaty on the Functioning of the European Union, art 48.

The Court of Justice has played a significant role in fleshing out and defining social security and social assistance rights, always recognising that such rights were central to the protection of free movement and citizenship.

Chapter 2

THE A2 ACCESSION COUNTRIES (ROMANIA AND BULGARIA)

1. Introduction

The rights accorded to citizens of Member States of the European Union and, since 1992,¹ citizens of the *European Union*, by virtue of Treaty and secondary law –and generously interpreted by the Court of Justice– are readily identifiable from the jurisprudence of the Court of Justice and the significant body of extant and ever-increasing academic literature, which has flourished since the early days of the ‘Community’.² The supremacy³ of EU law is beyond doubt as is its direct effect.⁴ Unity of the Union’s legal order and legal certainty requires uniformity and effectiveness. Consequently, any individual who can point to a right under EU law may seek to enforce that right in any other⁵ Member State where he or she resides, even where it conflicts with national law.⁶ This has placed the individual squarely at the heart of the EU process of integration.

Since 2004 the Union has grown exponentially,⁷ enlargement⁸ having added thirteen new Member States.⁹ Concerns about the impact of enlargement on

¹ The Treaty of The European Union (Maastricht), 1992, art 8.

² See generally: Castro, Olivera, A, ‘*Workers and other Persons: Step-by-Step from Movement to Citizenship*’ (2002) 39 CMLRev 77; Mancini G., ‘*The Free Movement of Workers in the Case-Law of the European Court of Justice*’ in D. Curtin and D. O’Keefe (eds), *Constitutional Adjudication in European Community and National Law*, (Butterworths, 1992); Tryfonidou, A, ‘*In Search of the Aim of the EC Free Movement of Person Provisions: Has the Court of Justice Missed the Point?*’ (2009) 46 CMLRev 1591; Spaventa, E, ‘*From Gebhard to Carpenter: Towards a (Non)-Economic European Constitution*’ (2004) 41 CMLRev 743.

³ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585. *Meagher v Minister for Agriculture* [1994] I IR 329.

⁴ Art 288 (ex-Art 249 TEC) Treaty on the Functioning of the European Union.

⁵ In exceptional circumstances even in the Member State of which one is a citizen (Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279).

⁶ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629 at para 17.

⁷ The A10 countries would enlarge the Union by one fifth. Dustmann, C. and Casanova, M. and Fertig, M. and Preston, I. and Schmidt, C.M., *The impact of EU enlargement on migration flows*. (Home Office Online Report 25/03) <<http://discovery-dev.ucl.ac.uk/14332/1/14332.pdf>> accessed 27 August 2012.

⁸ Article 49 of the Consolidated Version of the Treaty on the European Union provides that, subject to Article 2, any European State may apply for membership of the Union.

⁹ Treaty of Accession, 2003, in respect of the A10 countries (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia) and the Treaty of Accession, 2005 in respect of the A2 countries (Romania and Bulgaria). Croatia is now a Member State.

extant Member States labour markets¹⁰ and fear within the EU15, that immediate access would have significant implications for western European social welfare systems,¹¹ gave rise to a situation where new Member States were subject to *transitional measures* –permitting derogations from fundamental rights, principally the right to take up employment¹²–applicable at the discretion¹³ of Member States. In Ireland, no derogations were applied against the A10 countries.¹⁴ However, derogations, which were lifted on 22 July 2012,¹⁵ were applied from the date of accession, 1 January 2007, in respect of both Romania and Bulgaria.¹⁶

This chapter considers the nature and effect of the transitional measures on Romanian and Bulgarian¹⁷ nationals living in this State and the effect of the measures on social welfare rights and comprehensively examines the implementation of the Irish transitional arrangements, in the process identifying serious breaches of European and national law and the legal challenges which have resulted therefrom –carefully categorising those who have no entitlement because of legitimate implementation and those who lawful entitlements were affected by improper implementation of transitional measures in Ireland.

¹⁰ See Wyatt & Dashwood's *European Union Law*, Anthony Arnull, Alan Dashwood, Michael Dougan, Malcolm Ross, Eleanor Spaventa, Derrick Wyatt, (5th Edn, Sweet & Maxwell, London, 2006) 745-747.

¹¹ The EU15 is made up of the older Member States: Austria, Belgium, Britain, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden. Four years before the A10 enlargement, Sinn warned of a 'nearly perfect differential mobility among the western European countries can be expected, and the pressure on present social systems will be enormous' and raised concerns about the 'marginal migrant', a low paid worker, contributing little by way of tax, but entitled to schooling, housing and healthcare. Sinn, Hans-Werner, *EU Enlargement and the Future of the Welfare State*, (Stevenson Lectures, University of Glasgow, May 2000) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=263525> accessed 1 August 2012.

¹² Treaty of Accession, 2005, art 1 permits derogation from art 45 TFEU (ex-art 39 TEC).

¹³ Treaty of Accession, 2005, arts 2 and 8(4),

¹⁴ Employment Permits Act 2003, s 3(2).

¹⁵ Department of Jobs, Enterprise and Innovation, press release 22nd July 2012 <www.djei.ie/labour/workpermits/bulgariaromania.htm>, <www.djei.ie/press/2012/20120720a.h> both accessed 22 July 2012.

¹⁶ Employment Permits Act 2003, s 2(10)(c), (as inserted by Employment Permits Act, 2006, s 3).

¹⁷ Any reference in this chapter to Romanian nationals should be read as including Bulgarian nationals.

The chapter ends with a stark conclusion that the manner in which Ireland has addressed the legal infirmities identified in this chapter and litigated in the superior courts –by simply sweeping them under the carpet, so to speak¹⁸– will create further difficulties and lead to further litigation. Of particular concern is the continued application of existing law to Romanian and Bulgarian nationals seeking to obtain social welfare and residency entitlements, in respect of employment prior to the ending of the transitional arrangements and the potential effect on future EU citizens.¹⁹

2. The effect of the transitional arrangements on social welfare rights and employment law claims

Officially,²⁰ there are almost 18,000 Romanian nationals residing in this State –up from 8,566 in 2006²¹– more than half of whom are likely to have arrived in the State post-accession. For those who have resided here ‘legally’,²² since 1 January 2007, Permanent residence and all its benefits²³ beckon, from 1 January 2012. ‘Legal’ residence, for the purpose of both social welfare entitlements and permanent residence, in this State, for economically active Romanian and Bulgarian nationals, would require admittance to the labour market for an uninterrupted period of 12 months,²⁴

¹⁸ The State has ‘settled’ all of the cases to date, which are discussed below, with no admission of liability or amendments to existing law.

¹⁹ Croatia became a Member State in 2013. However, no restrictions were put in place. *Statement by the Department of Jobs, Enterprise and Innovation re Labour market issues relating to 2011 EU Accession Treaty*, 24th May 2013:

‘In light of all these issues, Government has decided not to exercise an option under the Treaty to restrict access to Ireland’s labour market for nationals of Croatia.’

Accession discussions were opened with Turkey in 2005 and Macedonia was recognised as a candidate in December 2003.

²⁰ Central Statistics Office *Census 2011 Results*, <http://www.cso.ie/en/media/csoie/census/documents/census2011pdr/Commentary%20Usual%20Res,%20Migration%20etc.pdf> accessed 20 August 2012.

²¹ *ibid* at 30, where the CSO refers to a 110% population increase since the 2006 census.

²² Directive 2004/38/EC of The European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L134, art 16(1).

²³ Art 16(1) provides that: ‘This right shall not be subject to the conditions provided for in Chapter III.’

²⁴ Treaty of Accession, 2005, art 2.

by way of an employment permit or an exemption or exception from this requirement.

In respect of social welfare entitlements, the Supreme Court in *FAS v Minister for Social Welfare & Abbott*²⁵ held that reliance cannot be placed upon a contract prohibited by statute for the purpose of social welfare contributions and benefits, thereby excluding Romanian and Bulgarian nationals unlawfully employed without an Employment Permit, from social welfare entitlements. Further, under the Social Welfare Consolidation Act, 2005²⁶ ‘lawful residence’ –meaning coming within Directive 2004/38²⁷– is a prerequisite to habitual residence. Whilst some ambivalence on this point is detectable within Europe –Advocate General Sharpston addressed the issue of unlawful employment somewhat favourably in *Zambrano*²⁸ and the European Parliament has recommended continued ‘Regularisation’ in respect of irregular Third Country Nationals²⁹– Article 2 of the Treaty of Accession, 2005 appears to be unequivocal, referring to and granting rights only to those ‘legally’ working. Thus, however attractive the argument, it is unlikely that a national court, tasked with considering the proportionality of refusing an unlawfully employed Romanian/Bulgarian national social welfare, would look much further than the Treaty, particularly in light of

²⁵ Unreported, Supreme Court, Egan J. (Hamilton CJ. And Flaherty J. concurring) 23rd May 1995:

‘If the Oireachtas has decided to prohibit expressly and absolutely a particular type of contract by statute, it would be anomalous if reliance were to be placed on that contract for the purpose of Social Welfare contributions and benefits.’

²⁶ Social Welfare Consolidation Act, 2005, s 246 (as amended by the Social Welfare and Pensions Act (no. 2) 2009, s 15. This controversial provision is discussed in detail in Chapter 1, section 2.10.

²⁷ *ibid* s 246(6)(b), which refers to S.I. 656 of 2006, which transposes Directive 2004/38 into national law.

²⁸ Case C-34/09 *Zambrano* [2011] (not yet reported in ECR), where Advocate General Sharpston, in addressing a period of five years employment which the Belgium authorities considered unlawful (in the absence of an employment permit), observed, that:

‘In assessing proportionality in the present case, the national court will need to take into account the fact that Mr Ruiz Zambrano worked full time for nearly five years for Plastoria. His employment was declared to the Office national de la sécurité sociale. He paid the statutory social security deductions, and his employer paid the corresponding employer’s contributions. He has thus in the past contributed steadily and regularly to the public finances of the host Member State.’

²⁹ Parliamentary Assembly, Recommendation 1807 (2007), *Regularisation Programmes for Irregular Migrants*, <<http://assembly.coe.int/Documents/AdoptedText/ta07/EREC1807.htm>> accessed 10 June 2010. Cf Directive 2009/52, para 15 of the Preamble, in respect of third country nationals.

Court of Justice judgments such as *Rottmann*³⁰ where the Court referred to the loss of ‘rights enjoyed’³¹ and the ‘loss’³² being justified. The unlawfully employed Romanian national, arguably, never enjoyed the rights in the first instance. Different considerations may, however, arise in respect of a challenge to the constitutionality of the restrictions and compatibility with the European Convention on Human Rights.

In respect of employment law claims, it was suggested (and appears to have been practice) that the absence of an employment permit, where one was required by law, did not prevent the Employment Appeals Tribunal (EAT) from finding in favour of an employee in a claim for unfair dismissal³³ and, indeed other such employment law claims before the Rights Commissioners Service and the Labour Court, where it appears to have been practice to ignore –whether deliberately or otherwise– the absence of an employment permit. This position, however, had been radically altered by the recent finding in *Hussein v The Labour Court*³⁴ where Hogan J. held that:

‘...neither the Rights Commissioner nor the Labour Court could lawfully entertain an application for relief in respect of an employment contract which is substantively illegal in this fashion.’³⁵

Ostensibly, the absence of an employment permit, irrespective of the reasons, created a substantively illegal’ contract, upon which, in the absence of a saving clause, the employee, a third country national,³⁶ could not sue unless the legislature had clearly given a right to sue.³⁷ This has significant ramifications for unlawfully and, in some cases, lawfully, employed

³⁰ Case C-135/08 *Rottmann* [2010] ECR I-01449.

³¹ *ibid.* para 56.

³² *Rottmann* (n 30).

³³ Mary Redmond, *Dismissal* in Regan, Maeve (Ed.), *Employment Law*, (Tottel Publishing Ltd, 2009) 546, referring to decisions of the EAT.

³⁴ [2012] IEHC 364.

³⁵ *ibid.* para 17.

³⁶ Ireland opted out of Directive 2009/52, art 6 of which would have protected the rights of unlawfully employed TCN’s.

³⁷ Hogan J. relied upon the earlier Supreme Court decision of *Martin v Galbraith* [1942] I.R. 37 where it was held at [42] that:

‘Parties to a contract which produces illegality under a statute passed for the benefit of the public cannot sue upon a contract unless the Legislature has clearly given a right to sue.’

Romanian and Bulgarian nationals who lost their employment prior to 1 January 2012 and whose claims are now in the Labour Court system.

The figures for employment permit applications in respect of Romanian nationals, pre³⁸ and post-accession³⁹ –even taking account of exceptions, exemptions and other factors⁴⁰– would suggest that a significant number of Romanian nationals, whether knowingly or otherwise,⁴¹ were working illegally in this State between 2007 and 2012. Whilst the ramifications of this are, to some degree, offset by the ending of the transitional arrangements, the economic climate remains difficult, unemployment having increased exponentially since 2008,⁴² thus exercising those rights, whether by way of retaining or obtaining employment, may prove difficult. Equally, those previously unlawfully employed, whose employment was rendered lawful from 1 January 2012, who subsequently lose that employment before the expiration of 12 months, will only be entitled to social welfare for a period of 6 months⁴³ and will almost certainly be denied Social security *benefits*⁴⁴ as such payments are, by and large, contingent upon PRSI contributions made two years prior to the loss of employment.⁴⁵ This first category of Romanian and Bulgarian nationals, who cannot bring themselves within the exemptions or exceptions, will find that their rights – and by association, the rights of their families– in this State, are measured

³⁸ In 2006, 1,494 employment permits were issued to Romanian nationals by the Department of Jobs, Enterprise and Innovation <<http://www.djei.ie/labour/workpermits/statistics.htm>> accessed 15 August 2012.

³⁹ Between 2007 and 2011, inclusively, just 1,539 employment permits were issued to Romanian nationals by the Department of Jobs, Enterprise and Innovation <<http://www.djei.ie/labour/workpermits/statistics.htm>> accessed 15th August 2012.

⁴⁰ Such as the presence of spouses and children. As just over 3,000 permits were issued, this would require, leaving aside the exemptions and exceptions, a ratio of 5 to 1 (five family members to every worker).

⁴¹ There is some anecdotal evidence to suggest that many employers of Romanian nationals engaged such persons on the basis of their EU citizenship, mistakenly presuming that they had full access to the Irish labour market on that basis alone.

⁴² Live Register stands at 436,700, Central Statistics Office, *Live Register May 2012* (30 May 2012), <http://www.cso.ie/en/media/csoie/releasespublications/documents/labourmarket/2012/lreg_may2012.pdf> accessed 21 August 2012.

⁴³ Directive 2004/38, art 7(3)(c).

⁴⁴ The distinction between social *Benefits* and social *Assistance* is discussed in Chapter 1, section 2.1.

⁴⁵ By example, Maternity Benefit and Jobseeker's Benefit, Social Welfare Consolidation Act 2005, s 48 and s 64, respectively.

from 1 January 2012, irrespective of time already spent in the State prior to that date, if they were unlawfully employed.

There is a second category of Romanian and Bulgarian nationals, those who, but for the unlawful implementation of the derogations permitted by the Treaty of Accession, 2005 and other provisions of EU law, would be exempt from the requirement to have an employment permit. These are readily discernible from the multiple legal challenges, by way of judicial review in the High Court⁴⁶ which have successfully challenged the negative decisions of the Minister for Social Protection and the Minister for Jobs, Enterprise and Innovation concerning, respectively, social welfare rights and the right to work without an employment permit or both.

3. The Legality of Transitional measures

Whilst the transitional measures applied to Romania and Bulgaria were not without precedent⁴⁷ – and every accession Treaty prior to the 2004 enlargement provided for a transitional period,⁴⁸ where derogations were, in theory, possible⁴⁹ – they remain controversial and potentially divisive, creating what a number of commentators have referred to as ‘second’ or ‘various’ classes of citizenship. The European Commission has been consistently vocal – cited by this State as one of the reasons for lifting the restrictions early⁵⁰ – in calling for the lifting of the restrictions, against

⁴⁶ The author has represented applicants in a number of such cases which are discussed throughout the Chapter.

⁴⁷ Greece, Spain, Portugal and the A8 countries were subject to transitional measures, though not Ireland, Finland, Sweden or Austria. See Kochenov, Dimitry *European Integration and the Gift of the Second Class Citizenship*, (Murdoch University, eLaw Journal, Vol. 13, No 1, 2006) at 209 and Hoffmeister, Frank, *Earlier enlargements*, in Ott, Andrea and Inglis, Kirstyn (eds.), *Handbook on European Enlargement*, (The Hague: T. M. C. Asser Press, 2002) 87.

⁴⁸ See Art. 135 of the 1972 Act of Accession; Art. 130 of the 1979 Act of Accession; Art. 379 of the 1985 Act of Accession; Art. 152 of the 1994 Act of Accession. See Koen Lenaerts, *European Union Law*, (3rd Edn, Sweet & Maxwell, 2011) 444.

⁴⁹ The derogations – which were never applied – permitted by the 1972, 1979, 1985 and 1994 Acts of Accession would only be permitted where there was a serious disturbance in the labour Market of the Member State wishing to apply the measures.

⁵⁰ Department of Jobs, Enterprise and Innovation, press release (n14) which refers to: ‘arguments presented to the Government by the EU Commission and the Bulgarian and Romanian governments for removing restrictions...’

Romania and Bulgaria.⁵¹ Further, extant Member States, including the EU15 made a commitment in 2005 to move as quickly as possible to the full *acquis* in the area of free movement of workers.⁵²

During the transitional period, in which Member States are permitted to *regulate*⁵³ access to their labour markets, citizens of the A2 countries are, to a considerable extent, like the A8 countries before them, governed not by EU law but, as noted by the Commission, ‘diverse national measures’⁵⁴ as the derogations were optional.⁵⁵ This affects the principle of uniformity of EU law. Thus while a Romanian or Bulgarian national entering the UK is free to take up employment in a pre-determined, albeit substantially restricted, category of posts,⁵⁶ such as au pair placement or domestic work in a private household, merely upon obtaining an accession worker card,⁵⁷ in Ireland, there are no exempted categories of employment which may be undertaken without an employment permit.⁵⁸ Sweden, Finland, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia applied no restrictions. Greece, Spain, Hungary and Portugal

⁵¹ European Commission, *Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty*, COM(2008) 756 FINAL. *Report from the Commission to the Council on the Functioning of the Transitional Arrangements on Free Movement of Workers from Bulgaria and Romania {SEC(2011) 1343 final}* COM(2011) 729 final Similar calls were made in respect of A8 enlargement in 2006: *Report on the functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004 – 30 April 2006)*, COM (2006) FINAL.

⁵² 12005S/AFI/DCL/03 Final Act - II. Declarations - A. Joint Declarations by the present Member States - 3. Joint Declaration on the free movement of workers: Romania Official Journal L 157 , 21/06/2005 P. 0391 - 0391

⁵³ Annex VII, Treaty of Accession, 2005, art 1.

⁵⁴ European Commission, *Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty* (n. 51).

⁵⁵ Art 12 of Annex VI and VII states that:

‘Any present Member State applying national measures in accordance with paragraphs 2 to 5 and 7 to 9, may introduce, under national law, greater freedom of movement than that existing at the date of accession, including full labour market access’.

⁵⁶ The full list of excluded categories is as follows:

‘airport-based operational ground staff of an overseas airline, au pair placements, domestic workers in a private household, ministers of religion, missionaries or members of a religious order, overseas government employment, postgraduate doctors, dentists and trainee general practitioners, private servants in a diplomatic household, representatives of an overseas newspaper; news agency or broadcasting agency sole representatives, teachers or language assistants on an approved exchange scheme, overseas qualified nurses coming for a period of supervised practice.’

<<http://www.ukba.homeoffice.gov.uk>> accessed 21 November 2010.

⁵⁷ The Accession (Immigration and Worker Authorisation) Regulations 2006 (S.I. 2006 No. 3317).

⁵⁸ There were a significant number of categories of employment for which an employment permit will not be granted.

opened their labour markets and apply EU law on free movement of workers from 1 January 2009. Denmark followed suit on 1 May 2009.

Enlargement is, as noted by Kochenov, a political rather than a legal issue,⁵⁹ with membership –and the conditions of membership⁶⁰– of the Union within the absolute discretion of the Union and its Member States, though Hillion suggests that the Court of Justice may retain some measure of control.⁶¹ The Annexes⁶² to the Treaty of Accession, 2005 which provide for the transitional measures, in respect of Romanian and Bulgaria, form an integral part of the Treaty do not constitute an Act of the council within the meaning of Article 263 TFEU (ex-Art 230 TEC). Consequently, the Court of Justice, as noted in *Levantina Agricola Industrial SA (LAISA) and CPC Espanal*:⁶³

‘... has no jurisdiction to consider the legality of such provisions.’⁶⁴

The Court of Justice can, however, interpret the provision of the Acts of Accession and the Accession Treaties.

Political considerations demanded that the ambitions of some of the new Member States and the anxiety about potential negative effects⁶⁵ on the

⁵⁹ Dimitry Kochenov, *European Integration and the Gift of the Second Class Citizenship*, (Murdoch University, eLaw Journal, Vol. 13, No 1, 2006).

⁶⁰ Case C-93/78 *Lothar Mattheus v Doego Fruchtimport und Tiefkuhlkost eG* [1978] ECR 2203, para 7.

⁶¹ Hillion suggests that it is not so clear cut insofar as the Commission in its observations submitted to the court in the *Mattheus v. Doego* ruling (n 60), averred that the discretion was subject to the following proviso: derogations from Community law may only be of limited duration; adjustments to the Treaty may only be made insofar as it proves to be necessary by reason of the accession and; when making adjustments to the acquis, the member states may not depart from the principles governing the Community. Christophe Hillion, *Negotiating Turkey's Membership to the European Union. Can the Member States Do As They Please?* *European Constitutional Law Review*, (2007) 3: 269–284.

⁶² Annex VI in respect of Bulgaria and Annex VII in respect of Romania.

⁶³ Joined cases C-31/86 and C-35/86 *Levantina Agricola Industrial SA (LAISA) and CPC Espanal* [1988], ECR 2285.

⁶⁴ *ibid.* para 21.

⁶⁵ The then Tainaiste, Mr. Michael McDowell, informed a meeting of the National Forum on Europe (December 2006) that:

‘... in relation to Romania and Bulgaria the governments, Ireland and Britain made a decision collectively that by virtue of the common travel area and that by virtue of the radical divergence between per capita income in Romania and Bulgaria compared to the rest of Europe, that as long as the other Member States were not adopting an open door policy, it would be folly for Ireland to risk a

labour market and employment conditions of the old Member States, had to be balanced,⁶⁶ the result of which is that, as noted by the Commission, the Accession Treaty of 2005 allows Member States to ‘temporarily restrict the free access of workers’⁶⁷ from A2 countries. In addressing the effect of similar restrictions prior to the A8 enlargement, the Commission averred that ‘Community law on the free movement of workers cannot apply during this period’.⁶⁸ However, the Court of Justice has consistently held, in cases such as *Metallurgiki Halyps*,⁶⁹ that derogations are permitted:

‘only in so far as they are expressly laid down by transitional provisions’⁷⁰

Further, in *Commission v United Kingdom*,⁷¹ those derogations:

‘...must be interpreted restrictively with reference to the Treaty provisions in question and must be limited to what is absolutely necessary in order to attain its objective’.⁷²

The 2003 and 2005 Accession Treaties both contained a ‘safeguard’ clause⁷³—extant for seven years post-accession— which permitted Member States who elected not to apply restrictions at all or who lifted restrictions early to apply or re-apply restrictions. Somewhat controversially, the possibility of a

further wave of migration because it would, in fact, have the potential to seriously destabilise our labour market and that in turn would lead to blue collar racism in Ireland.’

⁶⁶ M. Byrska, *The Unfinished Enlargement: Report on free movement of people in EU-25*, European Citizen Action Service, Brussels: ECAS, (2004),

⁶⁷ European Commission, *Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty* (n 51).

⁶⁸ European Commission, *The Transitional Arrangements for the free movement of worker from the new member states following enlargement of the European Union on 1st May 2004*, 23 May 2008.

⁶⁹ Case 258/81 *Metallurgiki Halyps v Commission* [1982] ECR 4261.

⁷⁰ *ibid.* at para 8. See further: Case C-420/07 *Apostolides* [2009] ECR I-3571, para 33 and joined cases C-147/11 *Czop* and C-148/11 *Punakova* (not yet reported in the ECR).

⁷¹ Case 231/78 *Commission v United Kingdom* [1979] ECR 1447.

⁷² *ibid.*, at para 13. See further: Case C-420/07 *Apostolides* [2009] ECR I-3571, para 35; Case 77/82 *Peskeloglou* [1983] ECR 1085, para 12; Case 11/82 *Piraiki-Patraiki and Others v Commission* [1985] ECR 207, para 26; Case C-3/87 *Agegate* [1989] ECR 4459, para 39, and; Case C-233/97 *KappAhl* [1998] ECR I-8069, para 18).

⁷³ Treaty of Accession, 2005, Annex VII., Art 7

permanent safeguard clause is being considered in respect of Turkey's membership:

'Long transitional periods, derogations, specific arrangements or permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as freedom of movement of persons, structural policies or agriculture. Furthermore, the decision-taking process regarding the eventual establishment of freedom of movement of persons should allow for a maximum role of individual Member States. Transitional arrangements or safeguards should be reviewed regarding their impact on competition or the functioning of the internal market.'⁷⁴

4. The Treaty of Accession, 2005

The Treaty of Accession, 2005, signed on 25 April 2005 –the precise date of which is of considerable significance– provided for the accession of Romania and Bulgaria to the European Union, effective on 1 January 2007. The legal basis for seeking membership of the EU, Article 49 TEU –and the 'Copenhagen criteria'⁷⁵ – permitted any European State which respected the principles laid out in Article 6(1) TEU (now Art. 2 TEU as amended by the Lisbon Treaty), being the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, to apply for membership. Romania's membership of the Union was, as noted by Papadimitriou and Phinnemore, long and arduous⁷⁶ –the process commenced in 1995 just six years after the 1989 revolution which toppled

⁷⁴ Para 12, 4th indent of the Negotiating Framework (Luxemburg, 3 October 2005). See Christophe Hillion, *Negotiating Turkey's Membership to the European Union. Can the Member States Do As They Please?* *European Constitutional Law Review*, (2007) 3: 269–284.

⁷⁵ European Commission, *Towards a Closer Association with the Countries of Central and Eastern Europe* SEC(93) 648 final. The 'Copenhagen criteria', as noted by Hillion, supplemented the general Treaty provisions and refined the substantive rules for enlargement. For a further discussion on the rules of enlargement see Christophe Hillion, *EU Enlargement*, in *The Evolution of EU Law*, Paul Craig and Grainne De Burca (2nd Edn, Oxford University Press, 2011) 187.

⁷⁶ Dimitris Papadimitriou, David Phinnemore, *Romania and the European Union – from Marginalisation to Membership*, (Routledge, Abingdon, 2008).

Ceausescu— and questions persisted,⁷⁷ and still persist, post-accession,⁷⁸ about both Romania and Bulgaria's⁷⁹ level of preparedness. Nonetheless, both Romania and Bulgaria, despite having had little more than a decade and a half to 'democratize' following more than four decades of communist rule—which in Romania's case was particularly despotic—were both deemed to have met the criteria. In respect of Romania Carothers avers that:

‘The last ten years of Ceausescu's regime were particularly repressive and despotic, the cardinal elements of this legacy included a profound distrust by citizens of political life and all organized forms of power, a shattering atomization of the society, a deep fear of taking individual initiatives, and a paralysing and widespread sense of victimization.’⁸⁰

4.1 The Applicable Annexes

The transitional arrangements in respect of Romania and Bulgaria's admission to the Union were set out in Annex VI and Annex VII of the Treaty of Accession, 2005. There are two versions of the Annexes, one which was intended to prevail in the event that the Constitution of Europe was ratified and the other if it was not ratified.⁸¹ These Annexes refer to and

⁷⁷ *ibid.* The European Commission produced a number of pre-accession reports, 1997 and 1999, questioning Romania's preparedness. It was only in 2004 that the Commission declared Romania to be a functioning market economy. Accession negotiations closed on December 2004, with the European Council setting 1 January 2007 as the target date for accession.

⁷⁸ See speech to the Romanian Parliament by Martin Schulz, President of the European Parliament, 30 Oct 2012, where he stated that:

‘Sometime in the next few days, three letters from the Commission are due to be arriving in Bucharest. Those letters will inform the Romanian Government that your country's participation in three of the operational programmes co-financed from the EU Structural Funds, namely those dealing with transport, regional policy and measures to increase economic competitiveness, has been suspended until further notice. This decision is a response to serious shortcomings in the areas of public procurement, expenditure management and the prevention and detection of fraud and conflicts of interest. This is a tough blow. The reform process has not yet been brought to fruition, the work of developing an effective public administration has not yet been completed, and the fight against corruption has not yet been won.’

⁷⁹ In a Speech by Mr Olli Rehn, Member of the European Commission, responsible for Enlargement, “*Bulgaria and Romania to become Member States in the EU*”, Presentation in the EP, Strasbourg, 26 September 2006, reference was made to unresolved corruption and organised crime issues in Bulgaria.

⁸⁰ Thomas Carothers, *Romania, The Political Background*, in *Democracy in Romania*, (IDEA Report, 1997).

⁸¹ These versions of the Annexes refer to derogations in respect of Article III-133 and Article III-144 of the Constitution.

would, in the event of ratification of the Constitution, derive their legal authority from Article 1(1)⁸² of the Treaty of Accession, 2005 and Article 20 of the Protocol referred to in Article 1 of the Treaty. The legal basis for the second, applicable, Annexes is found in Article 2(1) of the Treaty.⁸³

Article 2(2) of the Treaty refers to the application of an Act (the Act of Accession) in the event that the Constitution remained un-ratified.⁸⁴ Article 23 of the Act of Accession states that:

‘The measures listed in Annexes VI and VII to this Act shall apply in respect of Bulgaria and Romania under the conditions laid down in those Annexes.’

The second Annexes refer to and derive their legal authority from the foregoing Article (23 of the Act).⁸⁵ Annexes VI and VII provide for identical transitional measures for Romania and Bulgaria (reference to Annex VII should be read as also referring to Annex VI hereinafter).

4.2 The Derogations

Article 1 of the Annex VII, dealing with Romania’s accession, provides for the following derogation:

‘Article 39 and the first paragraph of Article 49 of the EC Treaty shall fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71/EC between

⁸² ‘The conditions and arrangements for admission are set out in the Protocol annexed to this Treaty. The provisions of that Protocol shall form an integral part of this Treaty’

⁸³ ‘In the event that the Treaty establishing a Constitution for Europe is not in force on the date of accession, the Republic of Bulgaria and Romania become Parties to the Treaties on which the Union is founded, as amended or supplemented.’

⁸⁴ ‘The conditions of admission and the adjustments to the Treaties on which the Union is founded, entailed by such admission, which will apply from the date of accession until the date of entry into force of the Treaty establishing a Constitution for Europe, are set out in the Act annexed to this Treaty. The provisions of that Act shall form an integral part of this Treaty.’

⁸⁵ Annexes VI and VII provide for identical transitional measures for Romania and Bulgaria.

Romania on the one hand, and each of the present Member States on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.’

Article 2 (para. 1) provides that:

‘By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Romanian nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of accession.’

Article 8 provides that:

‘As long as the application of Articles 1 to 6 of Regulation (EEC) No 1612/68 is suspended by virtue of paragraphs 2 to 5 and 7 above, Article 23 of Directive 2004/38/EC shall apply in Romania with regard to nationals of the present Member States, and in the present Member States with regard to Romanian nationals, under the following conditions, so far as the right of family members of workers to take up employment is concerned:

— the spouse of a worker and their descendants who are under 21 years of age or are dependants, legally residing with the worker in the territory of a Member State at the date of accession, shall have, upon accession, immediate access to the labour market of that Member State. This does not apply to family members of a worker legally admitted to the labour market of that Member State for a period of less than 12 months;

— the spouse of a worker and their descendants who are under 21 years of age or are dependants, legally residing with the worker in the territory of a Member State from a date later than the date of accession, but during the period of application of the transitional

provisions laid down above, shall have access to the labour market of the Member State concerned once they have been resident in the Member State concerned for at least eighteen months or from the third year following the date of accession, whichever is the earlier.

Article 9 provides that:

‘Insofar as provisions of Directive 2004/38/EC which take over provisions of Directive 68/360/EEC (1) may not be dissociated from those of Regulation (EEC) No 1612/68 whose application is deferred pursuant to paragraphs 2 to 5 and 7 and 8, Romania and the present Member States may derogate from those provisions to the extent necessary for the application of paragraphs 2 to 5 and 7 and 8.’

The first significant point of note is that, despite the use of language in Articles 1 and 2 of Annex VII, suggestive of an obligation on Member States to apply the restrictions, the derogations are optional at the discretion of Member States. This is so for a number of reasons: Article 12 expressly provides for immediate full labour market access;⁸⁶ Article 1 provides that Member States may continue to apply transitional measures; Article 8(4) provides for more favourable measures whether national or resulting from bilateral agreements and, of course; it is the national law of Member States that regulates the access of workers from Bulgaria and Romania to their labour markets. Further, both the Commission⁸⁷ and Member States⁸⁸ have interpreted Annex VII in that manner. As the transitional measures were optional they were not ‘necessitated’ by EU for the purpose of Article 29 of the Irish Constitution and thus did not enjoy immunity from a constitutional challenge. This has potential implications –particularly in respect of the

⁸⁶ ‘Any present Member State applying national measures in accordance with paragraphs 2 to 5 and 7 to 9, may introduce, under national law, greater freedom of movement than that existing at the date of accession, including full labour market access.’

⁸⁷ European Commission, *Commission report on transitional arrangements regarding free movement of workers from Bulgaria and Romania*, MEMO/11/773, Brussels, 11 November 2011.

⁸⁸ A number of Countries opted not to apply the derogations, among them Sweden and the A8 countries –Sweden, undoubtedly, because discriminatory, transitional measures would not sit well with its liberal traditions.

constitutionally protected right to work— for Ireland, which are discussed later in this Chapter.

It is also perfectly clear, though somewhat misunderstood in this State, that the derogations, as noted by Wyatt et al,⁸⁹ only applied to the free movement of ‘workers’ and not the self-employed –whose rights are governed by separate and distinct EU Treaty provisions⁹⁰– or other rights-holders, such as students⁹¹ or the self-sufficient.

The Article 45 TFEU derogation –Article 45 constituting one of the four EU ‘fundamental freedoms’– is undoubtedly the most contentious and limiting, being both a personal and economic right. The rights derived from Article 45⁹² are far reaching –granting EU citizens the right to enter any other Member State and take up employment under the same conditions as a citizen of that State– zealously protected and were, as noted by Craig and De Burca, shaped by the Court of Justice since the early days of the Union,⁹³ who have treated this freedom as part of the ‘*foundations of the EU*’.⁹⁴ The fundamental nature of these rights has been reinforced by the Charter of Fundamental Rights of the EU which became legally binding when the Lisbon Treaty entered into force.⁹⁵

By virtue of Article 1 of Annex VII, Member States are, ostensibly, permitted to do precisely what Article 45 TFEU (ex-Article 39 TEC)

⁸⁹ Wyatt & Dashwood’s *European Union Law* (n 10) at 747.

⁹⁰ Article 48 TFEU. Workers are covered by Article 45 TFEU. A separate body of case law has been developed in respect of each of these Treaty provisions, discussed comprehensively in Chapter 1 in sections 2.13 and 2.16.

⁹¹ The Commission, in addressing the A8 enlargement, stated that:

‘There are no transitional arrangements in respect of rights of residence of groups other than workers (tourists, students, pensioners etc), nor in respect of the Community provisions on the coordination of social security schemes and articles other than articles 1-6 and 11 of Regulation 1612/68 on the freedom of movement for workers.’

European Commission, *The Transitional Arrangements for the free movement of worker from the new member states following enlargement of the European Union on 1st May 2004* (23 May 2008).

⁹² Together with Article 46 which provides for the European Parliament and Council to adopt secondary legislation.

⁹³ Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177.

⁹⁴ Paul Craig and Grainne De Burca, *EU Law, Text, Cases and Materials* (5th Edn, Oxford University Press, 2011) at 719.

⁹⁵ Art 15, which provides for freedom to choose an occupation and right to engage in work.

prohibits: to discriminate against Romanian and Bulgarian workers seeking employment in Member States.⁹⁶ The effect of similar derogations –in respect of A8 nationals– was addressed by the House of Lords in *Zalewska v Department of Social Development*⁹⁷, where it was held that:

‘The effect of that paragraph was to enable the United Kingdom, notwithstanding the fundamental rules of Community law as to free movement of person, to lay down its own rules for access to its labour market.’⁹⁸

Similarly, in this State, in the High Court, Dunne J. in *Solovastru v Minister for Social Protection & Ors*⁹⁹ held that:

‘...a Romanian national can only work in this country in certain circumstances.’

Successive Irish governments have, on three occasions,¹⁰⁰ determined that it would apply the derogations –on the final occasion on the grounds that there were serious disturbances in the Irish labour market.¹⁰¹ As a consequence, subject to exceptions which are addressed further on in this chapter, the position in the Irish State (up until 1 January 2012) was that A2 citizens wishing to take up employment in the State must first obtain an employment permit. This necessitated an amendment to section 2 of the Employment Permits Act 2003.

4.3 The Employment Permits Act 2003

⁹⁶ Article 45(1) TFEU (ex-Art 39 TEC) expressly prohibits any form of discrimination: ‘Such freedom of movement 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.’

⁹⁷ [2008] UKHL 67.

⁹⁸ *ibid.* para 26, Lord Hope of Craighead.

⁹⁹ [2011] IEHC 532.

¹⁰⁰ December 2006, December 2009 and December 2011, by way of press release on www.djie.ie.

¹⁰¹ Annex VII, art 5.

Prior to amendment, the 2003 Act restricted access to the Irish labour market of ‘non-nationals’,¹⁰² defined as those who are not citizens of the State but excluding –in accordance with EU Treaty provisions and secondary law– EU citizens and third country nationals exercising EU rights.¹⁰³ A separate provision was made in respect of the A8 countries, providing an exemption, which notably included a now-defunct¹⁰⁴ provision, derived from the Treaty of Accession 2004, for applying derogations to the A8 countries in the event of a disturbance¹⁰⁵ in the labour market of the State. Article 7(2)¹⁰⁶ Annex VII was utilised by Spain recently to bring about derogations in respect of Romanian nationals:

‘Following a request from the Spanish authorities on 28th July 2011, the European Commission has approved Spain's request to restrict its labour market to Romanian workers until 31 December 2012 due to serious disturbances on its labour market. Spain has been hit very hard by the crisis. The unprecedented fall in GDP (-3.9% between 2008 and 2010) has resulted in the highest unemployment rate in the EU, over 20% since May 2010. The continuous increase of Romanian residents in Spain and their high level of unemployment have had an impact on the capacity of Spain to absorb new inflows of workers.’¹⁰⁷

¹⁰² Pursuant to S 1(1) Employment Permits Act, 2003. Also referred to as a ‘foreign national’ (though no definition is given), s 1(1) Employment Permits Act, 2006.

¹⁰³ S 2(10)(c), as amended by s 3 Employment Permits Act 2006.

¹⁰⁴ S 3(3) Employment Permits Act 2003.

¹⁰⁵ Arguably, from 2008 onwards, due to the severe economic down-turn, the Irish labour market was subject to a ‘disturbance’ and in those circumstances, the then Government could have introduced transitional measures up to May 2011, in respect of the A8 countries.

¹⁰⁶ Annex VII, art 7[2]:

‘When a Member State referred to in the first subparagraph undergoes or foresees disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation, that Member State shall inform the Commission and the other Member States thereof and shall supply them with all relevant particulars. On the basis of this information, the Member State may request the Commission to state that the application of Articles 1 to 6 of Regulation (EEC) No 1612/68 be wholly or partially suspended in order to restore to normal the situation in that region or occupation. The Commission shall decide on the suspension and on the duration and scope thereof not later than two weeks after receiving such a request and shall notify the Council of such a decision. Any Member State may, within two weeks from the date of the Commission's Decision, request the Council to annul or amend the Decision. The Council shall act on such a request within two weeks, by qualified majority.’

¹⁰⁷ European Commission, Press Release: *The Commission accepts that Spain can temporarily restrict the free movement of Romanian workers*, IP/11/960 11/08/2011.

Section 3(b) of the Employment Permits Act 2006 amended the 2003 Act to include the following passage:

‘but this section, subject to section 2A and any order under section 3A(1) for the time being in force, does apply to a foreign national who is a national of the Republic of Bulgaria or Romania (including at a time subsequent to the accession of the Republic of Bulgaria or Romania to the European Union).’¹⁰⁸

This section places Romanian and Bulgarian citizens within the remit of the Employment Permits Acts 2003 and the restrictions therein. The Act prohibits outright, without exception –unlawfully so¹⁰⁹– a Romanian or Bulgarian citizen from entering employment¹¹⁰ or being employed¹¹¹ without an employment permit. S 2(1)-(2) provide that:¹¹²

‘A non-national shall not— (a) enter the service of an employer in the State, or (b) be in employment in the State, except in accordance with an employment permit granted by the Minister (an “employment permit”)...A person shall not employ a non-national in the State except in accordance with an employment permit.’

S 2(3) provides that a breach of the Act can give rise to criminal sanctions¹¹³ as against the employer¹¹⁴ and the employee:¹¹⁵

¹⁰⁸ S 2(10).

¹⁰⁹ See the discussion on Article 23 of Directive 2004/38 below in this chapter.

¹¹⁰ Employment Permits Act 2003, s 2(1).

¹¹¹ S 2(2) prohibits an employer from employing such a person.

¹¹² Employment Permits Act, s 2.

¹¹³ A question of Proportionality might arise in respect of the sanctions.

¹¹⁴ Sec(2)(b) is particularly onerous, the employer may be tried summarily or on indictment with a potential fine not exceeding €250,000 or imprisonment for a term not exceeding 10 years or both. It is a defence for the employer to show that he or she took all such steps as were reasonably open to him or her to ensure compliance with subsection 2. See *Hussain* case *supra* n. 33. This latter section could, provided there was some form of undertaking from the State, permit an employer to retain a Romanian or Bulgarian national, during the employment permit application process. The Minister has given a limited form of undertaking in legal proceedings, to employees and employers, to the effect that there was no intention, at present to prosecute for breaches of the Employment Permits Act 2003-2006.

¹¹⁵ S 2(3)(a) is a summary only offence, but appears to be one of strict liability offence insofar as there is no defined *mens rea* requirement and there does not appear to be any

‘A person who contravenes subsection (1) or (2) shall be guilty of an offence and shall be liable— (a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or (b) if the offence is an offence consisting of a contravention of subsection (2), on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 10 years or both.’

As noted earlier, a Romanian or Bulgarian national who was unlawfully employed cannot obtain social welfare¹¹⁶ or enforce employment law rights.¹¹⁷ The Act is enforced by the National Employment Rights Association (NERA), a section of the Department of Jobs, Enterprise and Innovation, on behalf of the Minister. NERA’s remit is to inspect employers’ premises to ensure compliance with the Act¹¹⁸ and they have unlawfully removed some Romanian nationals from their employment on foot of misinterpretation and misapplication of EU and national law. The actions of NERA have led to litigation. In *P v NERA & Ors*¹¹⁹ the applicant, a Romanian national –who, with her husband, were lawfully resident, premised upon their status as students– was forcibly removed from her position of employment by NERA, who refused to recognise that she had a right to work in the absence of an employment permit. The applicant successfully¹²⁰ asserted that, from the date her husband commenced his studies as a student, she was lawfully entitled to take up employment, without an employment permit, as she was the family member of a Union citizen who held right of residence¹²¹ and that after twelve months she had been ‘admitted’ to the labour market of this State for the purpose of the Treaty of Accession, 2005.¹²²

defence for the employee, mere employment and the absence of an employment permit is sufficient to engage the offence.

¹¹⁶ *FAS v Minister for Social Welfare* (n 25).

¹¹⁷ *Hussein v Labour Court* (n 34).

¹¹⁸ Carrying out 1139 inspections under the Employment Permits Acts 2003-2006 in 2010.

¹¹⁹ 2012 Judicial Review.

¹²⁰ The Minister furnished the applicant with a letter accepting that she had a right to work in the State from the date her husband commenced his studies in 2008.

¹²¹ Directive 2004/38, art 23 of. This is addressed more fully below.

¹²² Annex VII, art 2

The Act of 2003 was radically amended by the Employment Permits Act, 2006 and the State has applied the provisions of the 2006 Act –together with administrative rules fleshing out the Act– to Romanian and Bulgarian nationals. This, however, is highly problematic, for a number of reasons: the administrative rules are, it is submitted, *ultra vires* the 2006 Act and; as the Act was promulgated on 1 January 2007, its application is contrary to the ‘stand-still clause’. The derogation, permitted in respect of Article 45 TFEU by Annex VII, is subject¹²³ to transitional provisions,¹²⁴ Article 14(3), which is the ‘stand-still clause’, provides that:

‘The effect of the application of paragraphs 2 to 5 and 7 to 12 shall not result in conditions for access of Romanian nationals to the labour markets of the present Member States which are more restrictive than those prevailing on the date of signature of the Treaty of Accession.’

A stand-still clause is, as noted by the Court of Justice in *Oguz*,¹²⁵ a quasi-procedural rule which specifies, *ratione temporis*, the provisions of a Member State’s legislation that must be referred to.¹²⁶ The Treaty of Accession, 2005, was signed on the 25th April 2005. Therefore, it is the conditions which prevailed upon *that* date, which are applicable and not the date of accession (1 January 2007). There is little, if any, wriggle-room for the State in this regard, as derogations are allowed only in so far as they are expressly laid down by transitional provisions¹²⁷ and must be interpreted restrictively and limited to what is absolutely necessary.¹²⁸

¹²³ Annex VI and VII, art 1.

¹²⁴ Annex VI and VII, arts 2-14.

¹²⁵ Case C-186/10 *Oguz* [2011] ECR I-06957.

¹²⁶ *ibid.* para 28.

¹²⁷ Case 420/07 *Apostolides* [2009] ECR I-3571, para 33:

‘It must be observed at the outset that the Act of Accession of a new Member State is based essentially on the general principle that the provisions of European Union law apply *ab initio* and *in toto* to that State, derogations being allowed only in so far as they are expressly laid down by transitional provisions’

See further joined cases C-147/11 *Czop* and C-148/11 *Punakova* (not yet reported in ECR)

¹²⁸ Case C-231/78 *Commission v UK* [1979] ECR 1447, para 13.

Consequently, there are significant difficulties –which has resulted in much litigation¹²⁹– in the application of these Acts in respect of A2 nationals, particularly in respect of exceptions to the requirement to hold an employment permit,¹³⁰ and, moreover, in identifying the precise qualifying conditions which may be lawfully applied to Romanian and Bulgarian nationals who do require employment permits.

Successive Ministers at the Department of Jobs, Enterprise & Innovation, operated what might best be termed administrative schemes, which appear to have been published internally in the form of guidelines. The conditions which appear to have been applicable on 25th April 2005 may be summarised¹³¹ as follows:

The *Work Authorisation Visa programme*¹³² permitted prescribed highly skilled persons, such as IT, Engineering and Medical personnel to take up employment and;

The *Employment Permit scheme* which permitted all others to seek employment and was conditional upon the position being first offered to Irish nationals and citizens of EEA States. Significant categories of employment were excluded, by then Government Policy –in the premises that such categories would be filled by the A8 countries which had joined the Union in 2004.¹³³ Those categories included: all clerical and administrative Positions, all general operatives/labourers, most construction worker positions and many other positions.

¹²⁹ These cases are discussed throughout this Chapter.

¹³⁰ This is comprehensively discussed in this Chapter in section 4.3.

¹³¹ This information titled *Procedures and Guidelines in relation to applying for a work permit which were in place in 2005*, was furnished, via a Freedom of Information request, by the Department of Jobs, Enterprise & Innovation in April 2011.

¹³² This scheme was operated by the Department of Foreign Affairs and ceased on 31 December 2006, with the Employment Permits Act 2006 commencing on 1 January 2007. The Department of Jobs, Enterprise and Innovation now operates a Green Card scheme. There does not appear to have been any readily identifiable legal basis for the Work Authorisation Scheme.

¹³³ *ibid.*

The previous¹³⁴ and most recent versions of the Department of Jobs, Enterprise and Innovation's *Employment Permit Arrangements, Guide to Work Permit Arrangement for Bulgarian and Romanian nationals*, (June 2011) contains an almost identical list of excluded or ineligible jobs categories¹³⁵ and other, additional, conditions including the requirement that, except in exceptional circumstances, applicants for a work permit must be applying for a post which carried a salary of at least €30,000.

Had these categories been lawfully excluded in 2005 under domestic law, then under EU law –in particular Article 14(3) of the Annexes– Ireland could continue to apply these restrictions as part of the transitional measures. The Treaty of Accession, 2005, permitted Member States to derogate from free movement rights on the basis of conditions that prevailed on 25 April 2005 and that the exclusion of significant categories of jobs, appear to have been extant on or about that date.

If this were the end of the matter, then a significant, if not, arguably, the majority, of Romanian and Bulgarian nationals would simply be excluded from employment in the Irish State. However, the Irish State cannot, it is submitted, assert that such conditions, as prevailed in 2005, still prevail solely on the basis that they were permitted by the Treaty of Accession. The conditions which are said to have prevailed on the date of the signing of the Treaty would have to be lawful, for the purpose of national law and the framing of those measures, extant on 25th April 2005, in any subsequent national law would also have to comply with the Irish Constitution, statute

¹³⁴ June 2007.

¹³⁵ All Clerical and Administrative Positions, all General Operatives/Labourers, all Operator and Production Staff. In the category 'Sales Staff' all retail sales vacancies, sales representatives, Supervisory/ Specialist, Sales. In the category 'Transport Staff': All drivers (excluding HGV), In the category 'Childcare Workers: Nursery/ Crèche Workers, Child Minder/ Nanny. In the category 'Hotel Tourism and Catering': all staff except chefs. In the category 'Craft Workers and Apprentice\Trainee Craft Workers': Bookbinder, Bricklayer, Cabinet Maker, Carpenter / Joiner, Carton Maker, Fitter - Construction Plant, Electrician, Instrumentation, Craftsperson, Fitter, Tiler - Floor / Wall, Mechanic - Heavy Vehicles, Instrumentation Craftsperson, Metal Fabricator, Mechanic - Motor, Originator, Painter And Decorator, Plumber, Printer, Engineer - Refrigeration, Sheet Metal Worker, Tool Maker, Vehicle Body Repairer, Machinist – Wood, Plasterers and Welders.

and any other relevant legal principles applicable in this State. This is clear from the ruling in *Kirllson*¹³⁶ where the Court of Justice held that:

‘In so far as Community law, including its general principles, does not include common rules to that effect, the national authorities when implementing such regulations act in accordance with the procedural and substantive rules of their own national law.’¹³⁷

National law –in this instance the Supreme Court’s ruling in *Meagher v Minister for Agriculture*¹³⁸– requires that where there is a ‘choice’¹³⁹ left to a Minister, he or she must legislate. This requirement was, ostensibly, complied with through the Employment Permits Acts 2006. Therefore, two issues must be addressed:

- (1) the legality –under national law– of the rules extant on 25th April 2005 and;
- (2) the legality of new Guidelines purporting to incorporate the rules extant on 25th April 2005.

It is only when these issues are addressed that we can distil precisely what conditions actually prevailed on that date, governing access to the labour market for Romanian and Bulgarian citizens.

Determining the precise legal status of the Guidelines,¹⁴⁰ which applied on 25th April 2005, is complex and difficult. If the Guidelines were purely administrative rules or an administrative scheme, with no parent

¹³⁶ Case C-292/97 [2000] ECR I-2737.

¹³⁷ *ibid.* at para 27:

‘In so far as Community law, including its general principles, does not include common rules to that effect, the national authorities when implementing such regulations act in accordance with the procedural and substantive rules of their own national law (see, *inter alia*, Case C-285/93 *Dominikanerinnen-Kloster Altenhohenau v Hauptzollamt Rosenheim* [1995] ECR I-4069, paragraph 26).’

¹³⁸ [1994] I IR 329.

¹³⁹ *ibid.* Where it was held that:

‘If the Directive left to the national authority matters of principle or policy to be determined, then the ‘choice’ of the Minister would require legislation by the Oireachtas.’

¹⁴⁰ Department of Enterprise, Trade and Employment, *Procedures and Guidelines in relation to Applying for a Work Permit, which were in place in 2005* (n 128). This is not a contemporaneous document.

legislation,¹⁴¹ operated by the executive for the purpose of permitting third-country nationals¹⁴² to enter employment in the State, then, arguably, the Guidelines would attract the protection of, or fall under the ambit of, the *sovereign* or *inherent* powers of the State, such as was afforded by the Supreme Court to the Irish Born Child Scheme 2005 in *Bode (A Minor) & Ors v Minister for Justice, Equality and Law Reform*.¹⁴³ This, however, cannot be so the rules governing employment in this State were placed on a statutory footing by the Employment Permits Act 2003.

Before turning to the question of whether or not the Guidelines were permitted by the 2003 Act it is worth considering the constitutionality of the Act through the prism of a long line of well-established Supreme Court authorities. The legislature is, pursuant to Article 15 of the Constitution, entitled to delegate power to the executive, provided it does so adequately. In the seminal case of *Cityview v ANCO*¹⁴⁴ this was given a broad reading,

‘Administrative agencies must be given considerable scope within which to fulfill the task entrusted to them of implementing the policies formulated by the legislature. It is sufficient if the legislature, as has been done here, gives adequate guidelines to the executive in regard to the implementation of its functions.’¹⁴⁵

However, in *Cityview* the Court prohibited the delegation of policy-making powers by the Oireachtas. The long title of the Act of 2003 is relatively

¹⁴¹ In *Laurentiu v Minister for Justice* [1999] 4 IR 26, Denham J. posed and answered the hypothetical question:

‘If there had been no legislation the situation would have a parallel to that of the issue of passports. That also is a classic example of an exercise of the executive power of a sovereign nation. There has been no legislation on this matter in Ireland. The scheme is run by a minister of the executive. It must be run in a constitutional and fair manner. However, there is no issue of the constitutional ambit of delegated legislation as the Oireachtas has not sought to give the powers to the Minister.’

¹⁴² Up to 1st January 2007 this would have included Romanian and Bulgarian nationals.

¹⁴³ [2007] IESC 62, where Denham J. held that:

‘The inherent power of the State includes the power to establish an ex gratia scheme of this nature... a special administrative scheme, the IBC 05 Scheme, was introduced by the Minister. The Minister obtained Government approval... It was an example of the State exercising its discretion to allow specific foreign nationals to reside in Ireland.’

See further, the observations of Charleton J. in *Prendergast v Higher Education Authority* [2008] IEHC 257.

¹⁴⁴ [1980] IR 381.

¹⁴⁵ *ibid.*

short¹⁴⁶ –as is the Act itself having with just four sections. Section 2 of the Act creates a criminal offence for the employer and employee and creates categories of persons who are exempted¹⁴⁷ from the requirement to have an employment permit. Section 3 provides that, where transitional measures are in force in respect of a Member State, preference¹⁴⁸ must be given to nationals of that Member State by the Minister for Enterprise, Trade and Innovation over third country nationals when work permits are being granted –this important provision complies with Article 14(2) of the Annexes.¹⁴⁹ Other than the foregoing limitations, the Act appears to have granted the Minister an absolute discretion in respect of what rules might be applied to the granting of an employment permit. This can hardly be said to comply with the *adequate guidelines* requirement in *Cityview*.

Some guidance as to which side of the line the Ministerial Guidelines, extant in 2005, fall may be found in the two Supreme Court decisions in *Laurentiu Minister for Justice*¹⁵⁰ and *Casey v Minister for Arts, Heritage, Gaeltacht and the Islands*.¹⁵¹ In *Casey* the Court was dealing with an ad hoc ministerial permit scheme which limited the number of persons permitted to operate a shuttle service from the mainland to visit a national monument on the Skellig Islands. One of the questions before the Court was whether or not the impugned Act granted the Minister such a power. The Court

¹⁴⁶ ‘An Act to provide for the grant of employment permits in respect of non-nationals, to prohibit the employment of non-nationals who do not have such permits, to provide for the grant of such permits in respect of the nationals of certain states under certain circumstances and to provide for related matters.’

¹⁴⁷ These include: persons who have been declared refugees, members of their families where so permitted to enter the State; programme refugees; EU nationals not subject to transitional measures and those permitted by the Minister for Justice, Equality and Law Reform to reside and work in the State. This latter section is questionable in light of Directive 2003/109, which requires five years residence for such rights.

¹⁴⁸ S 10(2) of the Employment Permits Act 2006 provides that:

‘he or she has taken all such steps as were reasonably open to him or her to offer the employment in respect of which the application is made to a citizen or a foreign national referred to in any of paragraphs (a) to (d) of section 2(10) of the Act of 2003 or to whom section 3 of that Act applies...’

¹⁴⁹ Art 14(2) provides that:

‘Notwithstanding the application of the provisions laid down in paragraphs 1 to 13, the present Member States shall, during any period when national measures or those resulting from bilateral agreements are applied, give preference to workers who are nationals of the Member States over workers who are nationals of third countries as regards access to their labour market.’

¹⁵⁰ *Laurentiu v Minister for Justice* (n 141).

¹⁵¹ [2004] IESC 14.

ultimately found that the principles and policies of the Act were '*spelled out*'¹⁵² in section 2 of the Act in question, which empowered the Minister to do all '*acts and things as may be necessary or expedient for the preservation or protection*'¹⁵³ of monuments. There were, in the view of the Court, '*express powers and duties conferred on the respondent*'.¹⁵⁴ In *Laurentiu* the Court was dealing with wide-ranging ministerial powers, found in section 5(1) of the Aliens Act 1935, to deport aliens. Here, the Court held that:

'[T]he Minister cannot have a legislative power in relation to deportation unless some policy or principles on foot of which he is to act are set out in the parent Act. In my view the Oireachtas of Saorstát Éireann did not legislate for deportation. It merely permitted the Minister for Justice to legislate for deportation. There is no inherent reason why an Act of the Oireachtas cannot set out some policy matters at least in relation to deportation.'

The Employment Permits Act 2003 specifies the categories of persons' subject to the requirement to hold an Employment Permit. It does not set down any criteria to be applied to the granting of an employment permit. The Act is entirely silent in terms of granting the Minister the right to create regulations and appears to be silent in respect of the right of the Minister to create administrative rules. The Act, ostensibly, appears to have granted the Minister an absolute discretion to determine what rules applied in the granting of employment permits and is, arguably, an impermissible delegation, by the Oireachtas, of its power to legislate, such as arose in *Laurentiu*,¹⁵⁵ in the premises that principles and policies are not present. The

¹⁵² *ibid.* para 63.

¹⁵³ *Casey* (n 151).

¹⁵⁴ *Casey* (n 151) at para 63.

¹⁵⁵ [1999] 4 IR 26, where Denham J. held that:

'There are limits to permissible delegation by the organs created by the Constitution. The Oireachtas may not abdicate its power to legislate. To abdicate would be to impugn the constitutional scheme... Also, in accordance with the democratic basis of the Constitution, it is the people's representatives who make the law, who determine the principles and policies. The checks and balances work as between the three branches of government - not elsewhere.... According to the Constitution and the law it is for the Oireachtas to establish the principles and policies of legislation.'

legislature delegated inadequately to the Minister and in so doing abdicated its power.

A further, comparable, example of this may be found in *O'Neill v Minister for Agriculture and Food*¹⁵⁶ where it was held that:

‘It is not merely that the lack of policy or principle deprives the Minister of suitable guidance but it also fails to provide any significant restriction on the ministerial power. This would be a reason for giving a wide construction to the power conferred on the Minister and a consequential doubt as to the constitutionality of the statutory delegation.’¹⁵⁷

Any remaining doubt as to the veracity of the proposition that the Employment Permits Act 2003 was unconstitutional, is perhaps confirmed by the fact that in 2006 the legislature drafted a new Employment Permits Act (2006) which appears to not only substantially comply with the principles and policies requirement in *Cityview*, but also contains sections which authorise both the making of regulations¹⁵⁸ and administrative¹⁵⁹ rules to flesh out the Act. By example s 14(1) which provides that:

‘The Minister may, having regard to, and only to, the matters specified in section 15, make regulations specifying, for a period not exceeding 2 years (“the appropriate period”), such one or more of the following as the Minister considers appropriate, namely: (a) the maximum number of employment permits that may be granted during the appropriate period; (b) the maximum number of employment permits that may be granted during the appropriate period in respect of a specified economic sector; (c) categories of employment (by reference to the economic sector or sectors into which they fall) which—(i) may be the subject of the grant of an employment permit during the appropriate period, or (ii) shall not be the subject of the grant of an

¹⁵⁶ [1998] 1 IR 539.

¹⁵⁷ *ibid.* at 553.

¹⁵⁸ Sections 14, 15, 29, 30.

¹⁵⁹ Employment Permits Act 2006, s 12.

employment permit during that period; (d) the minimum amount of remuneration (being an amount greater than that referred to in section 12 (1)(j)) that shall be payable in respect of an employment as a condition for the grant of an employment permit in respect of it; (e) the qualifications or skills that a foreign national, in respect of whom, or by whom, an application for an employment permit is made during the appropriate period, is required to possess in order for a grant of the permit to be made; (f) for the purposes of section 8 (5), in relation to an employment permit granted during the appropriate period on foot of an application by a foreign national, a period longer than 2 years beginning on the date of the grant of the permit.’

Importantly, the Act of 2006 also set out the basis upon which such regulations and rules would be made. Does the presence of this later, confirmatory, statute save an otherwise invalid instrument? The Supreme Court decision in *McDaid v Sheehy*¹⁶⁰ would suggest that it may well do.¹⁶¹ However, the difficulty for this State is that the Act of 2006 only became law on 1st January 2007. Therefore, it is submitted that the conditions for access to an employment permit, contained within the 2006 Act, cannot be applied to Romanian and Bulgarian nationals, in the premises that they were not extant conditions, or, to use the language of the Treaty, conditions which *prevailed* on 25th April 2005 and any attempt to apply the 2006 Act would offend the ‘stand-still’ clause contained within paragraph 14(3) of Annex VII of the Treaty of Accession, 2005.¹⁶²

The next logical question is: would a national Court look at the constitutionality of a once-defective, but now remedied Act? And, if so, what would the effect be? The jurisprudence of the Superior Courts in

¹⁶⁰ *McDaid v Sheehy* [1991] 1 IR 1.

¹⁶¹ In *Casey v Minister for Arts, Heritage, Gaeltacht and the Islands*, [2004] IESC 14, the Supreme Court, in referring to the earlier case of *McDaid v Sheehy* [1991] 1 IR 1, stated that:

‘The Supreme Court upheld his view that the confirmatory Act cured any possible defect but further took the view that because of this it was inappropriate that any decision should be made as to the constitutionality of the Imposition of Duties Act, 1957...’

¹⁶² This raises a question of the legality of Article 18(1)(b) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. 656 of 2006), which purports to apply the Employment Permits Act 2006 to Romanian and Bulgarian nationals.

Ireland is clear on the first question: a Court will only consider the validity of an Act where it is necessary¹⁶³ and will postpone such consideration in favour of finding another way in which to determine the issues between the parties.¹⁶⁴ It would also appear that the presence of a later, confirmatory, statute may save an otherwise invalid instrument.¹⁶⁵ Further, it is also clear that any applicant challenging the validity of a statute must be prejudiced or damaged by it.¹⁶⁶

On the basis of the foregoing, it is submitted that a Court, faced with this conundrum, would more likely consider the validity of the rules themselves, which prevailed on 25th April 2005. An enhanced version of these rules, the *Employment Permit Arrangements, Guide to Work Permit Arrangement for Bulgarian and Romanian nationals* –which incorporated a new requirement of a minimum salary level of €30,000¹⁶⁷– was published by the Minister on 1 January 2007. This, taken together with the promulgation of the Employment Permits Act, 2006 on 1 January 2007, strongly suggests that the Minister was operating on the basis that he was lawfully entitled to create conditions for access to the labour market which would prevail upon Accession, on 1 January 2007, rather than the conditions which prevailed on 25 April 2005.

A further difficulty arises for the Minister as a result of the Employment Permits Act 2006, in so far as the *Employment Permit Arrangements, Guide to Work Permit Arrangement for Bulgarian and Romanian nationals* are, it is submitted, *ultra vires* the 2006 Act.

¹⁶³ *McDaid v Sheehy* [1991] 1 IR 1, where the Supreme Court held that:

‘...it is clear from our jurisprudence that the Courts should not engage in the question of the possible invalidity of an Act of the Oireachtas unless it is necessary for its decision to do so.’

¹⁶⁴ *Cooke v. Walsh* [1984] I.R. 710, where the Supreme Court held that:

‘It is well settled that the consideration of any question involving the validity of a statute or a section thereof should, in appropriate circumstances, be postponed to the consideration of any other question, the resolution of which will determine the issue between the parties.’

¹⁶⁵ In *Casey*, the Supreme Court, in referring to the earlier case of *McDaid* observed that:

‘The Supreme Court upheld his view that the confirmatory Act cured any possible defect but further took the view that because of this it was inappropriate that any decision should be made as to the constitutionality of the Imposition of Duties Act, 1957...’

¹⁶⁶ *McDaid v Sheehy* [1991] 1 IR 1.

¹⁶⁷ The 2005 guidelines referred to highly paid jobs, without specifying a minimum salary level.

Whilst the 2006 Act permits and empowers the Minister to make rules –in respect of categories of employment (by reference to the economic sector or sectors into which they fall) which may be the subject of the grant of an employment permit during the appropriate period, or which shall not be the subject of the grant of an employment permit during that period¹⁶⁸ and the minimum amount of remuneration which may be stipulated¹⁶⁹– the Act expressly requires the Minister to do so by way of regulations.¹⁷⁰ These regulations, which must be laid before both houses of the Oireachtas,¹⁷¹ are subject to compulsory review every two years, to take account of, potentially changing, and Government policy.¹⁷² However, the *Employment Permit Arrangements, Guide to Work Permit Arrangement for Bulgarian and Romanian nationals* which contains the ineligible job categories and minimum salary level, is not a regulation, it is an administrative form of rule-making and consequently, it is submitted, *ultra vires* the Act of 2006 and contrary to Article 15 of the Constitution which vests the sole and exclusive power of making laws for the State in the Oireachtas.

It is clear from the judgment of the Supreme Court in *Casey v Minister for Arts, Heritage, Gaeltacht and the Islands*,¹⁷³ that administrative measures, of the type adopted by the Minister, are permitted under Article 15 of the Constitution –which provides for the recognition of subordinate legislatures– provided such administrative measures are expressly provided for by the Oireachtas in the statute and do not offend the principles laid down in *Cityview*. In *Casey* the Supreme Court, in addressing the provisions of section 12 of the National Monuments (Amendment) Act 1987, which permitted the Commissioners of Public Works or Local Authority to ‘maintain’ monuments, held that:

¹⁶⁸ Employment Permits Act 2006, s 14(1)(c).

¹⁶⁹ Employment Permits Act 2006, s 14(1)(d).

¹⁷⁰ Employment Permits Act 2006, s 14(1).

¹⁷¹ Employment Permits Act 2006, s 30(5).

¹⁷² *ibid.*

¹⁷³ [2004] IESC 14.

‘We are not concerned here with the making or the enforcement of a legislative instrument. The preservation of national monuments is quintessentially an administrative matter...’¹⁷⁴

The Court, however, went on to hold that:

‘Different considerations may arise where statutory provision is made for the making of regulations which must be laid before the Houses of the Oireachtas for approval or disapproval, where it is the intention of the relevant Act that regulatory powers delegated to an authority should be exercised by the making of such regulations and subject to such parliamentary control.’¹⁷⁵

In the earlier case of *O’Neill v Minister for Agriculture and Food*¹⁷⁶ where the Supreme Court addressed the issue of ministerial failure to make regulations as required by section 3 of the Livestock (Artificial Insemination) Act 1947 (the minister instead applied an administrative scheme) and, in an important passage, held that:

‘...it is highly improbable that they intended the scheme to be established by a series of purely administrative decisions with the regulations remaining entirely silent... the administrative scheme being adopted would be immune from the legislative scrutiny normally afforded to statutory instruments. Section 10 of the 1947 Act provided that every regulation made under the Act was to be laid before each House of the Oireachtas, as soon as might be after it was made, with a concomitant power for either House to pass a resolution within 21 days annulling the regulation... it was not published in the manner required by the Statutory Instruments Act 1947... it was [not] the intention of the Oireachtas that the important safeguards shielding the power of the Minister to enact by way of delegated legislation could be circumvented... I am forced to the conclusion that it was

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

¹⁷⁶ [1998] 1 IR 539.

ultra vires the 1947 Act and, in any event, could only have been carried out in the form of regulations made under that Act.¹⁷⁷

Section 3 of the 1947 Act provided that the Minister may make regulations. Section 14 of the Employment Permits Act 2006, which also uses the word ‘may’, similarly grants the Minister for Jobs, Enterprise and Innovation discretion. There was no obligation on either Minister to make regulations.¹⁷⁸ However, it is perfectly clear from the above passage in *O’Neill* that a Minister, if he or she wishes to make rules, must do so within the parameters of the statute.

Hogan and Morgan¹⁷⁹ identify an earlier Supreme Court authority, *Rooney v Minister for Agriculture and Food*,¹⁸⁰ which appears to run contrary to *O’Neill*. In *Rooney* the Court appeared to accept that the Minister could operate an extra-statutory scheme rather than the one envisaged in Section 58 of the Diseases of Animals Act 1966. The judgment refers to the fact that that no regulations had been made. The section empowered the Minister to:

by order -make provision for regulating the making and determination of applications for, and the mode of assessment and payment of, compensation’.

Pursuant to section 4 of the Act, every order must be laid before both houses of the Oireachtas. *Rooney* has been referred to in two more recent cases,¹⁸¹ though neither of which featured a direct competition between *O’Neill* –

¹⁷⁷ *ibid.* at 546-547.

¹⁷⁸ In *The State (Sheehan) v Government of Ireland* [1987] I.R. 550: the Supreme Court held that the Oireachtas by the manner in which it had couched the language of s. 60, sub-s. 7 and, in particular, by its choice both of the word "may" and of the Government and not a Minister in which to vest the discretion under that sub section in, showed that the discretion to bring s. 60 into operation after 1st April, 1967, was not limited in any way, as to time or otherwise.

¹⁷⁹ Gerard Hogan and David Gwynne Morgan, *Administrative Law in Ireland*, (4th Edn, Round Hall, 2010) at 63.

¹⁸⁰ [1991] 2 IR 539.

¹⁸¹ *Bakar Abdi v Minister for Justice, Equality and Law Reform* [2002] IEHC 179 and *Thompson Ighama v United Nations High Commissioner for Refugees*, unreported, High Court, November 4, 2002. See Hogan and Morgan (n 177) 63.

which was not mentioned in either case— and *Rooney*. Hogan and Morgan contend that in such a competition *O’Neill* would prevail.

On the basis of the foregoing, it is submitted that the administrative rules, known as the ‘*Employment Permit Arrangements, Guide to Work Permit Arrangement for Bulgarian and Romanian nationals*’, which were applied by the Department of Jobs, Enterprise and Innovation –and continue to be applied to third country nationals¹⁸²– were *ultra vires* the Employment Permits Act 2006 and consequently had no legal standing. This precise point was the subject of litigation in the first half of 2012, with five judicial review applications by Romanian nationals challenging decisions of the Minister to refuse the granting of employment permits. In each case the decision to refuse was premised upon the fact that the position of employment was in the ineligible jobs categories or the salary was below €30,000, or both.

In the first of these cases¹⁸³ the applicant was lawfully employed on the basis of her husband’s self-employment.¹⁸⁴ However, his self-employment was uncertain and, at the point at which the work permit application was made, had not yet reached the threshold for lawful self-employment in this State.¹⁸⁵ As a precaution, the applicant applied to the Minister for an employment permit and was refused on the basis that the position –cashier in a Restaurant– was on the ineligible list of jobs in the Guidelines. The applicant –having unsuccessfully exhausted the statutory review process¹⁸⁶– sought an order of *certiorari*, by way of Judicial Review, quashing both decisions on the basis that the rules were *ultra vires* the Act. The case was settled,¹⁸⁷ prior to hearing, with no admission of liability –the Guidelines

¹⁸² The Minister operates a number of schemes which may be accessed at <<http://www.djei.ie/labour/workpermits/guidelines.htm>> including the *Employment Permits Arrangements, Guide to Work Permits* (December 2011) which contains both the €30,000 salary clause and the ineligible job categories at <<http://www.djei.ie/publications/labour/2011/guidelines-workpermits-december11.pdf>>.

¹⁸³ *Z v Minister for Jobs, Enterprise and Innovation* 2012 JR.

¹⁸⁴ This aspect of the case is discussed in this Chapter in section 4.6.

¹⁸⁵ This aspect of the case is discussed in Chapter 1 in section 2.16.

¹⁸⁶ Employment Permits Act 2006, s 13.

¹⁸⁷ 14 March 2012.

remained in force— but the applicant being given an employment permit and her legal costs. A further case followed.¹⁸⁸

Leave¹⁸⁹ to seek judicial review was sought in two further cases,¹⁹⁰ where employment permits were refused, which had somewhat less favourable facts than the first case—both applicants had taken up employment prior to obtaining employment permits, so there was a *clean hands* issue and no statutory appeal had been sought.¹⁹¹ A further complicating factor was that the applicants' employer, concerned about potential prosecution for breaches of the 2003 Act and its onerous penalties, took both applicants off the roster with the intention of terminating their employment shortly thereafter. Faced with the prospect of the loss of their employment, the applicants not only sought leave to challenge the decisions of the Minister— including a challenge to the constitutionality of the Act and its compatibility with the ECHR— but also an injunction restraining both employer State, from taking steps to terminate the applicants' employment. The applications were heard by McGovern J. who granted leave—in spite of the clean hands issue and the failure of the applicant to exhaust the statutory appeal process—and the injunction, on the basis of the legal arguments and the fact that both applicants would otherwise lose, probably irrevocably, their positions of employment, as a consequence of which, neither applicant would be entitled to social welfare. The injunction, ostensibly, suspended the effects of the Employment Permits Act 2006—in respect of the applicants— pending the outcome of the case.¹⁹²

¹⁸⁸ *C v Minister for Jobs, Enterprise and Innovation* 2012 JR.

¹⁸⁹ Judicial Review consists of two stages, the first of which is an ex-parte application for 'leave'.

¹⁹⁰ *C v Minister for Jobs, Enterprise and Innovation & Ors* 2012 JR, *L v Minister for Jobs, Enterprise and Innovation*, 2012 JR.

¹⁹¹ The circumstances in which an applicant may choose Judicial Review over a statutory remedy is discussed in Chapter 3, section 4.2.

¹⁹² The basis for such an order is found in two Supreme Court decisions, *Pesca Valentia Ltd v. Minister for Fisheries* [1985] I.R. 193 and *Denis Riordan v An Taoiseach, The Minister for the Environment and Local Government and The Attorney General (No. 6)*. [2002] 4 I.R. at 404, where it was held that:

'[T]his court accepts that the courts may, in accordance with the decision in *Pesca Valentia Ltd v. Minister for Fisheries* [1985] I.R. 193, grant injunctive relief where it is contended that particular legislation is unconstitutional.'

A fifth case¹⁹³ was taken by another applicant –a young woman who wished to take up employment in social care– in circumstances where she was refused an employment permit by the Minister who, at the same time, granted a permit to the employer, in respect of a third country national for the same type of position, in clear contravention of the applicant’s express right to preference over third country nationals.¹⁹⁴

A further theme which was common to all five cases was the assertion, by the applicants, that the Minister was routinely granting employment permits to other Romanian nationals whose positions of employment were listed in Department’s ineligible jobs categories or were substantially under the €30,000 salary threshold or, in many cases, both. This last ground of challenge was sufficient in its own right to have the Minister’s decisions quashed. For even if a Court were to find that the Guidelines were entirely legal in their *administrative* form, the exercise of those powers by the Minister would nonetheless be governed by the requirements of administrative law and subject to the implied constitutional limitation of jurisdiction in all decision- making which affects rights or duties,¹⁹⁵ defined by the Supreme Court in *Dunne v Minister for Environment, Heritage and Local Government*¹⁹⁶ as the well-established principles governing administrative decisions.¹⁹⁷ The equality or ‘equal treatment’ argument, discussed below, would also play a role.

All of these cases were settled in favour of the applicants –the last three on the basis of mootness¹⁹⁸ brought about by the lifting of restrictions.

¹⁹³ *L v Minister for Jobs, Enterprise and Innovation & Ors* 2012 JR.

¹⁹⁴ Annex VII, art 14(2) (n 147) and Employment Permits Act 2003, s 2(11)(as amended).

¹⁹⁵ *Dunne v Minister for Environment, Heritage and Local Government (No. 1)* [2006] IESC 49.

¹⁹⁶ *ibid.*

¹⁹⁷ By example: reasonableness; the requirement to have regard to all relevant considerations and not having regard to improper considerations and; not acting irrationally. See further *Salafia v Minister for Environment & Others* [2006] IEHC.

¹⁹⁸ *Cunningham v The President of the Circuit Court & anor* [2012] IESC 39, where Clarke J held that:

‘...a court... should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot.’

It would appear that these five cases, together with the sustained pressure being placed on the State by a continuous stream of Article 23¹⁹⁹ cases in the High Court, contributed to the Government's decision²⁰⁰ to grant full access to Romanian and Bulgarian nationals to this State's labour market, prior to 1 January 2014.²⁰¹ It is noteworthy that the Government also took the further step of applying the decision retrospectively, from 1 January 2012. This had two effects: it legitimised any unlawful employment from that date and ostensibly neutralised further litigation.²⁰²

A version of the impugned guidelines continues to be applied to third country nationals and may affect the rights of future EU Member State entrants. This is being challenged in fresh litigation.²⁰³ The distinction between the application of these guidelines to TCNs and A2 citizens is that there is a simple remedy open to the Minister to neutralise any future action by TCNs, simply by making regulations in the form specified in the 2006 Act. This remedy was not open to the Minister in respect of A2 nationals, because of the stand-still clause –discussed above in section 4.3– which restricted Member States to national rules extant at the time of the signing of the Treaty of Accession, 2005.

4.4 Other potential legal challenges to the restriction of the right to work

Article 29 of the Irish Constitution provides an ostensible immunity,²⁰⁴ as against claims of unconstitutionality, for measures 'necessitated'²⁰⁵ by EU

¹⁹⁹ Article 23 is discussed below in this Chapter in section 4.6.

²⁰⁰ By decision dated 22nd July 2012, the said Department announced that:

'The Government decided on 17th July 2012 to cease restrictions on labour market access in respect of Bulgarian and Romanian nationals, to the Irish labour market, with effect from the 1st January 2012'

(<http://www.djei.ie/labour/workpermits/bulgariaromania.htm>).

²⁰¹ The press release stated that one of the factors leading to this decision was:

'legal advice received on the feasibility of continuing transitional arrangements'

(<http://www.djei.ie/press/2012/20120720a.htm>).

²⁰² Certiorari must be sought promptly or, in any event, within three months of the impugned decision being taken. O 84, R. 24(as amended), Rules of the Superior Courts, 1984-2012.

²⁰³ *W v Minister for Jobs, Enterprise and Innovation*, 2012 JR.

²⁰⁴ See Gerard Hogan and Gerard Whyte, *J.M. Kelly, The Irish Constitution*, (4th Edn, Tottell, 2003) 514-526.

membership. The derogations or transitional measures permitted by Annex VII were not necessitated and nor, it is submitted, did they give rise to any ‘obligations’ consequent upon membership of the Union, on the part of Ireland.²⁰⁶ Annex VI and VII left a choice²⁰⁷ to Member States as to whether restrictions, if any,²⁰⁸ would be applied. Therefore, it would appear open to any Romanian or Bulgarian national –provided the Court affirmed *locus standi*²⁰⁹ – who was refused an Employment Permit, or whose right to work was restricted, to challenge section 2(10) of the Employment Permits Act 2003 (as amended by section 3 of the Employment Permits Act 2006) on the basis that the said section unlawfully interfered with the constitutionally protected²¹⁰ right to work or earn a livelihood.²¹¹ The right, of course, is not absolute and may be restricted or regulated for reasons associated with the exigencies of the common good.²¹²

There is little doubt that –provided a Court accorded the right to A2 nationals²¹³ – the restrictions contained in the Employment Permits Acts 2003-2006 would be deemed to constitute an attack on, or interference with, the right to work. The question, to be determined by a Court, is whether or not the interference is unreasonable and unjustified.²¹⁴ Where a Court is

²⁰⁵ See *Crotty v An Taoiseach, Lawlor v Minister for Agriculture* [1990] 1 IR 365, *Greene v Minister for Agriculture* [1990] 2 IR 17.

²⁰⁶ Even taking account of the broad interpretation of ‘necessitated’ in *Lawlor v Minister for Agriculture* [1990] 1 IR 365, where Murphy J. held that the word *necessitated*:

‘...must extend to and include acts or measures which are consequent upon membership of the Community and are in general fulfilment of the obligations of such membership.’

²⁰⁷ Annex VII, arts 1-2

²⁰⁸ Annex VII, art 12

²⁰⁹ The question of *locus standi* for non-nationals to challenge the constitutionality of Acts appears to have been resolved in favour of such persons in a number of cases: *Kostan v Ireland* [1978] ILRM 12], *Laurentiu v Minister for Justice, Equality and Law Reform* [1999] 4 IR 26, *Re Article 26 and the Electoral (Amendment) Bill 1983* [1984] IR 268 and *McGimpsey v Ireland* [1990] 1 IR 110.

²¹⁰ Art 40.3.1. See Hogan and Whyte (n 204).

²¹¹ See *Murtagh Properties v Cleary* [1972] I.R.330 and *Murphy v. Stewart* [1973] I.R. 97.

²¹² *Attorney General v. Paperlink* [1984] ILRM 373 at 385, *Rodgers v. IT&G.W.U.* [1978] I.L.R.M., *Cox v. Ireland* [1992] 2 I.R. 503 and *in the matter of Article 26 of the Constitution and in the matter of the Employment Equality Bill, 1996* [1997] 2 I.R.: where Hamilton C.J. held that:

‘These rights are not absolute rights: the State in its laws may impose restrictions on their exercise where that is required by the exigencies of the common good.’

²¹³ Hogan and Whyte (n 204) suggest that EU citizenship would be determinative.

²¹⁴ In the High Court in *Cox v Ireland* [1992] 2 I.R. 503, Barr J. referred to: ‘...unreasonable and unjustified interference with... personal rights’

satisfied that the Oireachtas is engaged in a balancing exercise –which would almost certainly be argued by the State in any challenge to the Employment Permits Acts– additional considerations arise. The Court, out of deference to the Oireachtas,²¹⁵ applies a higher threshold requiring the challenger to establish that the balance contained in the impugned legislation is:

‘...so contrary to reason and fairness’ as to constitute an unjust attack on an individual's constitutional rights.²¹⁶

This level of deference and the threshold, if applied, would constitute a significant hurdle to any applicant. Though the observations of Hogan J. in *Plesca v HSE & Ors*,²¹⁷ where a Romanian national challenged the constitutionality of s. 2(10), would suggest that it is not insurmountable. Hogan J. observed that the constitutional challenge was a ‘*perfectly good argument*’.²¹⁸ Further, whilst no Court will substitute its own view for that of the Oireachtas, there is ample evidence²¹⁹ that a Court will, nonetheless, apply a proportionality test to legislation –a striking example being *In the*

In the matter of Article 26 of the Constitution and in the matter of the Employment Equality Bill, 1996 [1997] 2 I.R. the Supreme Court referred to an: ‘...unjust attack on some individual's constitutional rights.’

²¹⁵ *In the matter of Article 26 of the Constitution and in the matter of the Employment Equality Bill, 1996* [1997] 2 I.R. the Supreme Court held that the balancing of constitutional rights was:

‘peculiarly within the province of the Oireachtas’.

²¹⁶ *ibid.* The Supreme Court approved the following passage from *Tuohy v. Courtney* [1994] 3 I.R. 1 at 47:

‘... the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.’

²¹⁷ *Plesca v HSE & Ors*, unreported, Hogan J., High Court, 16 February 2011, an application to amend judicial review proceedings to include a challenge to the Constitutionality of s 2(10).

²¹⁸ *ibid.*

²¹⁹ Hogan and Whyte (n 204) at 1272, aver that the Supreme Court in *Re Article 26 and the Matrimonial Homes Bill, 1993* [1994] IR 305, struck down the legislation as ‘... a disproportionate interference by the State with the rights of the married family’. See Brian Foley, *The Proportionality Test, Present Problems*, (JSI Journal, Vol 208, 2008) 67. <[http://www.jsijournal.ie/html/Volume%208%20No.%201/2008\[1\]_Foley_Proportionality.pdf](http://www.jsijournal.ie/html/Volume%208%20No.%201/2008[1]_Foley_Proportionality.pdf)> accessed 31 Oct 2012.

*matter of Article 26 of the Constitution and in the matter of the Employment Equality Bill, 1996*²²⁰, where the Supreme Court held that:

‘In effect a form of proportionality test must be applied to the proposed section. (a) Is it rationally designed to meet the objective of the legislation? (b) Does it intrude into constitutional rights as little as is reasonably possible? (c) Is there a proportionality between the section and the right to trial in due course of law and the objective of the legislation?’²²¹

In order to succeed on this ground an applicant would have to show that s 3(10) of the Employment Permits Act 2003 was impermissibly wide²²² or disproportionate.²²³ Another associated constitutional right –the right to equal treatment²²⁴– is also worthy of some small consideration here as there is a line of Supreme Court authority which suggests that discrimination may arise where persons in the same ‘class’ are not treated in the same way. In *Brennan v Attorney General*²²⁵ Pringle J. held that:

‘Therefore it would appear that there is no unfair discrimination provided every person in the same class is treated to same way.’²²⁶

In *In Re Article 26 of the Constitution & Section 5 & Section 10 of The Illegal Immigrants (Trafficking Bill) 1999*,²²⁷ Keane J. held that:

²²⁰ [1997] 2 IR 231.

²²¹ *ibid.* at 245.

²²² The Supreme Court in *Cox v Ireland* [1992] 2 I.R. 503, held that the provisions of s 34 of the Offences Against the State Act, 1939, were ‘impermissibly wide and indiscriminate.’

²²³ Foley avers that in *Cox* the Supreme Court struck down provisions of the Offences Against the State Act, 1939 as being, essentially, a disproportionate violation on *inter alia* the plaintiff’s property rights and right to earn a livelihood. Brian Foley, *The Proportionality Test, Present Problems*, (JSI Journal, Vol 208, 2008) 67.

²²⁴ Constitution, art 40.1

²²⁵ *Brennan -v- Attorney General* [1983] I.L.R.M.

²²⁶ *ibid.* at 419. Cited with approval by Hamilton C.J. in *Lowth -v- The Minister for Social Welfare* [1998] I.R.321 at 341 and by Keane C.J. in *In Re Article 26 of the Constitution & Section 5 & Section 10 of The Illegal Immigrants (Trafficking Bill) 1999*.

²²⁷ *In Re Article 26 of the Constitution & Section 5 & Section 10 of The Illegal Immigrants (Trafficking Bill) 1999*.

‘...that the classification must be for a legitimate legislative purpose, that it must be relevant to that purpose, and that each class must be treated fairly.’²²⁸

To the forefront of any argument that A2 nationals were discriminated against or treated unfairly is the fact that A8 nationals –who, arguably, constitute the same ‘class’ as A2 nationals– were not subject to any restrictions in respect of the right to take up employment in this State upon accession and, further, were not subjected to post-accession restrictions in 2008 when Ireland was faced with serious disturbances in its labour market. The collapse of the Irish economy and significant increase in unemployment may, arguably, have warranted the imposition of restrictions of A8 nationals. Spain brought in post-accession restrictions in respect of A2 nationals following significant growth in unemployment. On the other hand, a court might differentiate between A2 and A8 nationals on the basis that the former posed a greater risk to the labour market or the social welfare system.

The European Convention on Human Rights Act, 2003,²²⁹ affords further, albeit limited,²³⁰ scope –an impugned Act remains valid pending legislative change²³¹– to challenge section 2(10) by way of a declaration of incompatibility,²³² provided that no other legal remedy is adequate and available.²³³ This latter provision is interpreted narrowly and can be problematic –sometimes fatal– if an applicant does not exhaust all other legal remedies.²³⁴

²²⁸ *ibid.*

²²⁹ ECHR Act 2003, s 5.

²³⁰ A declaration of unconstitutionality amounts to a ‘judicial death certificate,’ per Henchy J. in *Murphy v AG* ([1982] I.R. 241 at 307, whereas a declaration of incompatibility ‘would afford the Oireachtas a (relatively) leisurely opportunity to deliberate on the type of future legislative changes that would be necessary to ensure conformity with such a declaration’, per Hogan J. in *S. [a minor] & Ors -v- MJELR & Ors* [2010] IEHC 31.

²³¹ ECHR Act 2003, s 5(2)(a).

²³² ECHR Act 2003, s 5(1).

²³³ ECHR Act 2003, s 5(1).

²³⁴ In *Carmody v Minister for Justice, Equality and Law Reform* [2009] IESC 71, the Supreme Court held that:

‘s. 5(1) in conferring on the High Court, or this Court on appeal, jurisdiction to make a declaration concerning a statutory provision or rule of law only arises “where no other legal remedy is adequate and available”.

Although the most obvious starting point for an A2 citizen is Article 14 of the ECHR –which prohibits discrimination on the grounds of national origin– it cannot be engaged on a stand-alone basis²³⁵ and does not guarantee access to a particular profession.²³⁶ Nor does the Convention guarantee the right to work.²³⁷ The European Court of Human Rights, however, appear willing to protect the right to a ‘professional’ private life,²³⁸ acknowledging in *Niemietz v Germany*²³⁹ that Article 8 encompassed ‘activities of a professional or business nature.’²⁴⁰ This reasoning was applied in *Sidabras and Dziautas v Lithuania*²⁴¹ where it was held that a far-reaching ban on taking up private sector work did affect private life²⁴² and that, even having regard for the legitimacy of the aims pursued by the ban,²⁴³ such a ban constituted a disproportionate measure.²⁴⁴ The Court relied upon the right to work²⁴⁵ provisions of the European Social Charter.

It is thus submitted that, whilst there is little doubt that the State would argue, by way of defence, that the Act was necessary²⁴⁶ for the economic well-being of the country there is an arguable case that the Employment

See further, the observations of Hogan J. in *S. [a minor] & Ors -v- MJELR & Ors* [2010] IEHC 31:

‘... by virtue of the view which I have taken of the jurisdictional limits of the power to grant a declaration of incompatibility contained in s. 5(1) ... the court can only grant the applicants such a declaration in circumstances where their constitutional remedies have been exhausted.’

²³⁵ *Thlimmenos v Greece* (Application no. 34369/97) 6/4/2000 at para 40. *Sidabras and Dziautas v Lithuania* 55480/00, 27/10/2004 at para 72. See further: Case C 450/06 *Varec* [2008] ECR I 581, paragraph 48).

²³⁶ *Thlimmenos v Greece* (Application no. 34369/97) 6/4/2000 at para 41:

‘The Court considers that such difference of treatment does not generally come within the scope of Article 14 in so far as it relates to access to a particular profession, the right to freedom of profession not being guaranteed by the Convention.’

²³⁷ *Pancenko v Latvia* Application no. 40772/98 28 October 1999:

‘The Court recalls first that the Convention does not guarantee, as such, socio-economic rights, including... the right to work.’

²³⁸ See *Mólka v. Poland* (dec.), no. 56550/00, ECHR 2006-IV and *Campagnano v. Italy*, no. 77955/01, § 53, ECHR 2006-IV. Further, in a partly dissenting judgment in *Lykourazos v. Greece* (Application no. 33554/03) 15 June 2006, Spielmann and Tulkens JJ. referred to: ‘the Court’s recent case-law, which has recognised the right to a private professional life.’

²³⁹ Judgment 16th December 1992 series A No. 251

²⁴⁰ *Thlimmenos v Greece* (n 225) at paras 33-34:

‘There appears, furthermore, to be no reason of principle why... the notion of ‘private life’ should be taken to exclude activities of a professional or business nature...’

²⁴¹ 55480/00, 27/10/2004.

²⁴² *ibid.* para 47.

²⁴³ *Siddabras* (n 241) at paras 55-60.

²⁴⁴ *ibid.* para 62.

²⁴⁵ ECHR Act 2003, arts 1 and 2.

²⁴⁶ ECHR Act 2003, art 8(2).

Permits Acts 2003-2006, insofar as they affected A2 nationals by restricting their right to seek employment based upon their nationality, violated Article 8 and 14 of the European Convention on Human Rights. A declaration of incompatibility was sought in several of the Judicial Review cases, which were already discussed above. However, as all of those cases were settled in favour of the applicant prior to the substantive hearing, the issue awaits another case, most likely from a future Member State entrant.²⁴⁷ One of the obvious shortcomings in securing a declaration of incompatibility is the impugned provision's continued application remains unaffected.

Failure to secure a declaration of incompatibility at national level²⁴⁸ would permit an applicant to bring his or her case to the European Court of Human Rights. Such a case, were successful, would have significant ramifications for the European Union, particularly in light of its commitment to accede to the Convention.²⁴⁹

One legal argument which was ventilated –albeit in an interlocutory application– before the High Court in Ireland was the question of whether or not the reasoning of the Court of Justice in *Zambrano*²⁵⁰ could be applied to Romanian nationals. The essence of *Zambrano* was that EU citizen children, with third country national parents, who had no right of residence, would be forced to leave the Union in the absence of their parents being granted residency rights. In *Hrisca v Minister for Social Protection and Ors*²⁵¹ the applicant –a formerly self-employed Romanian national and father of a citizen Irish child who was refused social welfare²⁵²– argued that the effect

²⁴⁷ This issue also arises in two cases due to come before the High Court in late 2013 or early 2014, *P v Minister for Social Protection* 2013 JR and *R v Minister for Social Protection* 2013 JR, where the respondent is refusing to refund the applicants PRSI contributions or to grant the applicants rights based upon the PRSI contributions.

²⁴⁸ National remedies would have to be fully exhausted, requiring a High Court and Supreme Court hearing.

²⁴⁹ Art 6(2) TEU, as amended by the Lisbon Treaty. See generally: Groussot, Xavier, Lock, Tobias and Pech, Laurent, *EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14th October 2011* (November 7, 2011). Available at SSRN: <<http://ssrn.com/abstract=1958003>> or ,[http://dx .doi.org/10.2139/ssrn.1958003](http://dx.doi.org/10.2139/ssrn.1958003)> accessed 6 August 2013.

²⁵⁰ Case C-134/09 *Zambrano* [2011] ECR I-01177.

²⁵¹ Unreported, High Court, White J. 16 February 2012.

²⁵² This aspect of the case is discussed in detail in Chapter 1, section 2.10.

of decision in *Zambrano* was that third country nationals had more favourable rights than Romanian nationals and that this was contrary to Article 14 of Annex VII, which provided that:

‘Romanian migrant workers and their families legally resident and working in another Member State or migrant workers from other Member States and their families legally resident and working in Romania shall not be treated in a more restrictive way than those from third countries resident and working in that Member State or Romania respectively. Furthermore, in application of the principle of Community preference, migrant workers from third countries resident and working in Romania shall not be treated more favourably than nationals of Romania.’

On the basis of *Zambrano*, third country nationals who were the primary carers of Irish citizen children derive a right to reside and take up employment in the State. Article 14 –drafted to ensure compliance with the principle of Community Preference²⁵³– provides that Romanian nationals cannot be treated in a more restrictive way than TCN’s.

The question of whether or not the principle of community preference is an enforceable legal requirement depends upon the context in which it is invoked. The principle is enshrined in Regulation 1612/68.²⁵⁴ However, the Court of Justice in *Hellenic Republic v Council of the European Union*²⁵⁵ held that:

²⁵³ Defined by the Commission in *Green Paper on an EU approach to managing economic migration* COM/2004/0811 final, para 2.2.1:

‘Member States will consider requests for admission to their territories for the purpose of employment only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower resident on a permanent basis in that Member State and already forming part of that Member State’s regular labour market’.

²⁵⁴ Regulation 1612/68, art 19 (now found in Regulation 492/2011, art 17).

‘The Member States shall examine with the Commission all the possibilities of giving priority to nationals of Member States when filling employment vacancies in order to achieve a balance between vacancies and applications for employment within the Community. They shall adopt all measures necessary for this purpose.’

²⁵⁵ Case C-353/92 *Hellenic Republic v Council of the European Union* [1994] I-03411, at para 50:

‘It is sufficient to note in that regard that whilst the principle of Community preference may be taken into account by Community institutions as an element in the common agricultural policy, it nevertheless cannot affect their decision until all the economic factors influencing

‘Community preference is not in any case a legal requirement the violation of which would result in the invalidity of the measure concerned.’²⁵⁶

Further, a Council Resolution of 1994²⁵⁷ stated that:

‘The principles are not legally binding on the Member States and do not afford a ground for action by individual workers or employers.’²⁵⁸

However, the Court of Justice, as noted by Advocate General Jacob in *Hellenic*,²⁵⁹ has enforced certain provisions of the Acts of Accession, which were specifically intended to ensure that the principle of Community preference was observed in trade within the Community.²⁶⁰ In *Union Française de Céréales*²⁶¹ the Court of Justice enforced such a provision, holding that:

‘If it were accepted that the exporter had to bear that loss... he would be in an unfavourable competitive situation in relation to a seller in a third country... Such a result would be incompatible with the principle of Community Preference, which the Act of Accession was intended to promote.’²⁶²

In *Sommer*²⁶³ the Court of Justice considered the effects of the preference provisions in Article 14 of Annex VII and put the matter beyond any doubt, holding that the effect of community preference was to grant rights at least the same rights to Bulgarian nationals as were granted to third country nationals and, in addition, preference to the Bulgarian national:

world trade have been evaluated. As the Advocate General rightly observes in paragraphs 78 to 82 of his Opinion,

²⁵⁶ *ibid.* at para 51.

²⁵⁷ Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment [Official Journal C 274 of 19.09.1996].

²⁵⁸ *Ibid.* at para (vi).

²⁵⁹ (n 255).

²⁶⁰ Citing Case 6/78 *Union Française de Céréales v Hauptzollamt Hamburg-Jonas* [1978] ECR 1675 and Case 119/86 *Spain v Council and Commission* [1987] ECR 4121.

²⁶¹ Case 6/78 *Union Française de Céréales* [1978] ECR 1675.

²⁶² *ibid.* at para 4.

²⁶³ Case C-15/11 *Sommer* [2012] not yet reported in ECR.

‘Accordingly, if access to the Austrian labour market must be granted to a student who is a third-country national according to the rules laid down in Directive 2004/114, such access must be granted to a Bulgarian student under conditions which are at least as favourable and, in addition, that Bulgarian student must be given preference over a student who is a third-country national.’²⁶⁴

The applicant in *Hrisca* argued that the unforeseen and unintended effect of *Zambrano* was that he was entitled to lawfully reside and take up employment in the State without an employment permit. White J., who heard the matter over almost three days in December 2011, gave a written judgment on the 16 of February 2012, determining that the *Zambrano/Article 14* point should be referred to the Court of Justice by way of Preliminary Reference:

‘I certainly am of the view that the issues raised in the *Zambrano* case and the *Teixeira* case have implications for a Romanian national EU citizen, and there should be a referral to the European Court of Justice on those matters for a preliminary opinion.’²⁶⁵

On 28 February 2012, the Irish Government announced that Romanian and Bulgarian nationals who were parents of Irish citizen children would no longer require an employment permit.²⁶⁶ The *Hrisca* case was subsequently settled so the issue remains to be determined in another case.

The application of *Zambrano* to Romanian nationals had been briefly canvassed before the High Court prior to *Hrisca* in the *Plesca*²⁶⁷ case where an amendment to pleadings –which were issued before the *Zambrano* judgment was given– was sought to include a *Zambrano*-type argument.

²⁶⁴ *ibid.* at para 35.

²⁶⁵ *Hrisca* (n 216).

²⁶⁶ Department of Jobs, Enterprise and Innovation, *Employments Permit Information for Romanian Nationals* March 2012, ‘Romanian nationals who do not require and employment permit.’

‘From the 28 February 2012, a Romanian national resident in the State who is the parent of an Irish citizen child.’

²⁶⁷ *Plesca v HSE* (n 217).

The child in question in *Plesca* was not, however, an Irish citizen. This might have been a fatal flaw in another case. There were, nonetheless, difficult factors in the case which meant that the child had to remain in this State with his third country national mother, while the applicant, his father, was forced to leave the State to find work in the UK, having been refused social welfare in Ireland due to the absence of an employment permit. Hogan J. permitted an amendment based on the child's EU citizenship. The State in *Plesca*, faced with difficult legal and factual issues, permitted the applicant to take up employment without an employment permit.

Another striking weapon in the arsenal of any future applicant seeking to challenge restrictions on the right to work is the principle of proportionality. This principle, with its 'long lineage'²⁶⁸ of Court of Justice case law²⁶⁹ and Treaty provision,²⁷⁰ is now 'well established in EU law',²⁷¹ and, as noted above, ECHR law and national law. That the principle is applied to derogations, such as Annex VII, cannot be in any doubt. Such derogations, as noted earlier in *Apostolides*:

'...must be interpreted restrictively with reference to the Treaty provisions in question and must be limited to what is absolutely necessary in order to attain its objective'.²⁷²

As with the domestic version of the principle, the Court of Justice is reluctant to substitute its judgment for that of the administration or, as in this instance, the choice of the Member State. However, where breaches of the fundamental freedoms are at issue the Court of Justice applies the proportionality test more intensively²⁷³ and is willing to intrude into the

²⁶⁸ Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law*, (2nd Edn. Cambridge University Press, 2010) 367.

²⁶⁹ *ibid.* See Case C-11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getriebe und Futtermittel* [1970] ECR 1125.

²⁷⁰ TEU, art 5(4).

²⁷¹ Craig and De Burca (n 94) at 526.

²⁷² Case C-420/07 *Apostolides* [2009] ECR I-3571, para 35. See further case law (n 70). See further in the context of a Member State, *Zalewska v Department of Social Development* [2008] UKHL 67.

²⁷³ Craig and De Burca (n 94) 532.

balance of social and economic values, as is clear from the judgement in *Viking Line*:²⁷⁴

‘In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty...²⁷⁵ However, in *Schmidberger* and *Omega*, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality...²⁷⁶

This applies equally to the balance struck by either the EU institutions or national authorities. The test may be applied in respect of both *Union* – probably unstateable²⁷⁷ in respect of a challenge to transitional measures – and *Member State* action falling within the scope of Union law. Leaving aside domestic challenges to their legality, perhaps the most damning obstacles which faced an A2 national seeking an employment permit was the minimum salary level of €30,000 and the lengthy list of ineligible job categories,²⁷⁸ the combined effect of which was to exclude a sizeable proportion of A2 nationals from obtaining employment in this State. On the other hand, the State expressly reserved such positions for the anticipated influx of A8 nationals²⁷⁹ and latterly, was faced with a significant downturn in the economy and an exponential rise in unemployment. However, this would surely justify a restriction on numbers rather than wholesale

²⁷⁴ Case C-438/05 *International Transport Workers Federation and Finnish Seaman's Union v Viking Line ABP and OU Viking Line Eesti* [2007] ECR I-10779.

²⁷⁵ *ibid.* at para 45.

²⁷⁶ (n 274) at para 46.

²⁷⁷ On the basis of the ruling in *Levantina* (n 63) where the Court of Justice held that it had no jurisdiction to consider the legality of such provisions.

²⁷⁸ (n 132).

²⁷⁹ (n 128-129).

exclusion of categories and in that sense, arguably, fails the proportionality test.

4.5 Derogation permitted in respect of Directive 2004/38

Article 9 of the Annexes provides that Member States may derogate from Directive 2004/38, insofar as provisions of Directive 2004/38 which take over provisions of Directive 68/360/EEC may not be dissociated from those of Regulation 1612/68 whose application is deferred. This permits Member States to derogate from those provisions to the extent necessary for the application of the relevant paragraphs²⁸⁰ of the Annexes.

On first reading, this appears broad in scope, but closer examination reveals that it is in fact somewhat limited in breadth as derogations are only permitted in respect of Articles 1-6 of Regulation 1612/68. Of further significance, Articles 1-6 of Regulation 1612/68 address the rights of ‘workers’, not self-employed persons.²⁸¹ Articles 6 onwards, of the said Regulation²⁸² are not subject to derogation. The right of family members, to join a worker or self-employed person and take up employment, was originally found in Articles 10 and 11²⁸³ of Regulation 1612/68, which were repealed by Directive 2004/38 and ostensibly subsumed into that Directive. Article 11 appears to have been substantially transposed into, or ‘superseded’²⁸⁴ by, Article 23 of the Directive.²⁸⁵

Article 8 of the Treaty Annexes permits only a very narrow derogation in respect of Article 23 and, of particular significance to the family members

²⁸⁰ Paragraphs 2 to 5 and 7 and 8.

²⁸¹ Joined cases C-147/11 *Czop* and C-148/11 *Punakova* (not yet reported in ECR). Discussed in Chapter 1, section 2.10.

²⁸² Now repealed and replaced by Regulation 449/2011.

²⁸³ Art 11 provided that:

‘Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.’

²⁸⁴ Craig and De Burca (n 94) 748.

²⁸⁵ Craig and De Burca aver that Art 23 replaced the ‘relevant provisions of Regulation 1612/68’, (n 94) 746.

of Romanian and Bulgarian nationals wishing to access the labour market of other Member States, the derogation only impinges upon the right of family members of *workers* to take up employment as *workers*. The provisions found in Article 23, which permits the family members of the self-employed, students or those who have sufficient resources, to take up employment (without an employment permit), are not affected by the derogation. Some Member States, including Ireland, have not fully understood this nuance. It is also important, at this juncture, to recall that derogations, whilst permitted under Union law, are interpreted restrictively by the Court of Justice of the European Union.

4.6 The Article 23 Exceptions

Article 23 of Directive 2004/38 thus provides²⁸⁶ extremely important derivative rights to family members²⁸⁷ of Romanian and Bulgarian nationals, and because a very limited derogation is permitted by the Treaty of Accession 2005, the Article attains considerable importance and warrants close examination. Article 23 provides that:

‘Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.’

The first point of note is that this provision covers third-country nationals.²⁸⁸ In order to rely upon Article 23 one must be the ‘family member’ of a Union citizen –who moves to or resides in a Member State other than which he is a national²⁸⁹– the latter which is defined as being any person who has

²⁸⁶ Craig and De Burca (n 94) aver that Art 23 ‘guarantees the right to take up employment...’ 746.

²⁸⁷ See generally, Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law*, (2nd Edn. Cambridge University Press, 2010) 464-473.

²⁸⁸ To work only in the Member State in which spouse is employed (Case C-10/05 *Mattern* [2006] ECR I-3145). See Craig and De Burca (n 92) 748.

²⁸⁹ Directive 2004/38, art 3(1). This limitation was addressed in Case C-434/09 *McCarthy* [2011] ECR I-03375.

nationality of a Member State.²⁹⁰ *Family member*²⁹¹ is defined as the spouse,²⁹² partner,²⁹³ direct descendants (who are under 21) or dependents²⁹⁴ and dependent direct relatives.²⁹⁵ Significantly, the definition does not end there: point 6 of the Preamble to the Directive provides that, in order to maintain family unity in a broader sense, the situation of those who fall outside this definition must be examined by the host Member State on the basis of its own legislation, their relationship with the Union citizen or any other circumstances taken into account, such as their financial or physical dependence on the Union citizen. Although this provision affords Member States a ‘wide discretion’,²⁹⁶ it must, however be exercised ‘within the limits of the discretion’²⁹⁷ set by the Directive. The distinction between those who fall within the definition of family member and those who fall outside is that the former’s rights –irrespective of nationality²⁹⁸– are automatically conferred by the Directive,²⁹⁹ whereas the latter’s rights, such as they are, merely have to be ‘facilitated’.³⁰⁰

A *right of residence* may be derived from a number of articles in the Directive. Article 6(1) creates an unconditional right of residence for three

²⁹⁰ Directive 2004/38, art 2(1).

²⁹¹ Defined in Directive 2004/38, art 2(2).

²⁹² Directive 2004/38, art 2(2)(a).

²⁹³ Directive 2004/38, art 2(2)(b):

‘the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;’

²⁹⁴ Directive 2004/38, art 2(2)(c):

‘the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);’

²⁹⁵ Directive 2004/38, art 2(2)(d):

‘the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);’

²⁹⁶ Case C-83/11 *Rahman* (not yet published in ECR), at para 84.

²⁹⁷ *ibid.* where the CoJEU held that:

‘None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term ‘facilitate’ and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness.’

²⁹⁸ Case C-127/08 *Metock and Others* [2008] ECR I-6241 para 95.

²⁹⁹ Point 6 in the Preamble of Directive 2004/38 refers to those:

‘not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State...’

³⁰⁰ *Rahman* (n 296), para 19.

months, predicated solely upon citizenship of the Union.³⁰¹ This provision is not subject to derogation and cannot be denied to Romanian nationals, who were held by the Court of Justice in *Jipa*³⁰² to enjoy:

‘...the status of a citizen of the Union under Article 17(1) EC and may therefore rely on the rights pertaining to that status.’³⁰³

Romanian and Bulgarian nationals, exercising a right of residence, cannot themselves, rely upon Article 6(1) of the Directive to take up employment in the absence of an employment permit. However, it is submitted that a *family member*³⁰⁴ of a Romanian or Bulgarian citizen exercising a right of residence for the initial three-month period could, on the basis of Article 23, take up employment in this State without an employment permit. Article 23 does not set down any minimum period of residence for the enjoyment of the right. Therefore there is no reason why the right could not be enjoyed by a family member the day after the Union citizen’s arrival into a Member State. The lawfulness of the employment would be limited to three months and it could not be asserted that the family member had been admitted to the labour market, for the purpose of the Annexes, as this requires 12 months employment.³⁰⁵ However, having been lawfully employed –and now ‘involuntarily’ unemployed– as a ‘worker’ for a period of less than 12 months, the family member would retain that status, under the Directive, for a period of not less than six months and be entitled to social welfare during that period.³⁰⁶ A conflict between EU and national law would, however, arise, as the family member, shorn of the right to take up employment after the three month period, would be deemed incapable of meeting an integral part of the Irish statutory criteria –namely being ‘available’ for work³⁰⁷ – for

³⁰¹ ‘Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.’

³⁰² Case C-33/07 *Jipa* [2007] ECR I-5157.

³⁰³ *ibid.* at para 17.

³⁰⁴ Wyatt et al aver that this would not apply to third Country nationals. Alan Dashwood, Michael Dougan, Barry Roger, Eleanor Spevanta and Derrick Wyatt, *European Union Law* (6th Ed, Oxford and Portland, Oregon, 2011) 482.

³⁰⁵ Annex VII, art 2.

³⁰⁶ Directive 2004/38, art 7(3)(c).

³⁰⁷ Social Welfare Consolidation Act 2005, s 141.

Jobseeker's Allowance.³⁰⁸ The provisions of the Directive, being unconditional and sufficiently precise, would have to prevail if they are relied upon before an Irish Court.³⁰⁹ It is further submitted that there is no reason why the rights –a right of residence and to housing³¹⁰– identified by the Court of Justice in *Teixeira*³¹¹ would not apply to a family member whose child commenced education in this State during the three month period and remained in education thereafter.³¹²

Article 7 provides a right of residence for: those who are workers or self-employed persons;³¹³ those who have sufficient resources³¹⁴ –irrespective of the source of those resources³¹⁵– and comprehensive sickness cover;³¹⁶ those who are sufficiently resourced students³¹⁷ with comprehensive sickness cover. Article 7 also provides for a right of residence for family members of Union citizens who come under any of the foregoing headings.³¹⁸ It is only the first category of persons –workers– who are restricted by the derogations.³¹⁹ All other categories are entirely unaffected, meaning that this broad spectrum of persons may be joined by a family member ‘who shall be entitled to take up employment or self-

³⁰⁸ This point was considered in *Solovastru v Minister for Social Protection & ors* [2011] IEHC 532.

³⁰⁹ Case C-103/88 *Fratelli* [1989] ECR 1839, at para 33:

‘Administrative authorities... are under the same obligation as a national court to apply the provisions ... of the Directive and to refrain from applying provisions of national law which are inconsistent with them.’

³¹⁰ This point is discussed in detail in Chapter 1, section 2.2.

³¹¹ Case C-480/08 *Teixeira* [2010] ECR I-1170.

³¹² *cf* the House of Lords decision in *Zalewska v Department of Social Development* [2008] UKHL 67, para 30, where it was held that access to EU Treaty rights for workers was contingent upon satisfaction of national measures that give access to its labour markets. This black-and-white approach is highly questionable, ignoring the significant rights conferred on A8 and A2 nationals by Article 23.

³¹³ Directive 2004/38, art 7(1)(a).

³¹⁴ Directive 2004/38, art 7(1)(b). Sufficient resources for both themselves and family members.

³¹⁵ Case C-408/03 *Commission v Belgium* [2006] ECR I-2647. See Chalmers et al (n 268) 451.

³¹⁶ Insurance in any Member State will suffice. See Case C-413/99 *Baumbast v Secretary of State for Home Department* [2002] ECR I-7091.

³¹⁷ Directive 2004/38, art 7(1)(c).

³¹⁸ Directive 2004/38, art 7(d).

³¹⁹ European Commission, *Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty* (n 51), where the Commission averred, at para 1.3, that:

‘transitional arrangements can only be applied to workers but not to self-employed persons or any other category of EU citizens.’

employment.³²⁰ Put simply, a self-employed Romanian national working in a Member State may be joined by a family member in the host Member State and that family member may take up employment as a worker without having to hold an employment permit. The family member is exempt from the Accession Treaty derogations. The same is so for a family member joining a student or self-sufficient person. That family member does not require an employment permit. However, these important rights have been wholly denied to Romanian and Bulgarian nationals in this State.

Article 23 of Directive 2004/38 was originally transposed into Irish law as Article 18(1)(b) of the *European Communities (Free Movement of Persons) Regulations 2006*,³²¹ which provided that Union citizens and their family members³²² –third country nationals included³²³– were permitted:

‘notwithstanding anything in the Employment Permits Act 2003 (No. 7 of 2003), to seek and enter employment, to carry on any business, trade or profession and to have access to education and training in the State in the like manner and to the like extent in all respects as Irish citizens’.

This correctly transposed Article 23 and, had it remained so, would have permitted family members of Romanian and Bulgarian citizens who had a right to reside, other than as a worker, to take up employment in this State without an employment permit. However, the *European Communities (Free Movement of Persons) Regulations 2006* were revoked³²⁴ and replaced by the *European Communities (Free Movement of Persons) (No.2) Regulations 2006*,³²⁵ Article 18(1)(b) of which now contained a proviso:

‘without prejudice to any restriction on that entitlement contained in the Employment Permits Acts 2003 and 2006, to seek and enter

³²⁰ Directive 2004/38, art 23.

³²¹ SI 226 of 2006.

³²² SI 656 of 2006, art 3(1).

³²³ SI 656 of 2006, art 3(1)(b).

³²⁴ *European Communities (Free Movement of Persons) Regulations 2006 (No. 2)* SI 656 of 2006, art 27.

³²⁵ SI 656 of 2006.

employment in the State in the like manner and to the like extent in all respects as Irish citizens’.

This broad amendment had the effect of *unlawfully* bringing the Romanian and Bulgarian *family members* of workers –in the case of workers, lawfully so– the self-employed, the self-sufficient and students within the ambit of the Employment Permits Acts 2003-2006. As a consequence those who would otherwise have been able to rely upon the provisions of Article 23 of Directive 2004/38 to take up employment without an employment permit were required to have an employment permit. It also purported to apply the provisions of the Employment Permits Acts 2006³²⁶ to Romanian and Bulgarian nationals. This amendment did not affect the citizens of any other Member State and came into effect on 1 January 2007, the day of Romania and Bulgaria accession to the European Union.

Ireland was not unique in this error. The United Kingdom made a similar error prior to accession in 2007.³²⁷ Section 2(8) of the Accession (Immigration and Worker Authorisation) Regulations 2006³²⁸ rendered the family members of all Romanian and Bulgarian nationals subject to ‘worker authorisation’. However, this section was promptly amended in November 2007, by the Accession (Worker Authorisation and Worker Registration) (Amendment) Regulations 2007,³²⁹ to provide that:

‘A national of Bulgaria or Romania is not an accession State national subject to worker authorisation during any period in which he is a family member of —

...

(b)an accession State national subject to worker authorisation who has a right to reside under regulation 14(1) of the 2006 Regulations by virtue of being a self-employed person, a self-sufficient person or a

³²⁶ Doyle, Oran, *Conformity Study for Ireland, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, (Milieu Ltd. and Europa Institute, Edinburgh University, 2008).

³²⁷ Nicola Rogers, Garden Court Chamber, London, *EU Seminar Notes* (Nov 2007) paras 104-106.

³²⁸ SI 3317 of 2006.

³²⁹ SI 3012 of 2007.

student falling within sub-paragraph (c), (d) or (e) of regulation 6(1) of those Regulations (“qualified person”).’

In the explanatory note to the 2007 regulations it was acknowledged by the authorities in the UK that the restrictions contained in the 2006 regulations went beyond the scope of the derogation.³³⁰

Serious ramifications –in respect of residency, social welfare entitlements and employment law remedies– arise for those affected by the unlawful transposition of Article 23 of Directive 2004/38. Those who would otherwise be entitled to take up employment lawfully without a permit are deemed to be unlawfully employed. As a consequence, under national law, the substantive illegality of the contract has the effect of denying those persons EU residency rights,³³¹ social welfare entitlements³³² and employment law remedies³³³ in respect of all periods of employment prior to 1 January 2012. This has resulted in a number of legal challenges, in respect of decisions – the majority of which concern social welfare entitlements– taken by State agencies on foot of the unlawful transposition. The State agencies in question, primarily the Department of Social Protection, relied upon the stated position of the Department of Jobs, Enterprise and Innovation in respect of the lawfulness of employment.

One of the first cases³³⁴ to challenge the failure of the State to properly transpose Article 23 was *A v Minister for Jobs, Enterprise & Innovation, Ireland and the AG*.³³⁵ The applicant was a Romanian national –and spouse of a self-employed Romanian national– who took up employment as a worker in 2007, without an Employment Permit. In 2010, Child Benefit,

³³⁰ *ibid.* The Explanatory Note states that:

‘The labour market derogation also allows Member States to restrict access to their labour markets by family members of Bulgarian and Romanian workers. The provision in the 2006 Accession Regulations dealing with this restriction also covers the family members of Bulgarian and Romanian nationals who are self-employed, self-sufficient or students. This goes beyond the scope of the derogation.’

³³¹ Art 16 of Directive 2004/38 requires ‘legal’ residence (n 22).

³³² *FAS v Minister for Social Welfare* (n 25).

³³³ *Hussein v Labour Court* (n 34).

³³⁴ The Article 23 argument arose in a number of earlier judicial reviews in 2011.

³³⁵ 2011 JR.

paid in respect of the applicant's first child, was stopped by the Department of Social Protection on the grounds that the applicant's employment was unlawful. An appeal³³⁶ was made to the Social Welfare Appeals Office who refused to overturn the decision without evidence –which was not forthcoming– from the Department of Jobs, Enterprise & Innovation, of an entitlement to work without an employment permit. A statutory revision of decision³³⁷ was sought on the basis that the applicant was entitled to Child Benefit on foot of her own employment or her husband's self-employment and was successful. In 2010 the applicant applied for and was refused Maternity Benefit³³⁸ on the basis that her PRSI contributions for 2008 were invalid in the absence of an Employment Permit.

The applicant then sought a letter from the respondent –the Department of Jobs, Enterprise & Innovation– confirming her right to work without a permit. The respondent's position was that it was only from 1 January 2010, that a Romanian national who was the spouse/dependent of a self-employed Romanian national, legally self-employed in the State for an uninterrupted period of 12 months, would not require an employment permit. This had the effect of invalidating the applicant's PRSI contributions from 2007-2010 and disqualifying her from Maternity Benefit, as well as exposing the applicant to potential criminal sanctions.³³⁹ The decision was challenged on a number of grounds, the first of which being that the respondent had conflated the rights of the spouses of 'workers' to take up employment in the State –set out in Article 8 of Annex VII– with the right of spouses of self-employed persons, which is governed not by Article 8 of the Annexes but Article 23 of Directive 2004/38. The second ground was a challenge in respect of the State's failure to properly transpose Article 23 of the Directive. A further ground was the *Zambrano* argument³⁴⁰ as the applicant was the primary carer of a citizen Irish child.³⁴¹

³³⁶ Social Welfare Consolidation Act, 2005, s 311.

³³⁷ Social Welfare Consolidation Act 2005, s 301.

³³⁸ Social Welfare Consolidation Act 2005, ss 49-51.

³³⁹ Employment Permits Act 2006, s 32(3) which provides that persons contravening the Act can be prosecuted for up to two years after an offence has been committed.

³⁴⁰ This is discussed above in this Chapter at section 4.4.

³⁴¹ Ireland applied *Zambrano*-type rights from 28 February 2012.

The case brought into play a number of important principles of EU law: the binding nature of Directives on all ‘authorities’ of Member States,³⁴² the right to rely upon the provisions of an improperly transposed Directive,³⁴³ provided they are unconditional and sufficiently precise³⁴⁴ and grant rights to the applicant ; the right to hold any emanation of the State accountable as though it were the State itself;³⁴⁵ the right to damages,³⁴⁶ where there is a causal link³⁴⁷ and; the obligation upon authorities to dis-apply conflicting provisions of national law.³⁴⁸

The case was settled, prior to hearing, in favour of the applicant, with the respondent acknowledging that the applicant’s employment was lawful, thus entitling her to the Maternity Benefit which she had been refused, the right to remain in employment without an Employment Permit and, significantly, the right to count the period of time from which she derived the right to work from Article 23 as reckonable for the purpose of Permanent Residence. The applicant had, at all times, been lawfully employed on the

³⁴² Case C-106/89 *Marleasing* [1990] ECR I-4135 para 8:

‘...Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts’.

³⁴³ *Fratelli* (n 309) para 31:

‘When the conditions under which individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.’

³⁴⁴ Case C 188/89 *Foster* [1990] ECR 3313:

‘Unconditional and sufficiently precise provisions of a Directive may be relied upon against organisations or bodies which are subject to the authority or control of the State...’

³⁴⁵ *Coppinger v Waterford County Council* [1998] 4 IR 220:

‘The first question which has to be considered in connection with the claim based on the Directives is the question of whether Waterford County Council is an "emanation of the State." If it is, then its obligations towards a private individual under the Directives are no different than if it was the State itself.’

³⁴⁶ Joined Cases C-46/93 and C-48/93 *Brasserie du pecheur and Factortame* [1996] ECR I-01029 para 22:

‘the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained’

³⁴⁷ *ibid.* para 51:

‘There must be a direct causal link between the breach and the damage sustained by the individuals’

See further, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, at para 218:

‘there must be a direct causal link between the breach of the obligation on the State and the loss or damage sustained by those affected’

³⁴⁸ *Fratelli* (n 309) at para 33:

‘Administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.’

basis of her husband's self-employment and did not require an employment permit.

The Article 23 issue arose again, albeit indirectly, in *Z*³⁴⁹ –a case more properly concerned with the *vires* of the respondent's decision to refuse her an Employment Permit.³⁵⁰ Here the applicant argued that, although seeking an Employment Permit because of the tenuous nature of her husband's self-employment, she was nonetheless lawfully employed, without an Employment Permit on foot of her husband's self-employment, a right enjoyed under Article 23 of Directive 2004/38. The learned judge hearing the leave application for judicial review was sufficiently convinced of the merits of the case to grant the applicant an injunction on an ex-parte basis preventing any emanation of the State from interfering with her employment pending the determination of the proceedings. The case was settled with the respondent issuing the applicant with an Employment Permit.

The full effects of the State's failure to properly transpose Article 23 were felt by the applicant in *P v Minister for Jobs, Enterprise and Innovation and NERA*,³⁵¹ with NERA, the second named respondent, forcibly removing the applicant, a Romanian national, from her position of employment in February 2012. The applicant sought to rely upon Article 23, on the basis that, as her spouse was lawfully resident since 2008 as a student, attending college and working legally 20 hours per week, she was entitled to join him as a family member. After forcing the applicant out of her employment, NERA refused to accept that the applicant had any rights premised upon either her own rights as a student or her husband's lawful residence as a student. A further argument, advanced in the pleadings was that both the applicant and her husband, having been lawfully employed for more than 12 months, had been admitted to the labour market for the purpose of Article 2 of Annex VII. The State, in settling³⁵² the case in favour of the applicant,

³⁴⁹ *Z v Minister for Jobs, Enterprise and Innovation* (n. 183).

³⁵⁰ Discussed above.

³⁵¹ 2012 JR.

³⁵² There was a claim for damages in the case, but this was not pursued as the applicant found new employment almost immediately.

accepted that the applicant was lawfully employed without an employment permit from 2008, the date upon which her husband commenced college and work.

In another case, *O v Minister for Jobs, Enterprise & Innovation*,³⁵³ the applicant, whose spouse was a student, attending college and lawfully employed in the State since 2011, sought a letter from the respondent confirming that he was entitled to work without an employment permit on the basis of Article 23. The respondent's delay in furnishing such confirmation was highly prejudicial to the applicant who was unemployed and anxious to obtain employment. The applicant, when seeking employment, was consistently asked to furnish proof of his right to work. Further, any prospective employer accessing the respondent's website would find misleading information asserting that the applicant was not permitted to work. Again, the case was settled in favour of the applicant who was given a letter confirming his lawful status and his right to work. A right to work without an employment permit was also asserted in a number of other cases.

The Department of Jobs, Enterprise & Innovation now appears to be recognising Article 23 rights –and this approach appears to be filtering down to other departments such as Social Protection– rather than risking further litigation. However, in spite of the legal challenges to the State's failure to transpose Article 23, the law in this State remains unchanged.³⁵⁴ How this will be applied to citizens of new EU entrants remains to be determined –though it is noteworthy that, in Ireland, Croatia has been given full labour market access.³⁵⁵ Of course, it remains open to any aggrieved party to refer the matter to the Commission –albeit whose role is to bring

³⁵³ 2012 JR.

³⁵⁴ As of August 2013.

³⁵⁵ *Statement by the Department of Jobs, Enterprise and Innovation re Labour market issues relating to 2011 EU Accession Treaty*, 24th May 2013:

'In light of all these issues, Government has decided not to exercise an option under the Treaty to restrict access to Ireland's labour market for nationals of Croatia.'

The statement cites a number of reasons, primarily the small scale of Croatia's labour market and the fact that it is unlikely to distort Ireland's labour market.

about compliance rather than satisfying individual interests³⁵⁶ – under Article 258 TFEU.³⁵⁷

4.7 Admittance to the labour market

Romanian and Bulgarian nationals who had been *admitted* to the labour market of another Member State were entitled to full access to that labour market, without any further restriction. To be deemed ‘admitted’ to the labour market of a Member State it is necessary to have been employed for an uninterrupted period of 12 months,³⁵⁸ post or pre-accession –there was no such requirement for nationals of other Member States, who enjoy unfettered access to Member States’ labour markets. The right is not transferable³⁵⁹ to other Member States and can be lost through voluntary exit from the Member State.³⁶⁰ Clearly, a person who has held an Employment Permit and has continued in work in the employment specified³⁶¹ in the permit for a period of 12 months, has been ‘admitted’ to the labour market of that State. Can it be said that a person, without an employment permit but lawfully employed on the basis of Article 23, has been admitted to the labour market for the purpose of the Annexes? Of significance, Annex VII does not make admittance to the labour market of a Member State contingent solely on the basis of national law. Therefore it appears that a person may be admitted on the basis of national or EU law or a combination of both. The only condition is that the person is legally³⁶² working. This proposition appears to have been accepted by the respondent in the *P*³⁶³ case, where both the applicant and her husband were deemed to have been lawfully employed in the State initially on the basis of being students and latterly, permitted to continue in employment, on the basis of having been admitted to the labour market.

³⁵⁶ Com (2002) 141. See Paul Craig and Grainne De Burca, *EU Law, Text, Cases and Materials* (4th edn, Oxford Union Press, 2007) 748.

³⁵⁷ Ex-Art 226.

³⁵⁸ Annex VII, art 2

³⁵⁹ *ibid.*

³⁶⁰ (n 359).

³⁶¹ Employment Permits Act 2006, s 8(2), which provides that permits are not transferable unless permit specifies an economic sector, s 8(3).

³⁶² Annex VII, art 2(1).

³⁶³ *P v NERA & Ors* (n 119).

Admittance to the labour market is, of course, different to qualifying for social welfare and this leaves over a question: does a person, who has been working on the basis of an employment permit and who loses that employment prior to the twelve months being up, derive an entitlement to social welfare? It is submitted that the answer to this question must be yes, in the premises that Annex VII is concerned with access to the labour market, whilst Article 7(3)(c) of Directive 2004/38 confers the right to retention of ‘worker’ status for six months, where the employment was for less than twelve months. Further, there is no derogation permitted in respect of article 7(2) of Regulation 1612/68, which confers a right to equal treatment in respect of ‘social advantages’.

4.8 Jobseekers

The Annexes also permitted derogation in respect of *Jobseekers*.³⁶⁴ Under Union law, an EU citizen is entitled to enter any Member State for the purpose of seeking employment and, provided he or she is a genuine jobseeker, he or she is entitled, for a period of at least six months, to equal treatment as a Member State national jobseeker in respect of social welfare entitlements. The components of this jealously guarded right³⁶⁵ are found in Articles 2 and 5 of Regulation 1612/68³⁶⁶ read in conjunction with Articles 18, 20 and 45 of the TFEU.³⁶⁷ As the Annexes permitted derogation from both Article 45 TFEU and Article 1-6 of Regulation 1612/68,³⁶⁸ there can be little doubt that this important right, which facilitates free movement for workers in the most practical manner, did not apply to A2 nations while derogations remained in place.

4.9 Ministerial Rules

³⁶⁴ The rights afforded to jobseekers under Union law are dealt with comprehensively in chapter 1.

³⁶⁵ See Case C-292/89 *Antonissen* [1991] ECR I-745, C-171/91 *Tsiotras* [1993] ECR I-2925, Case C-138/02 *Collins*, joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nurnberg 900*.

³⁶⁶ Repealed and replaced by Regulation 492/2011.

³⁶⁷ Case C-138/02 *Collins* [2004] ECR I 2703.

³⁶⁸ Annex VII, art 2

Since 2007, the Minister for Enterprise, Trade & Innovation³⁶⁹ (now the Minister for Jobs, Enterprise and Innovation) has published a short document titled *Employment Permit Information for Romanian nationals, Romanian Nationals who do NOT need an Employment Permit*.³⁷⁰ This document sets out the Department's (and the State's) position on the circumstances in which a Romanian national is exempted from the requirement to hold an employment permit in order to work lawfully in the State. Paragraph 1,³⁷¹ ostensibly, applies the provisions of Articles 2(2) and 2(3) of Annex VII, though it appears to conflate the two articles, which are distinct.³⁷² Paragraph 2³⁷³ applies the provisions of Article 23 of Directive 2004/38 as it applies to other EU nationals who are not subject to transitional measures –in other words, a Romanian or Bulgarian national married to and residing in this State with another non-Romanian/Bulgarian EU national is entitled to take up employment without an employment permit. In Paragraph 3, which warrants close analysis, the Department attempts to apply the provisions of paragraph 8 of Annex VII, which provides that:

‘As long as the application of Articles 1 to 6 of Regulation (EEC) No 1612/68 is suspended by virtue of paragraphs 2 to 5 and 7 above, Article 23 of Directive 2004/38/EC shall apply in Romania with regard to nationals of the present Member States, and in the present Member States with regard to Romanian nationals, under the

³⁶⁹ Sections 1(1) of the Employment Permits Act 2003 and the Employment Permits Act 2006 tasks the said minister with responsibility for issuing employment permits in this State.

³⁷⁰ This has appeared in at least three different versions, dated January 2007, July 2010 and March 2012. An identical version in respect of Bulgarian nationals was published at the same time. <http://www.djei.ie/publications/labour/2012/employmentpermitinformation-romanians-march2012.pdf>. This link has subsequently been removed, following the decision of the Irish Government to lift all restrictions.

³⁷¹ ‘A Romanian national who has been resident in the State as the holder of an employment permit, expiring on or after the 31st December 2006, for an uninterrupted period of 12 months or longer.’

³⁷² The Minister's rules appear to countenance a situation where a Romanian or Bulgarian national who was granted an employment permit in 2006 which expired in 2007, would no longer require an employment permit. Under Article 2(2) and 2(3) of Annex VII it is conditional that there be a period of 12 months either pre or post-accession. Though clearly the Minister's more favourable rules fall under the ambit of Article 8(4) of the Annex.

³⁷³ ‘A Romanian national who is the spouse/dependant of an EU national*, other than a Romanian or Bulgarian national.’

following conditions, so far as the right of family members of workers to take up employment is concerned:

— the spouse of a worker and their descendants who are under 21 years of age or are dependants, legally residing with the worker in the territory of a Member State at the date of accession, shall have, upon accession, immediate access to the labour market of that Member State. This does not apply to family members of a worker legally admitted to the labour market of that Member State for a period of less than 12 months;

— the spouse of a worker and their descendants who are under 21 years of age or are dependants, legally residing with the worker in the territory of a Member State from a date later than the date of accession, but during the period of application of the transitional provisions laid down above, shall have access to the labour market of the Member State concerned once they have been resident in the Member State concerned for at least eighteen months or from the third year following the date of accession, whichever is the earlier.’

Paragraph 3 of the Minister’s rules states that:

‘From the 01 January 2010, a Romanian national who is the spouse/dependant of a Romanian or Bulgarian worker. **

The footnote provides that:

‘This applies to employees and self-employed individuals who have been legally employed in the State for an uninterrupted period of 12 months.’

The application of Article 8 of Annex VII, by the Minister, gives rise to a number of difficulties. The Minister’s rules applied the later date of three years post-accession (1st January 2010), rather than allowing for the earlier period of eighteen months, as expressly provided for in the third section of Article 8 of Annex VII. This had the effect of unlawfully delaying the

spouse and descendants of workers the right to take up employment by a potential period of twelve months. The second issue which arises is that Article 8 of Annex VII applies only to *workers*, not the self-employed. The Minister has unlawfully conflated the rights of the self-employed with that of workers. The third issue which arises is that the Minister refuses to accept that, after 1 January 2010, the spouse of a worker was permitted take up employment without an employment permit, insisting that the spouse could only take up employment after the worker had been working for 12 months. This issue was due to come before the courts in *M v Minister for Social Protection*³⁷⁴, where the respondent –relying upon the stated position of the Minister for Jobs, Enterprise and Innovation– refused to recognise that the applicant was entitled to count any period of her own employment, prior to the expiry of her husband’s 12 month employment permit, towards qualifying for Maternity Benefit. However, the respondent accepted that the applicant was entitled to this and settled the case on that basis.

Paragraph 4 of the Minister’s rules provides that self-employed Romanian nationals do not require an employment permit, with the proviso, however, that a permit would be required if the self-employed person wished to take up employment as a ‘worker’. Paragraph 6 deals with the rights of students and, as with paragraph 3, warrants close examination, ostensibly, because its purpose appears to be to give effect to Article 14 of Annex VII, which provides that:

‘Romanian migrant workers and their families legally resident and working in another Member State or migrant workers from other Member States and their families legally resident and working in Romania shall not be treated in a more restrictive way than those from third countries resident and working in that Member State or Romania respectively. Furthermore, in application of the principle of Community preference, migrant workers from third countries resident and working in Romania shall not be treated more favourably than nationals of Romania.’

³⁷⁴ 2012 849/JR.

Paragraph 5 of the Minister's rules was added on March 2012 and provides an exception, effective from 28 February, to the requirement to have an employment permit, for Romanian nationals resident in the State who are parents of an Irish citizen child. This would appear to have its origins in *Zambrano*.

Before addressing paragraph 6 of the Minister's rules governing Romanian and Bulgarian students, it is necessary to note that the Minister for Justice and Defence is expressly granted a discretionary right to permit non-nationals to work without an employment, pursuant to section 2(10)(d) of the Employment Permits Act 2003.³⁷⁵ In 2001 the State introduced a student work concession to allow Non-EEA students to take up employment during their studies.³⁷⁶ Students were permitted to work 20 hours per week during term time and 40 hours per week outside of term time. The conditions were that the course must be listed on the National Qualifications of Ireland *Internationalisation Register* and be of at least one year's duration.³⁷⁷

Paragraph 6 of the Minister's rules states that:

‘A Romanian national who is a student in the State and is enrolled on an academic course of more than one year's duration at a college listed on the Internationalisation Register on the National Qualifications Authority of Ireland Website (www.nqai.ie) is permitted to take up casual employment defined as up to 20 hours part-time work per week and fulltime during normal college vacation periods... It should be noted that on completion of their course of studies, an employment permit will be required for 12 months.’

³⁷⁵ The said section provides that:

‘This section does not apply to a non-national—..... who is permitted to remain in the State by the Minister for Justice, Equality and Law Reform and who is in employment in the State pursuant to a condition of that permission that the person may be in employment in the State without an employment permit referred to in subsection (1).’

³⁷⁶ Department of Justice & Defence, *New Immigration Regime for Full-time Non-EEA Students, Final Report and Recommendations of the Interdepartmental Committee*, (September 2010):

‘The introduction of this concession was aimed at ensuring that Ireland did not fall behind competitor countries who generally offer this sort of labour market access.’

³⁷⁷ Department of Justice & Defence, *New Immigration Regime for Full-time Non-EEA Students, Guidelines for Language and Non-Degree Programme Students* (January 2011) at 16.

It could be argued, of course, that Article 14 of Annex VII is not concerned with the rights of students, as students are not specifically referred to. However, the entitlement to work, granted to Non-EEA students, arguably brings the student work concession within the remit of paragraph 14 and requires that Romanian and Bulgarian nationals must be granted the same right to work, provided they meet the conditions of the scheme. If this is indeed the case, then the Minister's rules, once again, are incompatible with Union law. Under paragraph 6 of the Minister's Rules, Romanian nationals are required to be on a course of *more* than one year's duration. The student work concession for third country nationals, operated by the Minister for Justice and Defence, requires that the course be *at least* one year's duration. This places a higher demand on the Romanian and Bulgarian national, contrary to paragraph 14 of Annex VII³⁷⁸ and the ruling of the Court of Justice in *Sommer*.³⁷⁹

Of further concern is the requirement by the Minister that, on the completion of their studies, Romanian nationals would still require an employment permit for a period of 12 months, the implication being that the Romanian/Bulgarian national who, having been lawfully permitted to work for 12 months in this State, albeit part-time³⁸⁰ for a substantial period of that time, could not then rely upon the provision of paragraph 2 of Annex VII, which provided protection for those admitted to the labour markets of Member States, both pre³⁸¹ and post-accession.³⁸² This is a questionable interpretation of paragraph 2 of the Annex which implies a presupposition

³⁷⁸ This point was raised in Judicial Review proceedings in *Oprea v Minister for Jobs, Enterprise & Innovation* (n 342).

³⁷⁹ Case C-15/11 *Sommer* [2012] not yet reported in ECR, at para 35:

'Accordingly, if access to the Austrian labour market must be granted to a student who is a third country national according to the rules laid down in Directive 2004/114, such access must be granted to a Bulgarian student under conditions which are at least as favourable and, in addition, that Bulgarian student must be given preference over a student who is a third-country national.'

³⁸⁰ Part-time workers enjoy extensive protection under EU law (see Chapter 1).

³⁸¹ 'Romanian nationals legally working in a present Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.'

³⁸² 'Romanian nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.'

that only those granted an employment permit can be deemed ‘admitted’ to the labour market. It also raises potentially serious issues in respect of social welfare entitlements, post-employment, and leaves the former student/worker in a legal no-man’s land.

Somewhat anomalously, at paragraph 6³⁸³ of the Minister’s rules, the Minister exempts Romanian and Bulgarian students, who completed a recognised degree and who worked for 12 months post-accession, from the requirement to hold an employment permit. The Minister does not require that the employment be uninterrupted and, in practice, appears to accept an aggregated period of 12 months over the lifetime of the degree. It might be argued that this provision offends the requirement of Article 2 of Annex VII which expressly requires uninterrupted access to the labour market for 12 months. However, this and other such favourable national measures, is covered by paragraph 8(3) of the Annexes, which provides that ‘... provisions shall be without prejudice to more favourable measures whether national or resulting from bilateral agreements.’ Paragraph 6 and 7 of the Minister’s rules provides a neat and simple illustration of the parameters of Annex VII, the former, not being permitted on the basis that it represents *less* favourable treatment, whilst the latter is permitted because it grants *more* favourable treatment.

The final provision of the Minister’s rules, paragraph 8, provides an exception to the requirement to hold an employment permit, to a Romanian national who has obtained prior explicit permission from the Department of Justice, Equality and Law Reform (now Justice and Defence) to remain resident and employed in the State without an employment permit. This is largely uncontroversial and gives effect, in part, to Article 2 of Annex VII. Further, as noted above, this is a discretion granted to the Minister for Justice and Defence pursuant to section 2(10)(d) of the Employment Permits

³⁸³ ‘However, a Romanian national who has graduated from an Irish third level institution, and have obtained a qualification at level 7 or higher (primary degree or above) in the National Framework of Qualifications - <http://www.nfq.ie/nfq/en/>, and who have worked for 12 months or more post 2007 on the basis of being a student, will not require an Employment Permit after graduation.’

Act 2003. Paragraph 8 is, ostensibly, a now historic,³⁸⁴ but nonetheless important provision, which served to protect Romanian and Bulgarian nationals who, for various reasons, were lawfully³⁸⁵ working in the State, in the period prior to accession, by ensuring that pre-accession rights were transferred into a post-accession right to work. It is a provision which, though relatively straightforward, has resulted in some difficulties for some social welfare claimants. By example, in *B v Minister for Social Protection*,³⁸⁶ the Minister unlawfully refused the applicant Jobseeker's Benefit on the basis that the applicant, a Romanian national with a good employment record and prior permission to work in an embassy in this State since 2003 (renewed annually beyond 1st January 2007, by the Department of Justice & Defence), was not entitled to social welfare benefits on the basis that she did not have a Stamp 4 from the Minister for Justice & Defence.

The Minister's rules have a significant knock-on effect as they are routinely relied upon and cited in decisions of the Department of Social Protection, who view the rules as 'law'.³⁸⁷ The difficulty, of course, with this approach is that the rules do not, as evidenced by the foregoing passages, reflect the law as it truly stands. Romanian and Bulgarian nationals enjoy more extensive rights than those afforded to them by the Department of Jobs, Enterprise and Innovation. The rules operated by the department make no reference whatsoever to the extensive rights enjoyed by family members of union citizens lawfully resident in the State –in particular the right to take up employment without an Employment Permit.

5. Conclusion

³⁸⁴ Post-accession, the Minister for Justice & Defence no longer retains any discretion in respect of section 2(10)(d) of the Employment Permits Act 2003 (*B v Minister for Justice, Equality & Law Reform* [2009] IEHC 333):

'In effect, the Minister's competence to perform that agreement, insofar as it involved making a decision for the purposes of s. 3 of the 1999 Act, ceased on the 1st January, 2007.'

³⁸⁵ Usually by way of Stamp 4.

³⁸⁶ 2012 JR.

³⁸⁷ In the *A* case the Department of Social Protection relied upon the position of the Department of Jobs, Enterprise and Innovation. The position of the latter department was also cited regularly in refusal letters by the Department of Social Protection.

Transitional measures are controversial yet have always been³⁸⁸ and likely always will be³⁸⁹ a part of the Union –eager new Member State applicants, anxious to enjoy the benefits of the Union, undoubtedly consider it a relatively small price to pay. However, transitional measures are interpreted restrictively by the Court of Justice and subject to the principle of proportionality.

Ireland has erroneously applied measures which prevailed on the date of Accession rather than the date of the signing of the Treaty of Accession in 2005, thereby offending the stand-still clause, in the process breaching EU law, substantive national law and rules of national law, the effect of which was the unlawful exclusion of a significant majority of Romanian and Bulgarian nationals from the labour market of this State. Annex VI and VII of the Treaty of Accession, 2005 permitted only a narrow derogation in respect of Article 23 of Directive 2004/38. The unlawful derogation of the rights contained within Article 23 of Directive 2004/38 denied a significant number of Romanian and Bulgarian nationals the right to work lawfully without an employment permit, exposing those who did take up employment to criminal sanctions.

The administrative rules applied by the Minister for Jobs, Enterprise and Innovation misdirected the public and other government departments as to the correct statement of the law and were relied upon and used by other departments to unlawfully deny Romanian and Bulgarian nationals the right to work and the right to social welfare. The impact of the acts and omissions of Ireland upon individual Romanian and Bulgarian citizens should not be underestimated.

Most of the legal points raised in this chapter were the subject of judicial review proceedings in the High Court in Ireland. None of these cases, with

³⁸⁸ (n 48).

³⁸⁹ Treaty of Accession 2012, Annex V, permitted Member States to apply transitional measures in respect of Croatia.

the exception of the *Hrisca*³⁹⁰ case, ever went to substantive hearing and all, without exception, were settled in favour of the applicants. Equally, all of the cases concerned Romanian nationals, implying a degree of deliberate discrimination.

The transitional measures were lifted two years early, the effect of which was to grant to Romanian and Bulgarian nationals full and unrestricted access to Ireland's labour market. How this State will treat future Member State entrants remains to be seen –though it is noteworthy that Croatia has not been subjected to transitional measures in Ireland.³⁹¹ Turkey's accession to the Union, should it proceed, will bring new challenges. For these reason, this chapter will continue to retain some vitality and relevance into the future.³⁹²

³⁹⁰ With the exception of *Hrisca* (n 216), which, in any event, the State settled on 9 Nov 2012.

³⁹¹ (n 347).

³⁹² Further, the UK and other Member States retain restrictions until 31 December 2013.

Chapter 3

THE IRISH SOCIAL WELFARE SYSTEM AND JUDICIAL REVIEW

1. Introduction

Navigating the Irish social welfare system,¹ where entitlements for EU nationals are determined by EU Treaty,² secondary law,³ the case law of the Court of Justice⁴ –where rights are still being identified⁵– and a myriad of national statutes,⁶ regulations⁷ and operational guidelines,⁸ is becoming increasingly difficult. If the Superior Courts in this State routinely struggle to answer what perhaps, ought to be, relatively straightforward questions,⁹ how does a vulnerable EU worker, with no legal training, find an effective remedy when a decision goes against him or her? Does the disappointed claimant go back to the original decision-maker or another decision-maker, appeal a negative decision to the Social Welfare Appeals Office or challenge the original or appeals decision by way of Judicial Review? These are all complex questions which have troubled the Irish Superior Courts in the past fifty years.

The purpose of this chapter is to address these questions and create a pathway for the confused claimant and practitioner alike, addressing:

- (1) First instance decision making;
- (2) The statutory appeals system and;

¹ See generally Gerard Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002) at 132.

² Treaty on the Functioning of the European Union, principally arts 18, 20, 45-49. Discussed in Chapter 1.

³ Regulation 883/2004, Regulation 492/2011 and Directive 2004/38 *inter alia*.

⁴ See Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, where the Court of Justice of the European Union held that it alone determined the definition of ‘worker’.

⁵ See, by example, Case C-480/08 *Teixeira*, where a former worker no longer economically connected to a Member State, was deemed to retain a right to reside on the basis of her daughter’s right to attend school. Discussed in Chapter 1.

⁶ Available on www.irishstatutebook.ie, the starting point of which is the Social Welfare Consolidation Act 2005, which has been much amended since commencement. There are in excess of 100 Acts listed which are related to social welfare.

⁷ There are some 1200 statutory instruments, related to social welfare, listed on [irishstatutebook.ie](http://www.irishstatutebook.ie).

⁸ Available on <http://www.welfare.ie/EN/OperationalGuidelines/Pages/default.aspx>.

⁹ By example, the rights of formerly self-employed EU nationals, has troubled the High Court since 2010 (see *Solovastru v Minister for Social Protection* [2011] IEHC 532, *Hrisca v Minister for Social Protection*, unreported, White J., 16 February 2012), discussed in Chapters 2 and 3.

(3) Remedy in the courts by way of Judicial Review.

2. First Instance Decision-Making

2.1 Jurisdiction of Deciding Officers

Deciding officers¹⁰ are employed by the Minister for Social Protection¹¹ and operate against a backdrop of 2.5 million applications and, as noted by the Department of Social Protection in circumstances where:

‘Expenditure on schemes and services provided by the Department accounts for almost one third of gross voted Government current expenditure. In 2010, the total expenditure by the Department was €21 billion.’¹²

Deciding Officers are tasked by statute,¹³ as first instance decision-makers, with determining whether or not the qualifying conditions¹⁴ for any given social welfare payment have been met by any given claimant. This jurisdiction is strictly limited to deciding officers¹⁵ and, prior to 2011,¹⁶

¹⁰ See generally: Hogan and Morgan, *Administrative Law in Ireland*, (4th Edn, Roundhall, 2010) at 305-306; Mel Cousins, *Social Welfare Law*, (2nd Edn, Thompson, Roundhall, 2002) chp 18 and; Mel Cousins, *Social Security Law*, (Wolters Kluwer Thompson, 2010 at 297),

¹¹ Social Welfare Consolidation Act, sec 299:

‘The Minister may appoint such and so many of his or her officers as the Minister thinks proper to be deciding officers for the purposes of this Act, and every person so appointed shall hold office as a deciding officer during the pleasure of the Minister.’

¹² Department of Social Protection, *Briefing Material*, (2011) at 3, which also states that:

‘Each week approximately 1.4 million people receive a social welfare payment and, when qualified adults and children are included, a total of almost 2.1 million people benefit from weekly payments.’

<http://www.welfare.ie/en/downloads/minister_brief_2011.pdf> accessed 14 January 2013.

¹³ Social Welfare Consolidation Act 2005, sec 301(1):

‘Subject to this Act, every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer.’

¹⁴ By example, a claimant seeking Jobseeker’s Allowance, pursuant to s 141 of the Social Welfare Consolidation Act 2005, must be 18 years old, unemployed, capable of work, available for and genuinely seeking employment.

¹⁵ cf. Hogan and Morgan, *Administrative Law in Ireland* (n 10), at 305, aver that:

‘In practice most applicants will, first, be advised by junior Department of Social and Family Affairs officials as to their entitlements to the benefit which is claimed. If the advice is in the negative, then the applicant can insist that a deciding officer adjudicate upon the claim.’

This is problematic, because such persons have no jurisdiction to make decisions and, further, the Social Welfare Appeals Office would have no jurisdiction to hear an appeal from such a person.

designated employees of the Health Service Executive.¹⁷ Decisions made by any other persons employed by the Minister would, undoubtedly, be quashed by a court, for want of jurisdiction,¹⁸ such as occurred in *Z v Minister for Social Protection*,¹⁹ where a Social Welfare Inspector determined that the applicants PRSI contributions were invalid because the applicants –both of whom were Romanian nationals– did not have Employment Permits.²⁰ The inspector, whose jurisdiction is solely investigatory,²¹ also cancelled the applicants PRSI contribution, meaning that they could not derive any benefit from the contributions.

2.2 Application of fair procedures, natural and constitutional justice

There is tension in the process, as between the claimant and decision-maker, which has led to the development of case law defining the manner in which deciding officers must behave. First and foremost, a Deciding Officer must be *'free and unrestricted in discharging their functions'*²² under the Social Welfare Consolidation Act 2005 and act *'freely and fairly as becomes anyone who is called upon to decide upon matters of right or obligation.'*²³

The functions exercised by a deciding officer are administrative and must be exercised judicially²⁴ –though they are not exercising ‘judicial functions’²⁵–

¹⁶ On the 27th September 2011, the legal functions of the Health Service Executive, in respect of its operation of the Community Welfare Services, which primarily processed Supplementary Welfare Allowance and Rent Supplement payments, were transferred to the remit of the Minister for Social Protection, pursuant to Part 4 of the Social Welfare and Pensions Act 2010 (commenced by S.I. 471 of 2011).

¹⁷ Social Welfare Consolidation Act 2005, s194(1), which provided that:

‘Subject to the general direction and control of the Minister, the Executive, in respect of its functional areas, shall be responsible for the administration of functions performable under this Chapter and the functions relating to supplementary welfare allowance...’

¹⁸ The jurisdiction and role of Department of Social Protection Medical Assessors is due to come before the High Court in 2013 in *Jennings v the Minister for Social Protection* [2013] 90/JR.

¹⁹ [2012] JR.

²⁰ For a comprehensive discussion on Employment Permits see Chapter 2.

²¹ Social Welfare Consolidation Act 2005, s 250(2):

‘Every social welfare inspector shall investigate and report to the Minister on any claim for or in respect of benefit and any question arising on or in relation to that benefit which may be referred to him or her by the Minister...’

²² *McLoughlin v Minister for Social Welfare* [1952] IR 1 at 27.

²³ *ibid.*

²⁴ *Hoolahan v Minister for Social Welfare*, High Court, Barron J., unreported, 23rd July 1986:

meaning that they must follow the principles of constitutional and natural justice.²⁶ One important principle which has emerged, in spite of the Minister having power to suspend payments where there is a question mark over entitlement,²⁷ is the requirement that social welfare payments –which a claimant has been in receipt of for ‘some time’²⁸ –should not be ceased by a deciding officer without notice²⁹ to the affected claimant and an opportunity for the claimant to answer the case against him or her.³⁰ Explicit here, of course, is the deeply enshrined principle³¹ that a claimant be heard first,³² as

‘The function to be exercised by the deciding officer was an administrative one which he had to exercise judicially.’

²⁵ *Minister for Social, Community and Family Affairs v Scanlon* 2001, 1 I.R. 56: where Fennelly J. stated, at 87:

‘Implicit in this submission is the consequence that all deciding and appeals officers are exercising judicial functions. I am quite satisfied that this argument is devoid of merit. Such decisions are inherently administrative... The fact that such officers are bound to act judicially [to follow the principles of natural and constitutional justice] does not alter the character of their functions.’

See Hogan and Morgan (n 10) at 296.

²⁶ *Corcoran v The Minister for Social Welfare and The Attorney General* [1992] 2 I.R. 175: ‘...hearings by the Deciding and Appeal Officers were hearings to which the rules of constitutional and natural justice applied.’

See also *Minister for Social, Community and Family Affairs v Scanlon* 2001, 1 I.R. 56 (n 24).

²⁷ Social Welfare Consolidation Act 2005, s 334(2), which provides that the Minister may suspend payments. Provided the requirements of natural and constitutional justice are met, this would not appear to be incompatible with the case law.

²⁸ *Thompson v Minister for Social Welfare* [1989] IR 618, where O’Hanlon J. held that:

‘I am satisfied, however, that before a Deciding Officer proceeds to a decision that an applicant who has been in receipt of unemployment assistance for some time, should have continuing payment disallowed, he should inform the person concerned that the position is being reviewed by him; the grounds upon which he is considering disallowing further payment; and the person concerned should be given an opportunity to answer the case made against him.’

Hogan and Morgan (n 10) at 305. ‘Some time’ is not defined. However, it would exclude payments under s 201 and 202 as these payments are temporary in nature. On balance it might be said that perhaps a six month period would be ample.

²⁹ In *Mallak v Minister for Justice Equality & Law Reform* [2012] IESC 59 the Supreme Court held that the general principles of natural and constitutional justice comprise a number of individual aspects of the protection of due process, including: ‘The obligation to give fair notice’, at para 52.

³⁰ *Thompson v Minister for Social Welfare* [1989] 1 IR 618, *Hoolahan v Minister for Social Welfare*, High Court, Barron J., unreported, 23rd July 1986:

‘What was essential was that the Prosecutrix should know fully the nature and extent of the case being made against her and that no decision should be made until she had been given proper opportunity to deal fully with the case.’

See further ‘*Decision Making and Natural Justice*’, Department of Social Protection, available on <http://www.welfare.ie/EN/OperationalGuidelines/pages/decnatj.aspx#appoint> <accessed on 3 Dec 2012>.

³¹ The right to be heard pre-dates the Irish Constitution by more than three centuries, *Bagg’s Case* (1615) 11 Co. Rep. 93b.

³² Cooke J. in *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121, the right was so fundamental even Parliament could not destroy it. Wade, however, asserts that ‘*hearings may be excluded by the scheme of legislation*’ (*Commissioner for Business Franchises v Borenstein* [1984] VR 375 at 498. But must be proportionate or risk being struck down as

the loss, even temporary, of social welfare may be, as noted by Murphy J. in *Corcoran v The Minister for Social Welfare and The Attorney General*,³³ of 'great importance'. It hardly need be said that bills must be paid and children fed and clothed and this quickly becomes impossible where a family's only source of income is abruptly cut off. In a more recent case, *Ayavoro v Minister for Social Welfare*,³⁴ the Court held that an impecunious person could not be left out of benefit for more than a 'very short time'.³⁵ The proviso here, of course, would be that the claimant must be entitled to the payment in the first place. The context of the learned judge's observation was in respect of the Minister's right to seek information from claimants,³⁶ where the failure to furnish the information can leave an claimant without payment, not strictly speaking on the basis of an outright refusal, but an inability to process the claim.

The requirement that a claimant be heard before any decision is taken also extends to circumstances where a claimant has expressly informed the decision-maker that he or she wishes to furnish further information.³⁷ This may also extend to requiring the decision-maker to allow the claimant to comment on reports from other agencies, which the decision-maker intends to rely upon³⁸ and a Deciding Officer only has jurisdiction to determine the

in (*Keating v Judge Crowley; Ireland and the AG; DPP and L. Keating*. [2003] 1 ILRM 88), upheld in Supreme Court [2010] IESC 1. Where a statute does not provide for a hearing it will be implied (*Hourigan v Kelly and Ors* Unrep. High Court 26 April 1991).

³³ (n 26).

³⁴ [2009] IEHC 66.

³⁵ *ibid*.

³⁶ Article 181 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. 142 of 2007) compels claimants to furnish such documents as may be required by the Minister when processing a claim.

³⁷ In *McConnell v Eastern Health Board*, unreported, High Court, Hamilton J. 1 June 1983, Hamilton J. (as he was then) held that:

'It is clear from the same that depending on the comments of the respondent in reply to his letter, he intended making further representations on behalf of the Prosecutor before any final decision was made. In my view, he should have been afforded such opportunity...'

³⁸ *Kiely v Minister for Social Protection* [1971] IR 21, at 28:

'In the judgment of Diplock L.J., from which I have already quoted, he dealt with what he called the second rule in this way:—"Where, however, there is a hearing, whether requested or not, the second rule requires the deputy commissioner (a) to consider such 'evidence' relevant to the question to be decided as any person entitled to be represented wishes to put before him; (b)to inform every person represented of any 'evidence' which the deputy commissioner proposes to take into consideration, whether such 'evidence' be proffered by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigations; (c) to allow each person represented to comment upon any such 'evidence' and, where the evidence is given orally by witnesses, to put questions to

question before him.³⁹ Where a decision is taken in the absence of a fair hearing it may be quashed by way of judicial review.⁴⁰

2.3 Duty to give reasons

A common complaint which arises in respect of EU nationals applying for social welfare is the refusal by deciding officers to give an unsuccessful claimant a written decision stating the reasons for the decision. Such a position is unsustainable as Deciding Officers are obligated under social welfare legislation to give both a decision and reasons in writing⁴¹ and by the Freedom of Information Act 1997-2003 to furnish both reasons and findings of fact.⁴² Further, natural and constitutional justice⁴³ obligates

those witnesses; and (d) to allow each person represented to address argument to him on the whole of the case."

See Gerard Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002) at 126.

³⁹ In *Murphy v Minister for Social Welfare*, unreported, High Court, 9th July 1987, Blaney J. held that:

'That was the only question submitted and so the deciding officer's jurisdiction was limited to deciding that question. He had no jurisdiction to decide a different question as he did. In doing that he acted ultra vires . What he ought to have done was to refuse to decide the question...The only jurisdiction of the Deciding Officer was to determine the question that was submitted to him. It seems to me to be self-evident that a deciding officer has no power to decide any question unless it is submitted to him for his decision...'

Gerard Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002) at 132. Cousins, *Social Security Law in Ireland* (n 10), suggests that this approach is legalistic and is not justified by the broad terms of s 300 of the Social Welfare Act 2005. Certainly s 300 gives the Deciding Officer jurisdiction to determine what was impugned. However, the point in *Murphy* was that *that* question was not put to him for determination.

⁴⁰ In *McConnell v Eastern Health Board*, unreported, High Court, Hamilton J. 1 June 1983, Hamilton J. (as he was then) held that:

'Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. Audi alteram partem means that both sides must be fairly heard.'

See further: *O'Connell v Southern Health Board*, High Court, 12 February 1988.

⁴¹ In respect of Supplementary Welfare Allowance payments: Social Welfare Consolidation Act 2005, s 300 and Social Welfare (Consolidated Supplementary Welfare Allowance) Regulations 2007 (S.I. No. 412/2007) (as amended by the Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No. 3) (Administrative Responsibility for Supplementary Welfare Allowance) Regulations 2011) (S.I. No. 514/2011) art 40. In respect of all other social welfare payments Social Welfare Consolidation Act 2005, s 300 and the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142/2007), art 191.

⁴² s 18(1) provides that:

'The head of a public body shall, on application to him or her in that behalf, in writing or in such other form as may be determined, by a person who is affected by an act of the body and has a material interest in a matter affected by the act or to which it relates, not later than 4 weeks after the receipt of the application, cause a statement, in writing or in such other form as may be determined, to be given to the person—

(a) of the reasons for the act, and

(b) of any findings on any material issues of fact made for the purposes of the act.

Deciding Officers to give reasons that are capable of supporting the decision,⁴⁴ the absence of which can create a presumption that there was no such material.⁴⁵ The refusal of the courts in Ireland to intervene in administrative decision-making, as noted by Delaney,⁴⁶ unless the applicant can meet the high threshold of establishing that there is ‘no relevant material’ to support the decision –espoused in *O’Keeffe v An Board Pleanala*⁴⁷– demands that bodies and tribunals be forthcoming about the reasons for reaching its conclusions.

The Court of Justice, in *Commission v Belgium*⁴⁸ held that:

‘one of the general principles of Community law is that any person must be able to obtain effective judicial review before the national courts of national decisions which may infringe a right conferred by the Treaties, and although that principle requires that the persons concerned must be able to obtain from the administration, prior to

It is restricted to particular persons affected by an act of scheduled public bodies. First Schedule covers all departments of State, including the Department of Social Protection.

⁴³ cf. Hogan & Morgan asserted that the passing of the Act left ‘very little..vitality..to the constitutional justice obligation to give reasons.’ Hogan & Morgan, *Administrative Law in Ireland* (3rd Edn., Round Hall, Dublin), (1998). The Supreme Court, however, in *Mallak* took a different view.

⁴⁴ In *The State (Daly) v. Minister for Agriculture* [1987] I.R. 165, the Supreme Court held that:

‘The view of the Minister must be seen to be bona fide held, to be factually sustainable and not unreasonable. If no reasons have been given for the exercise of the power, then this court cannot review the exercise of the power in the light of these criteria. The court must ensure that the material upon which the Minister acted is capable of supporting his decision.’

⁴⁵ In *The State (Daly) v. Minister for Agriculture* [1987] I.R. 165, further held that:

‘Since the Minister has failed to disclose the material upon which he acted or the reasons for his action there is no matter from which the court can determine whether or not such material was capable of supporting his decision. Since the Minister continues to refuse to supply this material, it must be presumed that there was no such material.’

See further *Mallak v Minister for Justice & Equality* [2012] IESC 59: where the Supreme Court held that:

‘The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal.’

It is also, as noted by De Blacam, open to a Court to require clarification of a body’s decision (*Hurley v Motor Insurers Bureau of Ireland*. [1993] ILRM 886).

⁴⁶ Hilary Delaney, *The Duty to Give Reasons in Administrative Decision-making*, (1994) 12 *Irish Law Times* 145 -148).

⁴⁷ [1993] 1 IR 39.

⁴⁸ Case C-249/88 [1991] ECR I-1275.

their bringing any action, knowledge of the grounds of such decisions.’⁴⁹

Further, the European Court of Human Rights, in *Garcia Ruiz v Spain*,⁵⁰ has held that Article 6 of the ECHR requires that courts or tribunals – so this is more relevant to the Social Welfare Appeals Office⁵¹ – should adequately state reasons, but not necessarily a detailed answer to every argument.⁵²

In the normal course of events, where an claimant makes an application for what is commonly referred to as a ‘primary’⁵³ payment, the claimant is given Supplementary Welfare Allowance⁵⁴ pending⁵⁵ the decision on the primary payment – which can routinely take months to be processed. This was somewhat problematic in the past – prior to the functions of the Community Welfare Services being brought under the control of the Minister for Social Protection⁵⁶ – as the Department of Social Protection administered the primary payment and the Health Service Executive (HSE) administered supplementary welfare allowance (SWA)⁵⁷. This meant that, in theory, the latter could refuse SWA. In practice, however, the HSE tended to pay SWA pending a decision by the Department of the primary payment,

⁴⁹ *ibid.* at para 23. See further: Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, Case 222/86 *Unectef v Heylens* [1987] ECR 4097.

⁵⁰ (1999) 31 EHRR 589. Hogan & Morgan, *Administrative Law in Ireland* (3rd Edn, Round Hall, 1998) at 577.

⁵¹ Cousins notes that the provisions of the ECHR do not apply to initial decisions. Mel Cousins, *Social Security Law in Ireland* (n 10) at 298.

⁵² (1999) 31 EHRR 589, at 26,

‘The Court reiterates that... judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case... it cannot be understood as requiring a detailed answer to every argument... in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court’s decision.’

⁵³ Such as Jobseeker’s Allowance, or Jobseeker’s Benefit.

⁵⁴ Social Welfare Consolidation Act 2005, s 189.

⁵⁵ Though Supplementary Welfare Allowance (SWA) is a stand-alone payment, S 195 of the Social Welfare Consolidation Act 2005 provides that:

‘The... deciding officer may, subject to regulations made by the Minister, determine or decide that a person shall not be entitled to supplementary welfare allowance unless the person—

(c) makes application for any statutory or other benefits or assistance to which the person may be entitled including any benefits or assistance from countries other than the State.’

⁵⁶ Social Welfare and Pensions Act 2010, Part 4, (commenced by S.I. 471 of 2011), 27th September 2011.

⁵⁷ Social Welfare Consolidation Act 2005, s 194, repealed by s 18 and Schedule 1 of the Social Welfare and Pensions Act 2008.

but were quick to cut off SWA where the primary payment was refused⁵⁸ and would not continue SWA in the event of an appeal to the, no-longer functioning, HSE Appeals Office⁵⁹ or the Social Welfare Appeals Office.⁶⁰

2.4 Payments pending appeal

There is provision in the Social Welfare (Consolidation) Act 2005, first provided for in 1952,⁶¹ for the Minister to make regulations which would provide for the payment of social welfare where there is an appeal pending.⁶² Such regulations, however, have not, to date, been enacted. Consequently, those awaiting a decision from the Social Welfare Appeals Office –where there can be delays of twelve months and more– have statutory entitlement to social welfare. This raises a significant question-mark over the statutory appeals system as an ‘effective’ remedy. Judicial review,⁶³ which is appropriate for every case,⁶⁴ may also be subject to delays and convincing a Court to grant interim relief to an applicant is very difficult.⁶⁵ This, logically, raises two questions: can a Minister be compelled to enact regulations and; can the Minister be compelled, by virtue of her

⁵⁸ This sequence of event occurred in *Solovastru v Minister for Social Protection & Ors* [2011] IEHC 532.

⁵⁹ Social Welfare Consolidation Act 2005, s 323, which, following substitution by s 18 and Schedule 1 of the Social Welfare and Pensions Act 2008, now only permits an appeal in respect of s 201 and 202 payments.

⁶⁰ Social Welfare Consolidation Act 2005, s 311.

⁶¹ Social Welfare Act 1953, s 48. Thereafter, Social Welfare (Consolidation) Act 1981, s 113 and Social Welfare (Consolidation) Act 1993, s 277.

⁶² Social Welfare Consolidation Act 2005, s 334(1), which provides that:

Regulations may make provision in relation to matters arising—

(a) pending the decision or determination under Part 2, 3, 4, 5, 6, 7, 8, 9 or 10 or this Part (whether in the first instance or on an appeal or reference, and whether originally or on revision) of any claim...

⁶³ Discussed later in this Chapter at section 4.

⁶⁴ Merits-based appeals, by example where a person has been found not to meet the habitual residence conditions, are probably best dealt with within the appeals process as Judicial Review is not concerned with whether or the decision is correct, but whether or not it was properly reached.

⁶⁵ In *Denis Riordan v An Taoiseach, The Minister for the Environment and Local Government and The Attorney General (No. 6)* [2002] 4 IR 404 it was held that:

‘...the granting of a mandatory injunction on an interlocutory application is exceptional...’

Such an order was unsuccessfully sought at interlocutory hearings in *Plesca v HSE* [2010] 1339/JR, *Solovastru v HSE, Minister for Social Protection & Ors*, unreported, High Court, Charleton J., December 2012 and *Hrisca v Minister for Social Protection*, unreported, High Court, White J. 16 February 2012. Though in the latter case the learned Judge strongly recommended that the respondent should pay Supplementary Welfare Allowance.

failure to properly resource the Social Welfare Appeals Office, to make provision for some form of interim payment?

The Separation of Powers doctrine⁶⁶ provides a significant barrier to any challenge to the Minister's failure in this regard. The Act of 2005 provides that the Minister 'may' make regulations⁶⁷ providing for interim payments pending appeal. The Supreme Court in *State (Sheehan) v Government of Ireland*⁶⁸ addressed this issue:

'In my opinion, however, s. 60, sub-s. 7 by vesting the power of bringing the section into operation in the Government rather than in a particular Minister, and the wording used, connoting an enabling rather than a mandatory power or discretion, would seem to point to the parliamentary recognition of the fact that the important law reform to be effected by the section was not to take effect unless and until the Government became satisfied that, in the light of factors such as the necessary deployment of financial and other resources, the postulated reform could be carried into effect. The discretion vested in the Government to bring the section into operation on a date after the 1st April, 1967, was not limited in any way, as to time or otherwise.'⁶⁹

One distinguishing factor between the Social Welfare Consolidation Act 2005 and the act at issue in *Sheehan* was that it was the Government, rather than the Minister who was empowered to make the regulations and the dissenting judgment of McCarthy J. points towards a potentially different outcome.⁷⁰ However, Gilligan J. when given an opportunity to reconsider

⁶⁶ Article 6 of the Constitution of Ireland provides that the powers of government are of three types: government, legislative, executive and judicial. Hogan and Morgan, *Administrative law*, (n 10). Further, In *Boland v. An Taoiseach* [1974] I.R. 338, in a passage cited with approval in *TD v Minister for Education* [2001] 4 IR 259, Griffin J., referred to Article 6 of the Constitution and other articles and said, at p 370, that:

'In my view, these Articles demonstrate that the Oireachtas, and the Oireachtas alone, can exercise the legislative power of government; that the Government, and the Government alone, can exercise the executive power of government; and that the judicial power of government can be exercised only by judges duly appointed under the Constitution in courts established by law under the Constitution.'

⁶⁷ (n 63).

⁶⁸ [1987] 1 I.R. 550.

⁶⁹ *ibid.* at 561.

⁷⁰ [1987] I.R. 564:

the issue in *Kenny (t/a Denture Express) v The Dental Council & Ors*⁷¹ – where the statute granted discretion to a Minister rather than the Government– declined to do so and followed the reasoning⁷² of the majority in *Sheehan*.

There are, as noted by Hogan and Morgan,⁷³ circumstances in which ‘may’ can be interpreted as meaning ‘must’ or ‘shall’, provided the conditions set out in *Julius v. Lord Bishop of Oxford*⁷⁴ –adopted in a number of Irish Supreme and High Court decisions⁷⁵– are met by the statute:

‘a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise...’

Whilst this canon of construction has generally been used by courts to interpret extant statutory provisions rather than cause such provisions to be enacted, Gilligan J. in *Kenny (t/a Denture Express)* was willing to countenance such an argument, which failed on the basis of not meeting the test set out in *Julius*. In applying the test to s. 334, it may be said that there is little doubt that s. 334 deposits a power with a public officer (the Minister for Social Protection) –the section is sub-titled ‘interim payments’– for the purpose of being used for the benefit of persons who are specifically pointed

‘In my view, it is inconceivable that the legislature in passing the two Courts Acts of 1961 could have contemplated that an unrestricted discretion was given to the Government as to the date on which these Acts would come into force—that they could be delayed indefinitely.’

⁷¹ [2009] 4 IR 321.

⁷² Gilligan J. held that:

‘It is also clear from the case law that the general rule is that where “may” is used it is to be read as conferring a discretionary power. The case of *The State (Sheehan) v. the Government of Ireland* [1987] I.R. 550 is instructive.’

⁷³ Hogan and Morgan, *Administrative Law* (n 10) at 506-507.

⁷⁴ (1880) 5 A.C. 214.

⁷⁵ In *In re Application of Dunne* [1968] I.R. 105, at p. 116, this proposition was endorsed by the Supreme Court, where Walsh J. stated that: ‘It is a well-recognised canon of construction’. The test espoused in *Julius* has been considered and/or applied in *The King (Local Government Board) v The Guardians of the Poor of Letterkenny Union* 1916 IR 18, *Conroy v Minister for Defence* [1934] 1 IR, *Dolan v Neligan* [1967] IR 247, *Charles Maunsell v The Minister for Education and Canon Breen* [1940] IR 213, *Application of Dunne* [1968] IR 105, *Duffy v Corporation of Dublin* [1974] 1 IR 39, *O’Connell v South Western Regional Fisheries Board Ireland* unreported, 15 April 1986, Carroll J. and *Harrahill v C* [2008] IEHC] 250.

out (social welfare claimants in the Appeals system). However, as in *Kenny*, there is, arguably, an absence of ‘conditions specified under which such persons would be entitled to call for the establishment of a scheme’.

The absence of regulations does not entirely deprive the Minister or Deciding Officers from being able to make interim payments. There are two discretionary payments found in the Social Welfare Consolidation Act 2005. Section 201 provides a power to make a single payment where there is an exceptional need.⁷⁶ Section 202 provides for the payment of Supplementary Welfare Allowance in cases of urgency. Of some significance, neither section is subject to the claimant being habitually resident.⁷⁷ Further, the discretion afforded to a deciding officer under s 201 is remarkably wide in so far as the deciding officer is permitted to over-ride multiple provisions⁷⁸ of the Social Welfare Consolidation Act 2005. Exceptional needs and urgent case payments have been used to provide short-term support to claimants, often EU nationals, who have been deemed to have no social welfare entitlements.⁷⁹ A person refused a payment under s 201 and 202 now has an in-house appeal⁸⁰ –to an SWA Review Officer– which, in practice, is much quicker than an appeal to the Social Welfare Appeals Office. However, there no longer appears to be an appeal to the Social Welfare Appeals Office

⁷⁶ See Department of Social Protection, *SWA Circular No. 2/12*, 27 January 2012.

⁷⁷ Social Welfare Consolidation Act 2005, s 192, which provides that:

‘A person shall not be entitled to an allowance (other than an allowance under sections 201 and 202) under this Chapter unless he or she is habitually resident in the State at the date of the making of the application for the allowance.’

⁷⁸ Social Welfare Consolidation Act 2005, s 202 provides that:

‘Nothing in section 190 , 191 , 193 or 198 shall prevent the payment of supplementary welfare allowance in an urgent case... the... deciding officer shall not be bound by anything contained in sections 195 to 198 and Part 4 of Schedule 3 or in any regulations made under this Chapter’.

See further art 38 of S.I. 412 of 2007. S 190 and 191, in effect, prohibit the payment of Supplementary Welfare Allowance where the claimant is, respectively, in full-time education and full-time work. S 193 prohibits the payment where the claimant is on and actively participating in a strike. S 198 prohibits the payment of Rent Supplement, in respect of housing where a claimant or spouse of claimant is in full-time employment.

⁷⁹ This occurred in *Plesca v HSE & Anor* [2010] 1339/JR.

⁸⁰ Social Welfare Consolidation Act 2005 (as substituted by s 18 and Schedule 1 of the Social Welfare and Pensions Act 2008):

‘Where a person is dissatisfied with the determination of a designated person of a claim by him or her under section 200, 201 or 202, an appeal lies against the determination to another person appointed or designated by the Minister.’

in respect of such decisions,⁸¹ though, if the decision were defective, judicial review would lie.

The availability of discretionary payments does not remedy the absence of regulations specifying the circumstances in which a claimant in the appeal system is entitled to social welfare payments pending the outcome of the appeal, ostensibly because the former is discretionary whereas the latter would grant legally enforceable rights. Further, there appears to be a Department of Social Protection policy preventing Deciding Officers from making interim Supplementary Welfare Allowance payments to claimants pending the outcome of an appeal. Given the significant delays in the appeals system⁸² and the significant percentage of errors made at the first instance decision making stage,⁸³ this is entirely unsatisfactory, particularly for EU nationals whose support base may be substantially limited in comparison to that of an Irish citizen. The policy, if utilised to prevent Supplementary Welfare Allowance payments under s 201 or 202 to claimants in the appeals system, would, arguably, unlawfully fetter the discretion of Deciding Officers. In *Kershaw v Eastern Health Board*⁸⁴ the Court held that a paragraph of a circular⁸⁵ was ultra vires the Act, as it excluded absolutely the payments of a supplementary welfare allowance contrary to the provisions of the Social Welfare (Consolidation) Act 1981⁸⁶ which expressly granted deciding officer's discretion⁸⁷ to make the payment. In the context of EU law it is open to an Irish Court to set aside a

⁸¹ Section 312 of the Social Welfare Consolidation Act 2005, which provided for an appeal against decisions under s 323, was repealed by s 18 and Schedule 1 of the Social Welfare and Pensions Act 2008.

⁸² In 2011 average waiting time for a summary appeal was almost six months and in excess of a year for an oral appeal (Social Welfare Appeals Office Annual Report, 2011 at 3).

⁸³ 42.2% of appeals where there was an oral hearing were favourable (Social Welfare Appeals Office Annual Report at 3).

⁸⁴ [1985] ILRM 235.

⁸⁵ Circular, 23 June 1983. The Circular itself was deemed to be a lawful exercise of administrative power.

⁸⁶ Social Welfare (Consolidation) Act 1981, s 209 (subsequently repealed).

⁸⁷ In *Devitt v Minister for Education* [1989] ILRM 639, Lardner J. held that:

‘No doubt in relation to the exercise of this statutory discretion the Minister may adopt general rules of procedures to guide himself and to notify other concerned persons as to the manner in which he will exercise his discretion provided that they are relevant to the exercise of his powers and are reasonable. But he is not in my view entitled by any such rules or procedures to limit the scope of the discretion entrusted to him or to disable himself from the full exercise of it.’

provision of national law and grant interim relief on the basis of the ruling of the Court of Justice in *Factortame*.⁸⁸

In the United Kingdom there is express provision made in regulations⁸⁹ for the making of interim payments where an application for social welfare is pending, where the claimant is, or *may be*⁹⁰ entitled to payment. However, the regulations⁹¹ have been construed by the courts in the UK as excluding interim payments where there is an appeal pending to the First-tier Tribunal.⁹² In *R v Secretary of State for Social Security, ex parte Grant*⁹³ Harrison J. refused to make an order requiring interim payments to be paid where the applicant for judicial review made an application for interim relief, holding that ‘*there is no power for the Secretary of State to make interim payments.*’⁹⁴ The issue was canvassed again more recently, in Northern Ireland in the High Court in *Juscik (Tradeusz) v Department of Social Development*,⁹⁵ where Treacy J. accepted that the Court has power to dis-apply the regulations, on the basis of the *Factortame* principles and, in refusing to grant the order, citing Lord Goff in *Factortame (No 2)*,⁹⁶ held that:

‘the Court should not exercise its discretion to restrain a public authority by interim injunction from enforcing apparently authentic law unless satisfied, having regard to all the circumstances, that the

⁸⁸ Case C-213/89 *Factortame* (No.2) , where it was held, at para 23, that:

‘... Community law must be interpreted as meaning that a national court which, in the case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.’

See further, Case C-432/05 *Unibet* [2007] I-02271.

⁸⁹ Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, reg 2.

⁹⁰ *R v Secretary of State for Social security ex parte Sarwar & Ors* [1995] 7 Admin LR 781. See Desmond Rutledge, *Welfare Benefits and Judicial Review*, July 2012, < <http://www.gardencourtchambers.co.uk>> accessed 2 Jan 2013.

⁹¹ Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, reg 2(1A).

⁹² The Social Security and Child Support (SSCS) Tribunal deals with disputes concerning *inter alia* Income Support; Jobseeker's Allowance, Incapacity Benefit; Employment Support Allowance, Disability Living Allowance, Attendance Allowance, Retirement Pensions and Child Support. See further, The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, (S.I. No. 2685 (L. 13)).

⁹³ [1997] EWHC Admin 754.

⁹⁴ *ibid.* at para 22.

⁹⁵ [2011] NIQB 7.

⁹⁶ [1991] 1 AC 603 at 673.

challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course.’⁹⁷

Treacy J. also raised concerns regarding the potential deluge of such claims and the pressure on the public purse. The issue of interim relief was canvassed again in the UK in *R (Sanneh) v Secretary for State for Work and Pension*,⁹⁸ but, again, appears to have faltered⁹⁹ on the basis of an insufficiently strong case.¹⁰⁰ In *Sanneh* the Court also raised concerns about the prospect of repayment of monies, if an order was made and where the applicant was ultimately deemed not to be entitled to the social welfare payment. In *LD v Secretary of State for Work and Pensions*¹⁰¹ the High Court in the UK refused to grant interim payments to a claimant in the appeals system. This was appealed to the Court of Appeal who granted permission for the appeal and also ordered an interim payment pending the earliest determination of the claimants appeal by the First Tier Tribunal, on the basis that the Secretary of State ultimately controlled access to the First Tier Tribunal and that there had been unreasonable delay in sending the papers to the tribunal.¹⁰²

It is clear from the UK and Northern Ireland rulings that a strong case, with significant prejudice, is required where an applicant is seeking to have a provision of national law suspended on the basis of the principles espoused in *Factortame*. This is hardly surprising, given that in *Factortame* the potential damage to the applicant, in the absence of interim relief, was as noted by the Court of Justice, potentially irreparable.¹⁰³

⁹⁷ [2011] NIQB, 7 at para 16.

⁹⁸ [2012] EWHC 1840 (Admin).

⁹⁹ The first stage of Judicial Review, Leave, was refused. This was successfully appealed to the Court of Appeal and has been remitted to the High Court for substantive hearing.

¹⁰⁰ Purle J QC, held, at para 11, that:

‘Given that the claimant and her child lived sustainably (though not lavishly) at the time that the decision was made, the challenge to the 15th December letter really does not, in my judgment, get off the ground. In those circumstances, I do not consider that there is a sufficiently arguable claim to justify a judicial review. It follows from this that there is no judicial review claim to which interim relief is appropriately to be attached.’

¹⁰¹ C1/2011/1936.

¹⁰² See: Child Poverty Action Group PAG, Welfare Rights Bulletin 223, August 2011 <<http://www.cpag.org.uk/content/interim-interim>> accessed October 2011.

¹⁰³ *Factortame (No. 2)* (n 88) at para 13:

It is unlikely that an Irish court would compel the Minister for Social Protection to enact regulations. However, in a sufficiently strong case, where there is prejudice, an EU national, perhaps faced with the prospect of returning to his home state and removing children from school in Ireland, could secure an interim order from an Irish court for payment of social welfare. This is likely to come about not on the basis of a court espousing a general principle that all social welfare claimants in the appeals system are entitled to interim payments, but where an individual claimant's legal claim to payment is sufficiently strong to warrant an interim order –this would require the applicant to withdraw his case from the Social Welfare Appeals Office and take his chances in court.¹⁰⁴ An alternative remedy is for the appellant to seek an order of Mandamus, by way of judicial review, compelling the Social Welfare Appeals Office to grant an early hearing date.¹⁰⁵

Prior to entering the appeals system or, indeed, to contemplating Judicial Review proceedings, it is prudent –arguably essential in the latter case if costs are to be secured– for claimants who have been refused at first instance to seek a statutory revision of the decision as a revision represents the most expedient method for addressing an erroneous first instance decision or to re-open a decision on the basis of new evidence. Section 324 of the Social Welfare Consolidation Act 2005 provides for a Revision of Determination in respect of Supplementary Welfare Allowance payments,¹⁰⁶ while section 301 of the Act of 2005 provides for a Revision of Decision in respect of all other social welfare payments. An important distinction arises in respect of these sections, in so far as revision under s 324 must be carried out by a deciding officer other¹⁰⁷ than the person¹⁰⁸ who carried out the

'The House of Lords, before which the matter was brought, gave its abovementioned judgment of 18 May 1989. In its judgment it found in the first place that the claims by the appellants in the main proceedings that they would suffer irreparable damage if the interim relief which they sought were not granted and they were successful in the main proceedings were well founded.'

¹⁰⁴ Discussed later in this Chapter.

¹⁰⁵ *ibid.*

¹⁰⁶ This would include Exceptional Needs and Urgent Case payments pursuant to s 201 and 202 of the Act of 2005 and Rent Supplement pursuant to s 198 of the Act of 2005.

¹⁰⁷ S 324(1), (as amended by section 18 and schedule 1 of the Social Welfare and Pensions Act 2008) provides that:

original decision. This, in essence would mean that where a decision was made, for a second time by way of revision, by the same deciding officer, it would be *ultra vires* the Act –leaving the decision open to judicial review– as the officer would lack jurisdiction¹⁰⁹ to make the second decision.

2.5 Statutory revision of decision or determination

Sections 301 and 324 provide an unlimited right, at any time,¹¹⁰ to reopen the issue in the light of new evidence or facts or where a mistake has been made in respect of the law or facts, even where there is an extant appeal pending.¹¹¹ In addressing almost identical provisions in the Social Welfare Consolidation Act 1981, Murphy J. in *Corcoran v Minister for Social Welfare*¹¹² held that:

‘... it must be recognized in the present case that not merely is there an ample right of appeal to an aggrieved party but that there is an unlimited right to reopen the issue "in the light of new evidence or of new facts". Whilst the loss, even the temporary loss, of unemployment assistance may be a matter of great importance indeed, a decision to that effect is not final and can, as I say, be reviewed on the basis of new evidence.’

The observations of Murphy J. have been repeated in more recent High Court cases, which have considered the provisions of sections 301 and

‘A designated person (in this subsection referred to as the ‘first-named designated person’) may at any time— (a) revise a determination of another designated person of entitlement to supplementary welfare allowance...’

¹⁰⁸ Prior to September 2011, Supplementary Welfare Allowance was determined by Community Welfare Officers in the employment of the Health Service Executive. A refusal had to be made by a Superintendent Community Welfare Officer, now titled Assistant Principal Officer of the Department of Social Protection.

¹⁰⁹ In *Sheehan v Minister for Family Affairs & Anor* [2010] IEHC 4 McMenamin J., at para 19, held that:

‘It is a well-established precept of judicial review that in general where the law provides for a code, or appeal mechanism prior to resorting to judicial review an applicant should exhaust his rights of appeal, unless [there is] want of jurisdiction...’

¹¹⁰ Both s 301 and 324 provide that a decision may be revised ‘at any time’.

¹¹¹ Section 301(3). *cf* ss. 301(1)(a) shall not apply to a decision relating to a matter which is on appeal or reference under section 303 or 311 unless the revised decision would be in favour of a claimant.

¹¹² [1991] 2 IR 175.

324.¹¹³ Whilst a deciding officer is not obligated to positively revise every decision there is nonetheless an obligation on the deciding officer to consider any submissions made and to make a fresh decision. A refusal or failure, on the part of the deciding officer, to issue a fresh decision, is open to judicial review. In *G v Minister for Social Protection*¹¹⁴ a Polish national who had requested a statutory revision of decision sought an order of mandamus in the High Court compelling the Minister to furnish him with a decision where the applicant's request for a revision had not been complied with. The Minister accepted that the applicant was entitled to a fresh decision. This issue also arose in two other cases¹¹⁵ –concerning Irish applicants– which had an identical result, but with the bonus of a successful revision. The deciding officer has a discretion¹¹⁶ to determine the date from which a successful revision shall take effect. In principle this would normally mean from the date of the original application.

Where a revision is unsuccessful it can, nonetheless, serve an important function of rendering an out-of-date decision amenable to judicial review – where decisions must, generally, be challenged within three months.¹¹⁷ The Minister has, recently, attempted to circumvent this by asserting¹¹⁸ that the revision, following consideration of the new evidence, is being refused and that therefore the original out-of-date decision stands and is not amenable to

¹¹³ O'Neill J. in *Ayavoro v HSE & Minister for Social and Family Affairs* [2009] IEHC 66 held that:

‘In the first place, the statutory regime... not only provides for an appeal but, in fact, makes provision for revision of decision where further information is required.

Further, in *Sheehan v Minister for Family Affairs & Anor* [2010] IEHC 4 McMenamin J., at para 10, held that:

‘The appeal mechanism may work in two ways. It may either be considered by the appeals officer, or alternatively the matter may, pursuant to s. 301 of the Act of 2005 be referred back to the deciding officer for review or revision...’

Cf strictly speaking a revision does not form part of the appeal process, but it is, arguably, a form of appeal.

¹¹⁴ [2012] JR.

¹¹⁵ *R v Minister for Social Protection* 2012 JR and *D v Minister for Social Protection* 2012 JR.

¹¹⁶ Section 302(1) (c) of the Social Welfare Consolidation Act 2005, provides that:

‘it shall take effect as from the date considered appropriate by the deciding officer having regard to the circumstances of the case.’

¹¹⁷ Order 84, Rule 21(1), (as amended by S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011), provides that:

‘An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.’

¹¹⁸ This issue is due to come before the High Court in 2013 in *Malone v Minister for Social Protection* [2012] 1037/JR.

judicial review. It is unlikely that any Court would accept the Minister's approach –the respondent in *Kelly v The Minister for Social Protection*¹¹⁹ unsuccessfully advanced this argument– as this would require the Court to accept that there had been no fresh decision, when clearly there had been and where statute provides that the fresh, albeit negative, decision can be appealed.¹²⁰

Sections 301 and 324 represent something of a double-edged sword in so far as both sections have been used by deciding officers to negatively revise decisions in the absence of any request by the claimant for a revision. There are two reasons why this is so: section 302 expressly provides that the effect of a revised decision may be to disallow or reduce the rate of a social welfare payment and; section 301 does not limit, expressly or implicitly, to a claimant, the right to seek a revision and in *Minister for Social, Community and Family Affairs v Scanlon*¹²¹ the Supreme Court held that an earlier version of section 301 could apply retrospectively.¹²² It might also be said that it is axiomatic that the Minister and her deciding officers must have the ability to revise a decision where a payment has been made erroneously or by virtue of fraud or where circumstances have changed, provided the principles espoused in *Corcoran* are followed.

Sections 301 and 324 are important provisions to claimants, particularly in terms of securing a prompt decision in the face of significant delays in the Social Welfare Appeals Office. A claimant who has unsuccessfully appealed a decision may also avail of these sections,¹²³ but only where there

¹¹⁹ [2013] IEHC 260.

¹²⁰ Social Welfare Consolidation Act 2005, s 301(1):

‘...and the provisions of this Part as to appeals apply to the revised decision in the same manner as they apply to an original decision of a deciding officer.’

¹²¹ [2001] IESC 1.

¹²² *ibid.* Fennelly J.:

‘However, section 40 of the Act of 1992 removes any doubt. It is now clear that paragraph (aa) is to apply to "new facts or evidence relating to periods prior to and subsequent to the commencement of that paragraph". This provision is clear and unambiguous. It was the version of paragraph (aa) in force at the making of both the Deciding Officer and Appeals Officers' decisions. They are thus capable of retrospective effect.’

¹²³ This was not always so, in respect of the Social Welfare Consolidation Act 1981, it was held in *Lundy v Minister for Social Welfare* [1993] 3 IR 406, that:

has been a change of circumstances.¹²⁴ One provision which might appear to run contrary to the rights provided under s 301 and 324 is s 303 which states that:

‘A deciding officer may, where he or she thinks proper, instead of deciding it himself or herself, refer in the prescribed manner any question to be decided by the deciding officer to an appeals officer.’

However, the Minister does not appear to have prescribed¹²⁵ the manner in which a deciding officer can refer such questions, although deciding officers routinely refer matters directly to the Social Welfare Appeals Office. It might also be said that the wording of this section could, arguably, be read as referring to circumstances where the deciding officer had not made a decision and thus where a decision has been made it cannot then be referred on where a revision has been sought.

A claimant who has been refused a social welfare payment at first instance and whose request for a statutory revision of the decision is unsuccessful has two options: appeal the decisions to the Social Welfare Appeals Office or; challenge the decisions by way of judicial review proceedings in the High Court.

3. Statutory Appeals System/ Social Welfare Appeals Office

3.1 Jurisdiction of Chief Appeals Officer

‘... s. 300, sub-s. 1 expressly confines the jurisdiction of the deciding officer to revising decisions by deciding officers... he had no jurisdiction to revise the decision of an appeals officer.’

¹²⁴ Both section 301(b) and 324(c) provide that a deciding officer may:

‘revise any decision of an appeals officer where it appears to him or her that there has been any relevant change of circumstances which has come to notice since the decision was given...’

The effect of which is to exclude the Deciding Officer from revising an appeals officer’s decision on any other basis, as such a decision is final and conclusive, s 320.

¹²⁵ ‘Prescribed’ means made by way of regulations, pursuant to s 2(1) Social Welfare Consolidation Act 2005.

Where a claimant is refused social welfare at first instance he or she may appeal the decision to the Social Welfare Appeals Office (SWAO),¹²⁶ which is, in theory, an independent¹²⁷ appeals body, made up of a chief appeals officer, a deputy chief appeals officer and, as of 2012, forty appeals officers. The ‘independence’ of the SWAO, however, has been questioned by Hogan and Morgan¹²⁸ –and others¹²⁹– who assert that the connection between the Minister and the SWAO creates institutional bias or a perception of bias.¹³⁰ Whatever the truth or otherwise of these observations, it is perfectly clear from the case studies contained in the reports¹³¹ published annually¹³² by the SWAO, that Appeals Officers, in the main operate under a significant degree of independence from the Minister. Any deviation, whether self-imposed or from outside influence from this would be open to correction by

¹²⁶ In respect of appeals concerning s 200-201, Social Welfare (Consolidation) Act 2005, s 323 (as amended by section 18 and schedule 1 of Social Welfare and Pensions Act 2008). In respect of all other social welfare payments, Social Welfare (Consolidation) Act 2005, s 311.

¹²⁷ The SWAO states that:

‘The Social Welfare Appeals Office operates independently of the Department of Social and Family Affairs. It aims to provide an independent, accessible and fair appeals service...’

<<http://www.socialwelfareappeals.ie/>> accessed 4 Jan 2013.

¹²⁸ Hogan and Morgan (n 10), at 293, comment that ‘particular doubt had existed about the independence of the deciding officers/appeals system,’ and, at 308, ‘The system is administered by civil servants working in the Department of Social Welfare whose independence is not guaranteed by law and, who, perhaps, are influenced by departmental policy considerations.’

¹²⁹ In Northside Community Law Centre’s, *The Social Welfare Appeals System: Accessible & Fair?* (NCLC, 2005) it is averred, at page 2, that:

‘It operates separately from the Department of Social and Family Affairs with separate premises and staff. However, the Social Welfare Appeals Office, while stated to be independent, comes within the remit of the Department of Social and Family Affairs and is staffed by civil servants. Irrespective of whether the Social Welfare Appeals Office is independent in practice, it may be open to the perception that it is not independent in its structures.’

Available on <<http://www.nclc.ie/documents/NCLCSocialWelfare.pdf>> accessed 4 Jan 2013.

¹³⁰ The explanatory note in the Social Welfare (Appeals) Regulations 1990 (S.I. No. 344/1990) states that:

‘Part V of the Social Welfare Act, 1990 provides for certain changes in the Social Welfare (Consolidation) Act, 1981 to facilitate the establishment of the new Social Welfare Appeals Office as an executive office of the Department of Social Welfare. Under that Act appeals will in future be made to the Chief Appeals Officer, rather than to the Minister. The Act also provides that the functions of the Chief Appeals Officer will be prescribed in regulations.’

¹³¹ Available on <www.socialwelfareappeals.ie>.

¹³² Social Welfare Consolidation Act 2005, s 308 compels the Chief Appeals Officer to publish such reports.

the courts as is patently clear from the finding of the Supreme Court in *McLoughlin v Minister for Social Welfare*,¹³³ where it was held that:

‘...Appeals officers under the Social Welfare Act, 1952 are... and are required to be, free and unrestricted in discharging their functions under the Act’¹³⁴

Prior to the establishment of the SWAO in 1991, appeals were dealt with by appeals officers¹³⁵ under the direction of the Minister. This meant that appeals were sent to the Minister for distribution to appeals officers.¹³⁶ Part V of the Social Welfare Act, 1990 amended the Social Welfare (Consolidation) Act, 1981 to facilitate the establishment of the Social Welfare Appeals Office as an ‘executive office’ of the then Department of Social Welfare. Under the amended Act appeals would, in future, be made to the Chief Appeals Officer, rather than to the Minister. Part V of the 1990 Act does not expressly refer to the setting up of a separate appeals office – though it is clear that this was the intention¹³⁷ – but does, nevertheless, remove the jurisdiction of the Minister from the process and grant that jurisdiction to the chief appeals officer. Consequently, there can be little prospect of a successful challenge to the jurisdiction of the Chief Appeals Officer. Part V of the Act of 1990¹³⁸ also provided that the functions of the Chief Appeals Officer would be prescribed, which was done by way of regulations,¹³⁹ the most recent version of which was made in 1998¹⁴⁰ and amended in 2011.¹⁴¹

¹³³ [1958] IR 1 at 27.

¹³⁴ *ibid.* at 27.

¹³⁵ S 43 of the Social Welfare Act 1952 provided for the employment of appeals officers, as did the Social Welfare (Consolidation) Act 1981, prior to amendment by the Social Welfare Act 1990.

¹³⁶ Social Welfare (Insurance Appeals) Regulations, 1952 (S.I. No. 376/1952).

¹³⁷ The Social Welfare Act, 1990 (Part V) (Commencement) Order, 1990 S.I. No. 345/1990, provides that:

‘This Order brings into effect the provisions of Part V of the Social Welfare Act, 1990, which provides for certain changes in the social welfare appeals arrangements so as to facilitate the establishment of the new Social Welfare Appeals Office as an executive office of the Department of Social Welfare, with effect from 1 January, 1991.’

¹³⁸ Social Welfare Consolidation Act 1981, s 299 (as amended by s 20 Social Welfare Act 1990).

¹³⁹ Social Welfare (Appeals) Regulations 1990 (S.I. No. 344/1990).

¹⁴⁰ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998).

¹⁴¹ Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011).

3.2 Right to an oral hearing

The Regulations provide for an oral hearing at the discretion¹⁴² of the appeals officer. In *Kiely v Minister for Social Welfare (No. 2)*¹⁴³ the Supreme Court held that an oral hearing was mandatory unless the case was of such a nature that it could be determined summarily:

‘The fact that power to determine the appeal summarily is given only in those terms means that an oral hearing is mandatory unless the case is of such a nature that it can be determined without an oral hearing, that is to say, summarily. An appeal is of such a nature that it can be determined summarily if a determination of the claim can be made fairly on a consideration of the documentary evidence. If, however, there are unresolved conflicts in the documentary evidence as to any matter which is essential to a ruling of the claim, the intention of the regulations is that those conflicts shall be resolved by an oral hearing.’¹⁴⁴

This is in keeping with the Regulations.¹⁴⁵ The High Court addressed the issue again in *Galvin v Chief Appeals Officer*¹⁴⁶ where Costello P. held – without any reference to the Supreme Court authority in *Kiely*– that there was no ‘*hard and fast*’¹⁴⁷ rule that there must be an oral hearing, a view

¹⁴² Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998) (as amended by art 5 of Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011), provides that:

‘Where, in the opinion of the appeals officer, a hearing is required he or she shall, as soon as may be, fix a date and place for the hearing, and give reasonable notice of the said hearing to the appellant, the deciding officer or designated person, as the case may be, and any other person appearing to the appeals officer to be concerned in the appeal.’

See further: *Galvin v Chief Appeals Officer* [1997] 3 IR 240, where Costello P held that:

‘The statute gives a discretion to the appeals officer to hold or not to hold an oral hearing.’

¹⁴³ [1977] 1 IR 267.

¹⁴⁴ *ibid.* at 278.

¹⁴⁵ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 13 of which provides that:

‘Save as provided in section 270, where the appeals officer is of the opinion that the case is of such a nature that it can properly be determined without a hearing, he or she may determine the appeal summarily.’

Originally provided for in the Social Welfare (Assistance Decisions and Appeals) Regulations, 1953 (S.I. No. 9/195), art 16.

¹⁴⁶ *Kiely v Minister for Social Welfare* [1997] 3 IR at 240

¹⁴⁷ *ibid.* Costello P. held that:

shared by the European Court of Human Rights,¹⁴⁸ who took the view that an oral hearing could, in fact, delay matters, contrary to the ‘reasonable time’ requirement in Article 6. This is in keeping with the general rule in administrative law –that there is no fixed¹⁴⁹ rule requiring an oral hearing, that ‘written statements or other material’¹⁵⁰ or, as in the United States, an ‘exchange of views’¹⁵¹ may suffice. However, Costello P., in *Galvin*, went on to hold that ‘account’¹⁵² should be taken as to whether an oral hearing was requested and – in determining whether the rules of natural justice were breached in that fair procedures required that an oral hearing should have been held to determine the dispute– held that the dispute could not have been resolved without an oral hearing. This is very much in keeping with the ruling in *Kiely* and the pragmatic approach taken by the courts in Ireland, identified by De Blacam,¹⁵³ where the question posed is whether or not a hearing is required in order to enable the applicant fairly and adequately make his case?¹⁵⁴ In *Miller v Sweden*¹⁵⁵ the European Court of Human Rights adopted a similar approach. However, as noted by Whyte,¹⁵⁶

‘There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing.’

¹⁴⁸ *Schuler-Zgraggen v Switzerland* 16 E.H.R.R. 405, the ECtHR held that:

‘Lastly, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to "the particular diligence required in social-security cases" (see the Deumeland v. Germany judgment previously cited, p. 30, para. 90) and could ultimately prevent compliance with the "reasonable time" requirement of Article 6 para. 1 (art. 6-1) (see, mutatis mutandis, the Boddaert v. Belgium judgment of 12 October 1992, Series A no. 235-D, pp. 82-83, para. 39). There has accordingly been no breach of Article 6 para. 1 (art. 6-1) in respect of the oral and public nature of the proceedings.’

Mel Cousins, *Social Welfare Law*, (2nd Edn, Thompson, Roundhall, 2002) at 319.

¹⁴⁹ P.P Craig, *Administrative Law*, (5th Edn Thomson, 2001) at 433.

¹⁵⁰ Costello P. in *Galvin v Chief Appeals Officer* [1997] 3 IR 240.

¹⁵¹ Hilary Delany ‘*Judicial Review Of Administrative Action – A Comparative Analysis*, (Round Hall, Dublin, 1990), (2001) at 190, citing *US v Florida East Coast Rly Co.* [1973] 410 US 224.

¹⁵² *Galvin v Chief Appeals Officer* [1997] 3 IR 240. See further *Frenchchurch Properties Ltd v Wexford Co. Co.* [1992] 2 IR 268.

¹⁵³ Mark De Blacam, *Judicial Review*, (Lexis Nexis, 2000) at 127.

¹⁵⁴ *ibid* at 127.

¹⁵⁵ Application no. 55853/00, 8 Feb 2005, where the ECtHR held, at 34, that:

‘The Court considers that the issues raised by the applicant’s judicial appeal were not only technical in nature. In its view, the administration of justice would have been better served in the applicant’s case by affording him a right to explain, on his own behalf or through his representative, his personal situation, taken as a whole at the relevant time, in a hearing before the County Administrative Court (see, mutatis mutandis, the above-cited Göç judgment, § 51).’

Mel Cousins, *Social Security Law* (n 10) at 299.

¹⁵⁶ Gerard Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2000).

there is ample evidence that success rates in respect of oral appeals are far higher than appeals dealt with summarily. In 2011 48% of oral appeals were successful, whereas only 24.7% of summary appeals were successful.¹⁵⁷

Although the number of appeals being dealt with by way of oral hearing is up from 34.7% in 2011¹⁵⁸ to 40.3% in 2012,¹⁵⁹ the Appeals Office nonetheless continues to unlawfully deprive appellants of the right to an oral hearing, in circumstances where, on the facts of particular cases, there was a clear conflict of evidence which could only be resolved by way of an oral hearing. This has resulted in a number of judicial reviews, the outcome of which was the summary decision was withdrawn and an oral appeal given.¹⁶⁰

Recently, in *K v Minister for Social Protection*,¹⁶¹ the applicant, who was in the social welfare appeals system, succeeded in having a decision set aside, by way of judicial review, where an Appeals Officer determined and informed the applicant by letter that an oral hearing was warranted and latterly proceeded to make a negative decision without holding the oral hearing.

3.3 Right to Representation

There is further provision in the regulations for claimants to be represented, whether by family, friend or legal persons, at the oral hearing,¹⁶² again, at

¹⁵⁷ Social Welfare Appeals Office Annual Report, 2011 at 3:

‘Oral Hearings (34.7%): 8,821 of the 25,390 appeals finalised in 2011 were dealt with by way of oral hearings, of which 4,237 (48%) had a favourable outcome... : The balance of 16,569 appeals finalised were dealt with by way of summary decisions of which 4,094 (24.7%) had a favourable outcome for the appellant.’

¹⁵⁸ *ibid.*

¹⁵⁹ Social Welfare Appeals Office Annual Report, 2012 at 3:

‘Oral Hearings (40.3%): 9,267 of the 22,997 appeals finalised in 2012 were dealt with by way of oral hearings.’

¹⁶⁰ [2012-2013] Judicial Reviews.

¹⁶¹ [2012] Judicial Review.

¹⁶² Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 15 provides that:

‘(1) The appellant shall ordinarily appear at the hearing in person and he or she may be accompanied by any member of his or her family, or, with the consent of the appeals officer, by any other person. (2) The appellant may, with the consent of the appeals officer, be represented at the hearing by any member of his or her family or by any other person. (3) The deciding officer or designated officer, as the case may be, may appear at the hearing in

the discretion of the Appeals Officer. In this regard there is ‘no absolute right’¹⁶³ in either Ireland or the United Kingdom¹⁶⁴ to representation – though a statutory exclusion *in toto* might render it unconstitutional¹⁶⁵ or an unlawful fettering on discretion.¹⁶⁶ In *Corcoran v Minister for Social Welfare*¹⁶⁷ Murphy J. held that:

‘If, on the other hand, the applicant for Social Welfare benefits has the resources to instruct Solicitors at his own expense can those Solicitors as a matter of right attend before the Administrative Tribunal? In my view the answer is in the negative.’

There are valid arguments for and against an absolute right to legal representation. On one hand, as noted by Hogan and Morgan, the practical value of an oral hearing may depend upon the presence of an experienced advocate¹⁶⁸ (not necessarily a lawyer¹⁶⁹). On the other hand representation may, as noted by Craig, be counterproductive, unnecessary or overly

person or he or she may be represented by another officer of the Minister or the health board, as the case may be. (4) Any other person appearing to the appeals officer to be concerned may also attend at the hearing.

¹⁶³ P. Craig, *Administrative Law*, (5th Ed, Thomson, London, 2001) at 435. Hogan & Morgan, *Administrative Law in Ireland* (3rd Ed., Round Hall, Dublin, 1998) at 560.

¹⁶⁴ *R v Secretary of State for the Home Department Ex p. Tarrant* [1985] QB 251.

¹⁶⁵ *O’Brien v PIAB & Ors*, unreported, High Court, 25 Jan 2005, where McMenamin J. held that:

‘[T]he fact that the matters in issue before [PIAB] are truly ones of substance. They relate to the applicant’s property right in his cause of action in tort. They are connected (albeit indirectly) with his constitutional right of access to the courts.’

In the Supreme Court, in *O’Brien*, [2008] IESC it was held that:

‘A court would be slow to draw such an inference of such a breach of fundamental right. In this case I am satisfied that the statute did not intend to interfere with the right of legal representation.’

¹⁶⁶ In *Enderby Town FC Ltd v FA Ltd* [1971] Ch 591, Lord Denning MR held that:

‘The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: “We will never allow anyone to have a lawyer to appear for him.” The tribunal must be ready, in a proper case, to allow it. That applies to anyone in authority who is entrusted with a discretion. He must not fetter his discretion by making an absolute rule from which he will never depart.’

¹⁶⁷ [1991] 2 IR175. Murphy J. further held that, in respect of the Social Welfare (Assistance Decisions and Appeals) Regulations 1953 S.I 9 of 1953: ‘That Instrument does not provide for legal representation.’ This appears unduly narrow as Article 18(1) of the said regulations provided that:

‘The appellant may appear at the hearing in person. He may be represented at the hearing by any member of his family, or, with the consent of the appeals officer, by any other person.’

‘Any other person’ could, of course, be a legal representative.

¹⁶⁸ Gerard Hogan and David Morgan, *Administrative Law* (3rd Edn, Round Hall, 1998) at 560.

¹⁶⁹ Crosscare, a charity providing advice to social welfare claimants, routinely assist claimants via representation at SWAO oral hearings.

cumbersome,¹⁷⁰ and may have the effect of ‘protracting and complicating the proceedings to no advantage.’¹⁷¹ The deciding authority must consider the seriousness of the consequences for the applicant and, at least in England, the capacity of a person to present their own case.¹⁷² However, given the increasing complexity of cases coming before the Social Welfare Appeals Office, adequate representation can be essential. Fortunately, these issues rarely, if ever, now arise in social welfare appeals as Appeals Officers routinely admit representation at oral hearings, by way of a lay advocate or a legal team (consisting of solicitor and barrister¹⁷³). There does not appear to be any scope for the legal representation in respect of the deciding officer.¹⁷⁴

Where a claimant is represented by a legal team or otherwise, costs cannot be awarded¹⁷⁵ by an Appeals Officer other than expenses.¹⁷⁶ Consequently, it would appear that the appellant must foot any bill for legal costs, although it might be said that there is some ambiguity in respect of precisely what expenses are payable to a person acting in a representative capacity.¹⁷⁷ The appellant or witnesses attending are entitled to travel and subsistence and loss of remuneration,¹⁷⁸ whereas a person appearing in a representative capacity is entitled to an amount only in respect of the person’s actual

¹⁷⁰ P.P Craig, *Administrative Law*, (5th Edn Thomson, London, 2001) at 535.

¹⁷¹ (n 163) at 119.

¹⁷² (n 163) at 435. In *R v Secretary of State for the Home Department and another, ex parte Tarrant* [1985] QB 251, the court set out the ‘Tarrant’ rules, which, while addressing legal representation in prison discipline, required the authorities to consider:

‘the seriousness of the charge.. the complexity of the charge... whether the charge should be dealt with swiftly in order to maintain prison discipline... the gravity of potential penalties; and... the prisoner’s ability to understand the proceedings.’

¹⁷³ A barrister can appear at the District Court unattended by a solicitor, under the Bar Council of Ireland Code of Conduct. This rule may or may not extend to a Social Welfare appeal.

¹⁷⁴ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 15(3) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011, art 5: which provides that:

‘The deciding officer or designated person, as the case may be, may appear at the hearing in person or he or she may be represented by another officer of the Minister.’

¹⁷⁵ Social Welfare Consolidation Act 2005, s 316(1)(a) provides that:

‘(a) subject to paragraph (b), an award shall not be made in respect of any costs (whether in respect of the representation of the appellant or otherwise in relation to the matter) incurred by a person;’

¹⁷⁶ Social Welfare Consolidation Act 2005, s 316(1)(a) provides that:

‘(b) an appeals officer may make an award to a person appearing before the officer towards the person’s expenses, which shall be payable by the Minister.’

¹⁷⁷ See Hogan and Morgan, *Administrative Law*, (n 10) at 562.

¹⁷⁸ Social Welfare Consolidation Act 2005, s 316(2)(a).

attendance.¹⁷⁹ It cannot be doubted, however, that the intention of the legislature was to amend the Social Welfare Consolidation Act 1981¹⁸⁰ to limit any payments to expenses only.¹⁸¹

The Civil Legal Aid Act, 1995 does not, as of yet, make provision for legal representation at the Social Welfare Appeals Office, though may in respect of judicial review¹⁸² or in respect of a statutory appeal on a question of law¹⁸³ –which, arguably, complies with the ECtHR ruling in *Airey v Ireland*.¹⁸⁴ This has been the subject of some criticism by Irish law centres.¹⁸⁵ In the UK, legal aid was provided for social welfare claimants, but has, on foot of recent legislation, which has proven controversial,¹⁸⁶

¹⁷⁹ Social Welfare Consolidation Act 2005, s 316(2)(b), which provides that:

‘in the case of a person appearing before an appeals officer in a representative capacity, an amount only in respect of that person’s actual attendance.

¹⁸⁰ Social Welfare Consolidation Act 1981, s 298(11) of which provided that:

‘An appeals officer may, in relation to any matter referred to him under this section, award to any person any costs or expenses (including expenses representing loss of remunerative time) which he considers reasonable, and the award shall be payable by the Minister.’

¹⁸¹ This provision was considered in *O’Sullivan v Minister for Social Welfare*, unreported, High Court, Barron J, 9 May 1995, where it was held that a standard set fee could not be applied to legal costs. This resulted in the Oireachtas amending the 1981 Act by way of s 34 of the Social Welfare Act 1996 (now s 316 of the 2005 Act).

¹⁸² In *Maher v Minister for Minister for Social Welfare* [2008] IESC 15, the applicant, a lay litigant had been granted legal aid to cover ‘counsel’s opinion’ in his case. However, the Legal Aid Board declined to grant legal aid to take the matter further.

¹⁸³ Though issues of delay may arise, Legal Aid Board, Annual Report 2011, at 12:

‘While the Board provides a priority service or effectively prioritises a significant number of its clients, the waiting time for a first appointment with a solicitor for other matters was in excess of four months in 21 of the Board’s law centres at the end of the year.’

<<http://www.legalaidboard.ie/lab/publishing.nsf>> accessed on 4 Feb 2013.

¹⁸⁴ (Application no. 6289/73), 9 October 1979, at 26:

‘The conclusion appearing at the end of paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a “civil right”. To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (art. 6-3-c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.’

See further, *O’Donoghue -v- The Legal Aid Board & Ors* [2004] IEHC 413.

¹⁸⁵ See *The Social Welfare Appeals System: Accessible & Fair?* (Northside Community Law Centre, 2005). Available on <www.nclc.ie/documents/NCLCSocialWelfare.pdf> accessed on 12 Nov 2012. See further Free Legal Advice Centres (FLAC) ‘*Not Fair Enough, Making the case for reform of the social welfare appeals system*’ (October 2012). Available on www.flac.ie/download/pdf/not_fair_enough_exec_summary_final.pdf> accessed 12 Jan 2013.

¹⁸⁶ See Scope, *Legal aid in welfare: the tool we can’t afford to lose*, (2011), where it is suggested that the removal of legal aid will lead to unmeritorious appeals being taken which in turn will clog up the system and create further delay. <<http://www.baringfoundation.org.uk/LegalAidinWelfare.pdf>> accessed 4 Feb 2013.

been significantly circumscribed.¹⁸⁷ Given what is at stake –particularly for EU nationals who may be faced with having to leave Ireland if they cannot access social welfare– and the complex nature of some social welfare case, it seems somewhat anomalous that legal representation is not available to appellants. This, of course, has to be weighed against the willingness of private practitioner solicitors to take on cases on a pro bono basis in respect of social welfare appeals and judicial review. It is also must be borne in mind that often there are significant sums of money at issue in an appeal and that may be in the appellant’s interest to secure their own legal representation, even if he or she has to foot the bill.

3.4 Appeals Process

The Regulations provide that an appeal must be in writing,¹⁸⁸ setting out the basis and facts relied upon¹⁸⁹ and made within 21 days of the first instance decision¹⁹⁰. There is discretion to extend this period¹⁹¹ and, in fairness to the SWAO, extensions are routinely granted. There is an important provision – important in the context of judicial review, where the courts are loath to allow appellants to pursue both remedies¹⁹²– whereby an appeal can be

¹⁸⁷ Legal Aid, Sentencing and Punishment Act 2012, s 9:

‘(1) Civil legal services are to be available to an individual under this Part if ... they are civil legal services described in Part 1 of Schedule 1 (8):

8(1) Civil legal services provided in relation to an appeal on a point of law to the Upper Tribunal, the Court of Appeal or the Supreme Court relating to a benefit, allowance, payment, credit or pension under—

(a) a social security enactment..’

¹⁸⁸ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 9(1) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011, art 5.

¹⁸⁹ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 9(4) and 9(5) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011, art 5.

¹⁹⁰ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 9(2) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011, art 5.

¹⁹¹ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 9(3) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011, art 5. The SWAO Annual Report, 2011 states that:

‘In exercising discretion under this provision, factors to which the Chief Appeals Officer would have regard would include the reasons for the delay, the length of the delay (the longer the delay the more cogent should be the reason for the delay), the question at issue, the prospects of success and the interests of justice. (SWAO 2011b:7)’

¹⁹² Carroll J. in *State (Wilson) v Judge Neilan* Unreported, High Court, 18th April 1985, held that held that an applicant must elect between Judicial Review and an appeals process. De Blacam, *Judicial Review* (n 148).

withdrawn.¹⁹³ The SWAO then forward the appellant's submissions to the Minister who is obligated to furnish, to the SWAO, a statement and any relevant documents¹⁹⁴ –this can often lead to significant delay in the process as the Department can often take months to respond and the regulations merely require that the Department furnish the information 'as soon as may be'.¹⁹⁵ The term 'as soon as may be' has been considered by the Superior Courts in Ireland in a number of cases. In *Minister for Justice Equality and Law Reform v L G*¹⁹⁶ Peart J. held that the term permitted some passage of time.¹⁹⁷ In *McCarthy & anor -v- Garda Siochana Complaints Tribunal & ors*¹⁹⁸ the Supreme Court held that the term depended upon its statutory context:

'Provisions in statutes requiring expedition but not specifying any precise time limit have traditionally taken different forms such as "*as soon as possible*", "*as soon as practicable*" and as in this case "*as soon as may be*" etc. A good deal of the case law in relation to these respective expressions is of limited assistance in my view because their meaning is always contextual to the statute or document in which they appear.'¹⁹⁹

Further, that:

'I take the view that "*as soon as may be*" means as soon as may be reasonably practicable in all the circumstances...'²⁰⁰

¹⁹³ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 9(3) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011, art 5.

¹⁹⁴ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 10 as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011, art 5.

¹⁹⁵ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 10 as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011, art 5.

¹⁹⁶ [2005] IEHC 310.

¹⁹⁷ *ibid.* Peart J.:

'No strict time limit has been inserted in the Act or in the Framework Decision Itself. The phrase "as soon as may be" permits of some passage of time clearly.'

¹⁹⁸ [2002] IESC 18.

¹⁹⁹ *ibid.* Fennelly J.

²⁰⁰ *McCarthy* (n 198).

This point has been raised in a number of judicial reviews by applicants whose appeals have been delayed by the Department of Social Protection's delay in forwarding on departmental submissions. In *G v Chief Appeals Officer & Ors*²⁰¹ the Appeals Officer sent a request during May 2012 to the Department of Social Protection for their submission, which was not sent by the Department until almost a year later in April 2013, which led to a significant delay in the processing of the appeal. The applicant sought an order of mandamus compelling the Chief Appeals Officer to process the appeal and a declaration that the Department's delay in making their submissions was unlawful. The legal points raised in the pleadings were not ventilated before the Court at a full hearing, as the case was settled in favour of the applicant.

The regulations further provide for the taking of particulars from 'any other person'.²⁰² Any evidence upon which the Appeals Officer intends to rely or which is relevant,²⁰³ must be put to the appellant for comment and where the evidence is given orally, the appellant or his or her representatives must be allowed to question the person giving the evidence. In *Kiely v Minister for Social Welfare (No. 2)*²⁰⁴ Kenny J. approved the observations of Diplock LJ in *R. v. Deputy Industrial Injuries Commissioner - ex parte Moore* [1965]1 Q.B. 456:

'Where ... there is a hearing ... the second rule [of natural justice] requires the deputy commissioner (a) to consider such "evidence" relevant to the question to be decided as any person entitled to be represented wishes to put before him; (b) to inform every person represented of any "evidence" which the deputy commissioner proposes to take into consideration, whether such "evidence" be

²⁰¹ *G v Chief Appeals Officer, Social Welfare Appeals Office and Minister for Social Protection* [2013] Judicial Review.

²⁰² Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 12(a) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011), art 5.

²⁰³ In *Duffy v. Eastern Health Board*, unreported, High Court, ex tempore, 14 March 1988 where failure on the part of the Board to provide the applicant's legal advisers with material from the file necessary for the preparation of her appeal was held to amount to a breach of natural justice. See Whyte, Whyte, Gerard, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2000) at 126.

²⁰⁴ [1971] IR 267.

proffered by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigation; person entitled to be represented wishes to put before him; (b) to inform every person represented of any "evidence" which the deputy commissioner proposes to take into consideration, whether such "evidence" be proffered by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigation; (c) to allow each person represented to comment upon any such "evidence" and, where the evidence is given orally by witnesses, to put questions to those witnesses: and (d) to allow each person represented to address argument to him on the whole of the case.²⁰⁵

There is provision in the Act of 2005 for the compelling of witnesses to attend a hearing²⁰⁶ –failing which the witness is exposed to summary criminal conviction²⁰⁷ – and the taking of evidence on oath.²⁰⁸

Where a decision is not in favour of the appellant the Appeals Officer must furnish reasons for the decision.²⁰⁹ The rules in respect of the provision of reasons already discussed in this chapter would also apply to the SWAO. Further, the obligation on contracting states', under Article 6 of European Convention on Human Rights –which provides that 'in the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing'– extends to tribunals.²¹⁰ In *Hirvisaari v Finland*,²¹¹ where a social welfare payment was at issue the European Court of Human Rights held that

²⁰⁵ *ibid.*

²⁰⁶ Social Welfare Consolidation Act 2005, s 314(1) and 314(4).

²⁰⁷ Social Welfare Consolidation Act 2005, s 314(3).

²⁰⁸ Social Welfare Consolidation Act 2005, s 313 and 314(4).

²⁰⁹ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 19(3) as amended by Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011), art 5.

²¹⁰ In *Hirvisaari v Finland* (Application no. 49684/99) 27 September 2001, the applicant complained of not receiving a fair trial at the Pensions Board and the Insurance Court.

²¹¹ *Ibid* at para 30, the ECtHR held that:

'The Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case.'

tribunals and courts must state ‘adequately’ the reasons on which judgments are based.

3.5 Application of fair procedures, natural and constitutional justice

The regulations appear to give the Appeals Officer broad powers²¹² in respect of how the appeal hearing is conducted and how evidence is admitted.²¹³ This, however, would have to be tempered by the rules of natural and constitutional justice –including the requirement that both sides be fairly heard²¹⁴ and the right to challenge evidence by way of cross-examination²¹⁵ – already discussed throughout this chapter.

The ruling in *Murphy v Minister for Social Welfare*,²¹⁶ where Blayney J. held that a deciding officer has no power to decide any question unless it is submitted to him for his decision,²¹⁷ does not apply to Appeals Officers as there is an express statutory provision,²¹⁸ confirmed in *Kiely*,²¹⁹ whereby the decision on appeal can be heard *de novo* by an Appeals Officer.

²¹² Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 18(1) provides that: ‘The procedure at the hearing shall be such as the appeals officer may determine.’

²¹³ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 18(1) provides that: ‘The appeals officer may admit any duly authenticated written statement or other material as prima facie evidence of any fact or facts in any case in which he or she thinks it appropriate.’

²¹⁴ In *Kiely v Minister for Social Welfare (No. 2)* [1971] IR 267, it was held that: ‘Natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. Audi alteram partem means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination. The dispensation of justice, in order to achieve its ends, must be even handed in form as well as in content...Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing.’

²¹⁵ *ibid.*

²¹⁶ Unreported, High Court, Blayney J., 9th July 1987.

²¹⁷ See (n 39).

²¹⁸ Social Welfare Consolidation Act 2005, s 311(3), which provides that: ‘An Appeals Officer... shall not be confined to the grounds on which the decision of the deciding officer... was based, but may decide the question as if it were decided for the first time.’

²¹⁹ In *Kiely v Minister for Social Welfare (No. 2)* [1977] IR 267, Henchy J. commenting on an earlier version of the foregoing provision, held that:

‘The appeals officer may go outside the grounds on which the deciding officer made his decision and may decide the question as if it were being decided for the first time... The statutory intention, therefore, was that the appeals officer would be armed with the necessary jurisdiction to conduct a full and effective oral hearing *de novo*.’

3.6 Prompt consideration of appeals and delay

One provision of the regulations which warrants closer attention by the Courts is the requirement that appeals must be given ‘prompt consideration’.²²⁰ This requirement is set against a back-drop of 35,241²²¹ appeals made in 2011, more than one fifth of which related to Jobseeker’s Allowance and Supplementary Welfare Allowance.²²² These are both payments which are regularly applied for by EU nationals. There was also and a back-log of 20,274²²³ appeals from 2010, with similar figures for 2012.²²⁴ As a consequence, delay in the appeals system is marked –with average processing times for oral hearings of in excess of twelve months²²⁵ and almost six months for summary hearings²²⁶ –and highly problematic for appellants who may be left without social welfare payments for such significant periods of time. In *Sheehan v Minister for Social and Family Affairs*²²⁷ McMenamin J. observed that judicial review would lie where there was unlawful delay.²²⁸

There have, in 2013, been several judicial reviews brought by applicants against both the Minister for Social Protection, in respect of delays in first-instance decision-making and the Chief Appeals Officer, in respect of delays in processing appeals. In *K v Minister for Social Protection*²²⁹ the applicant was waiting in excess of ten months for a decision on Carer’s

²²⁰ Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108/1998), art 6.

²²¹ Chief Appeals Officer, Social Welfare Appeals Office, *Annual Report*, 2011 (SWAO, June 2012), at 2, available on: <<http://www.socialwelfareappeals.ie/pubs/annreps/annrep11.pdf>> accessed 13 Jan 2013.

²²² *ibid.* at 8.

²²³ (n 221) at 14.

²²⁴ Chief Appeals Officer, Social Welfare Appeals Office, *Annual Report*, 2012 (SWAO, June 2013), available on: <<http://www.socialwelfareappeals.ie/pubs/annreps/annrep12.pdf>> accessed 9 August 2013.

²²⁵ (n 221) at 6

²²⁶ (n 221) at 6.

²²⁷ [2010] IEHC 4.

²²⁸ *ibid.* at para 17:

‘One can envisage a set of circumstances in which a failure to deal with an appeal within a reasonable time might, potentially, constitute grounds for judicial review. The question that arises is whether there is any indication of a breach of statutory time limit or an unreasonable failure to comply with provisions under the Act?’

²²⁹ [2013] Judicial Review.

Allowance, in circumstances where there was significant prejudice as the applicant was the carer of a special needs child.

In *B v Health Service Executive*,²³⁰ the applicant was lawfully evicted –the landlord having sufficient time to go through the Private Rental Tenancy Board– during the period in which she awaited the outcome of her appeal. The remedy for delay is mandamus, compelling the SWAO to determine the appeal, by way of judicial review, which is discussed in detail below. In *Z v Chief Appeals Officer*²³¹ the applicant sought an order of mandamus from the High Court, by way of judicial review, compelling the Appeals Officer to make a decision, in circumstances where there was a delay of sixteen months.

3.7 Jurisdiction of Appeals Officer

Appeals Officers routinely consider complex question of national and European Union law, but what is their jurisdiction in Ireland? Hogan J. in *Plesca v HSE*²³² referring to the jurisdiction of a HSE Appeals Officer, held that:

‘The task of the appeals officer was to apply the law enacted by the Oireachtas. While he or she must, of course, be conscious of the provisions of the Constitution and EU Law, the appeals officer had no jurisdiction, for example, to disregard the express language of the Social Welfare Acts on the ground that they were considered to be a disproportionate interference with the constitutional right to earn a livelihood. This would amount to a form of ersatz declaration of unconstitutionality through an oblique procedure, something which would be contrary to Article 34.3.2 of the Constitution. Likewise, so far as EU law is concerned, it is plain that administrative agencies enjoy no power to determine that domestic enactments are

²³⁰ [2010] Judicial Review.

²³¹ [2012] Judicial Review.

²³² [2010] 1339 JR, unreported, High Court, Hogan J., 27th May 2011.

incompatible with EU law and that this jurisdiction is reserved to the judicial branch.’

While it is clear that only the High Court retains jurisdiction to strike down incompatible legislation, nevertheless, EU law places significant demands upon appeals officers and the SWAO, not least the obligation, as an emanation of the State, to dis-apply conflicting provisions of national law.²³³ If, for example, an appeals officer was faced with an Article 23 (Directive 2004/38) case,²³⁴ the appeals officer would be bound by the provisions of the Directive,²³⁵ despite the fact that it was improperly transposed,²³⁶ provided it was deemed unconditional and sufficiently precise.²³⁷ If the appeals officer failed to apply the provisions of the Directive, favouring national law instead, this would render the SWAO, as an emanation of the State, accountable as though it were the State itself. In *Coppinger v Waterford County Council*²³⁸ it was held that:

‘The first question which has to be considered in connection with the claim based on the Directives is the question of whether Waterford County Council is an "emanation of the State." If it is, then its obligations towards a private individual under the Directives are no different than if it was the State itself.’²³⁹

²³³ Case C-103/88 *Fratelli Contanzo v Comune di Milano* [1989] ECR 1839 at para 33:

‘administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.’

²³⁴ See Chapter 2.

²³⁵ Case C-106/89 *Marleasing* [1990] ECR I-4135 para 8:

‘...Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.’

²³⁶ *Fratelli* (n 233) para 31:

‘When the conditions under which individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.’

²³⁷ Case C-188/89 *Foster* [1990] ECR 3313:

‘Unconditional and sufficiently precise provisions of a Directive may be relied upon against organisations or bodies which are subject to the authority or control of the State...’

²³⁸ [1998] 4 IR 220.

²³⁹ *ibid.*

This would expose the SWAO, deciding officers making first instance decisions and by association the Minister to a damages claim. In *Brasserie du pecheur*²⁴⁰ the Court of Justice held that:

‘the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained’²⁴¹

3.8 Appeal to the High Court on a question of law

The Chief Appeals Officer may refer a case directly to the High Court²⁴² or the Circuit Court,²⁴³ though in practice this is extremely rare, as the majority of social welfare cases²⁴⁴ which end up in the High Court have been judicial reviews or statutory appeals on a question of law. An appeal on a question of law was originally provided for in the 1952 Act²⁴⁵ and again set out in s 299 of the Social Welfare Consolidation Act 1981, where it is provided that:

‘if a question is decided by an appeals officer, any person who is dissatisfied with the decision may appeal therefrom to the High Court on any question of law.’²⁴⁶

Section 299 was subject to section 298(6) of the Act of 1981, which provided that the decisions of an appeals officer –subject only to a revision from the appeals officer²⁴⁷ or the Chief Appeals Officer²⁴⁸– in respect of a broad range of social welfare payments²⁴⁹ were final and conclusive. This, ostensibly, excluded many SWAO decisions from an appeal to the High

²⁴⁰ Cases C-46/93 and C-48/93 *Brasserie du pecheur* [1996] ECR I-01029.

²⁴¹ *ibid.* at para 22.

²⁴² Social Welfare Consolidation Act 2005, s 306.

²⁴³ Social Welfare Consolidation Act 2005, s 307.

²⁴⁴ There are forty one cases listed on Courts.ie as having been taken against the Minister for Social Protection in 2012, fifteen of which appear to be appeals on a point of law, pursuant to s 327 of the Social Welfare Consolidation Act 320, the balance being Judicial Reviews. Available on: <<http://highcourtsearch.courts.ie/>> accessed on 14 1 2013.

²⁴⁵ Social Welfare Act 1952, s 45.

²⁴⁶ S 299(b).

²⁴⁷ Social Welfare Consolidation Act 1981, s 300(3)

²⁴⁸ Social Welfare Consolidation Act 1981, s 300(4).

²⁴⁹ Including Supplementary Welfare Allowance and Assistance (now Jobseeker’s Assistance).

Court on a question of law, so much so that Lynch J. in the High Court in *Kingham v Minister for Social Welfare*²⁵⁰ stated that:

‘This is an extremely wide exclusion and could be construed to exclude from appeal the vast majority of questions that might arise under the provisions of the 1991 Act.’

Lynch J. held that the Court must construe the exclusion narrowly so as not to oust the jurisdiction of the Court, ‘save where such ouster is clear’.²⁵¹ It might, however, be argued that the ouster was clear. In any event, Lynch J. held that as the issue before him involved statutory interpretation:

‘I think I have jurisdiction to deal with the question of the true construction of the statutes and regulations... and to refer the matter back to the Minister and the Department for reconsideration in the light of such construction if such construction so warrants.’

When the 1981 Act was once again consolidated in 1993, the right to appeal on a question of law was retained and set out in s 271, but s 296(6) of the 1981 Act was amended to give effect to the *Kingham* judgment. The decision of the appeals officer would be final and conclusive, but now subject to s 271,²⁵² in other words subject to a right of appeal to the High Court on a question of law. Further, the statutory provision, whereby a decision of an appeals officer is deemed to be final and conclusive, is subject to the right to seek a statutory revision of decision or determination which may be undertaken at any time. The effect of what is now s 301 and 324 of the Social Welfare Consolidation Act 2005 is that, ostensibly, no decision of an appeals officer is ever final and conclusive. Further, as noted in *Maher v Minister for Social Welfare*,²⁵³ a review with the Chief Appeals

²⁵⁰ Unreported, High Court, 25 November 1985. See Hogan and Morgan, *Administrative Law* (n 10) at 309.

²⁵¹ *ibid.*

²⁵² Social Welfare Consolidation Act, 1981:

‘...shall, subject to sections 248(1)(b), 262, 263 and 271, be final and conclusive.’

²⁵³ [2008] IESC 15, where Denham J. held that:

‘...it is clear under s.263 of the Act of 1993 that the Chief Appeals Officer may "at any time" review any decision.’

Officer may be invoked at any time.²⁵⁴ In *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs*²⁵⁵ the Supreme Court held that a review was not an appeal but that it was open to Chief Appeals Office to seek additional information if necessary.²⁵⁶

A number of important points remain to be addressed in respect of an appeal on a question of law. Firstly, what is a question of law? This issue was addressed directly by the Supreme Court in *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs*,²⁵⁷ where it was held that:

‘Clearly, on the authorities the High Court or this court on appeal is entitled to consider whether it was open to the appeals officers to come to the decision which she did arrive, at and, if not, whether the evidence conclusively established that Mr. Walsh was an independent contractor. If so, the High Court or this court on appeal can make a declaration to that effect. A statutory appeal on a question of law is not a judicial review and a question of law includes the question of whether the evidence supports only one conclusion.’

Laffoy J., in *Neenan Travel Ltd v Minister for Social and Family Affairs*,²⁵⁸ held that the Court had a narrow jurisdiction under s. 327 which excluded any challenge to the *vires* of an officer.²⁵⁹ This appears unduly narrow and contrary to the Supreme Court decision in *Castleisland*.

This provision is now found in s 318 of the Social Welfare Consolidation Act 2005.

²⁵⁴ Social Welfare Consolidation Act 2005, s 318.

²⁵⁵ [2004] IESC 40.

²⁵⁶ *ibid.* Geoghegan J.:

‘I would comment in passing that s. 263 does not appear by its terms to be conferring a double appeal. What seems to be envisaged is that the chief appeals officer may go through the materials which were before the appeals officer and check whether there was any error in law or on the facts. If he were to find that the appeals officer did not have enough facts or the facts which were before him or her were ambiguous, there may be circumstances in which the chief appeals officer would require additional evidence, but essentially it is a revising rather than an appellate procedure.’

²⁵⁷ [2004] IESC 40.

²⁵⁸ [2011] IEHC 458.

²⁵⁹ *ibid.* at para 4.5:

‘Finally, it is important to emphasise that, as counsel for the respondent submitted, the Court has a narrow jurisdiction under s. 327, in that it is limited to determination as to whether a decision of an Appeals Officer is correct in law. Counsel for the respondent was correct in his submission that an issue as to the *vires* of an officer of the respondent cannot be pursued in these proceedings.’

A further issue which was addressed in *Castleisland* was the appropriate interaction between the right to appeal a decision of an appeals officer to the High Court on a question of law and the separate right to appeal against the revised decision of the Chief Appeals Officer, now found in s 327 of the Social Welfare Consolidation Act 2005.²⁶⁰ An appeals officer's decision is subject to revision, at any time, by the Chief Appeals Officer.²⁶¹ In the High Court, in *Castleisland*, where two separate appeals were made against the decision of the appeals officer and the *unrevised* decision of the Chief Appeals Officer, O'Donovan J. treated both appeals as though they were one appeal from the decision of the Chief Appeals Officer. The Supreme Court took a different view and held that:

‘Although under s. 271 an appeal lies to the High Court from a decision of an appeals officer an appeal lies only from "*the revised decision of the Chief Appeals Officer*". If, as in this case the Chief Appeals Officer decides not to revise the decision of the appeals officer then it would seem to me there is no "revised decision of the Chief Appeals Officer" and, therefore, no right of appeal.’

This decision, though undoubtedly correct, gives rise to a potential problem insofar as an appeal to the High Court must be made within twenty one days from the date of the appeals officer's decision or, upon an extension of time being granted by the High Court,²⁶² which must be sought within six weeks, either within the six weeks or possibly –the wording of the rule is not clear– at the outside, a couple of weeks thereafter. The difficulty is that decisions which are sent to the Chief Appeals Officer routinely take a number of months to be considered and decided upon –meaning that any challenge to

²⁶⁰ Previously, Social Welfare Consolidation Act 1993, s 300(4).

²⁶¹ Social Welfare Consolidation Act 2005, s 318, which provides that:

‘The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.’

²⁶² Rules of the Superior Court, Order 90(4) provides that:

‘The summons shall be issued within twenty-one days of the date on which notice of the decision of the appeals officer was given to the party appealing; provided that the time within which the summons may be issued may be extended on application ex parte at any time within six weeks from the date on which notice of the decision of the appeals officer was given to the party desirous of appealing.’

the decision of the appeals officer in the High Court is now out of time²⁶³ – and, where there is no revised decision, clearly there can be no appeal to the High Court from the Chief Appeals Officer’s unrevised decision. In these circumstances there remain a number of options open to the unsuccessful appellant. He or she could, as noted by the Supreme Court in *Castleisland*²⁶⁴ seek judicial review of the unrevised decision of the Chief Appeals Officer. The downside is that the appellant would now be exposed to a costs order in the event of his judicial review case being unsuccessful, whereas, had he or she appealed on a question of law under s 327, there would be little or no exposure to costs,²⁶⁵ except, of course the costs of the appellant’s own legal team. There is another potential downside to being forced down the judicial review route in so far as judicial review is a discretionary remedy, thus an applicant is not entitled to relief ‘as of right’, even where the applicant’s legal argument is correct – an applicant could be denied relief on the basis of failing to exhaust alternative remedies or for lack of candour. Where a court is dealing with an appeal on a question of law, on the other hand, the court does not, as noted in *Mallinson v Secretary of State for Social Security*,²⁶⁶ have a residual discretion to limit relief.

Another possible way of circumventing the problem would be to go back to the original appeals officer and seek a revision²⁶⁷ of the original decision.

²⁶³ This situation appears to have arisen in the High Court in *Henry Denny v Minister for Social Welfare*, unreported, Carroll J. 18 October 1995, where the applicant lost an appeal in May 1993 and sought a review with the Chief Appeals Officer in September 1993 which was declined in October 1993. It may be that there were no time limits prescribed within the Rules of the Superior Courts at that time, but, in any event, Carroll J held that ‘Since the Chief Appeals Officer did not revise the decision but confirmed it, the appeal lies under Section 299B,’ and permitted the appeal to proceed.

²⁶⁴ [2004] IESC 40, where it was held that:

‘The Act does not appear to give any right of appeal to the High Court from the refusal of a Chief Appeals Officer to revise a decision, though no doubt in an appropriate case there might be grounds for judicial review.’

²⁶⁵ Rules of the Superior Court, Order 9(6) provides that:

‘No costs shall be allowed of any proceedings under this Order unless the Court shall by special order allow such costs.’

²⁶⁶ [1994] 1 W.L.R. 630, where it was held that:

‘This is a statutory appeal on a point of law. The court on such an appeal does not have the residual discretion which it has on an application for judicial review to limit the circumstances in which it grants leave or relief.’

²⁶⁷ Social Welfare Consolidation Act 2005, s 317, which provides that:

‘An appeals officer may, at any time revise any decision of an appeals officer, where it appears to the appeals officer that the decision was erroneous in the light of new evidence or of new facts brought to his or her notice since the date on which it was given, or where it

Provided the appeals officer was willing to entertain consideration of the original decision this would have the effect of bringing the old decision, if unrevised, back within time to appeal it on a question of law to the High Court.

3.9 Is the Social Welfare Appeals Office a tribunal for the purpose of Article 267 TFEU?

One question which remains to be addressed is whether or not the Social Welfare Appeals Office is a ‘tribunal’ for the purpose of Article 267 of the Treaty on the Functioning of the European Union which provides for preliminary references from ‘any court or tribunal of a Member States’ to the Court of Justice of the European Union.²⁶⁸ The SWAO –perhaps surprisingly, given the complex nature of social welfare law– has never made a preliminary reference to the Court of Justice in all of its twenty-two year history and has stated, albeit privately, that such matters are for the High Court.²⁶⁹ However, whatever the views of the SWAO, the Court of Justice has, as noted by Craig and De Burca,²⁷⁰ adopted the position that categorization under national law is not conclusive.²⁷¹ In *Doris Salzmann*²⁷² the Court of Justice held that:

appears to the appeals officer that there has been any relevant change of circumstances since the decision was given.’

This provision has been read by the SWAO as meaning that an appeals officer can reconsider his own decision.

²⁶⁸ TFEU, art 267(b).

²⁶⁹ The SWAO was asked, by letter, in 2011, whether it was willing to make a Preliminary reference in a particular case and responded that such matters were for the High Court.

²⁷⁰ Paul Craig and Grainne De Burca, *EU Law*, (5th Edn, Oxford, 2011) at 444.

²⁷¹ In Case C-43/71 *Politi* [1971] ECR 1039 the Court of Justice refused to countenance the Member State’s argument that the body in question was not a tribunal, holding, at para 5, that:

‘It is sufficient to note that the president of the tribunale di torino is performing a judicial function within the meaning of article 177 and that he considered an interpretation of community law to be necessary to enable him to reach a decision, there being therefore no need for the court to consider the stage of the proceedings at which the questions were referred.’

In case C-24/92 *Corbiau* [1993] ECR I-3011, the Court of Justice refused to answer a question from the Luxemburg tax authorities on the basis, at para 15-17, that:

‘It must be remembered that the expression "court or tribunal" is a concept of Community law, which, by its very nature, can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings. In this instance, the Directeur des Contributions does not act as such a third party. Being at the head of the Direction des Contributions Directes et des Accises (Direct Taxes and Excise Duties Directorate), he has a clear organizational link with the departments which made the disputed tax assessment, against which the complaint submitted to him is directed. This is

‘In order to determine whether a referring body is a court or tribunal within the meaning of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent...’²⁷³

The SWAO would appear –and this view is shared by many academics in Ireland²⁷⁴– to be a tribunal. Further, the Court of Justice has held that other social welfare bodies across the EU were tribunals.²⁷⁵ The Social Security Tribunals in the UK, by example, routinely make references.²⁷⁶ In *Broekmeulen*²⁷⁷ the Court of Justice applied the factors, but went on to refer to ‘the absence, in practice of any right of appeal to the ordinary courts.’²⁷⁸ This might imply that an appeals officer could not make a reference because

confirmed, moreover, by the fact that, if the matter were to come before the Conseil d’État on appeal, the Directeur des Contributions would be a party to the proceedings. The Directeur des Contributions is not, therefore, a court or tribunal within the meaning of Article 177 of the Treaty and the reference he has made must therefore be held inadmissible.’

²⁷² Case C-178/99 *Doris Salzmann* [2001] ECR I-4421. See generally, Paul Craig and Grainne De Burca, *EU Law*, (5th Edn, Oxford, 2011) at 444-445.

²⁷³ *ibid.*, at para 22.

²⁷⁴ B. McMahon and F. Murphy, *European Community Law in Ireland*, (Butterworth (Ire.), 1989), where the authors aver, at 226) that:

‘Following these British Precedents it seems logical to assume that the Irish equivalents, the Special Commissioners under the Income Tax Act, 1967 and Appeals Officers under the Social Welfare (Consolidation) Act 1981 would be empowered to submit References.’

See further, A. Collins and James O’Reilly, *Civil Proceedings and the State* (2nd Edn, Thompson Roundhall, 2004), aver, at 314, that:

‘Applying these principles in Ireland, it appears that a variety of bodies charged by statute with hearing appeals against public authorities may be ‘courts or tribunals for the purpose of Art 234 when discharging that function. These include... Appeals Officers under the Social Welfare Acts.’

See further, generally, Dr Elaine Fahy, *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (First Law, 2003) at 39. Mel Cousins, *Social Welfare Law* (n 10) at 332 and Mel Cousins, *Social Security Law in Ireland* (n 10).

²⁷⁵ In Case 61/65 *Vaasen Goobbels* [1966] ECR 377 the Court of Justice determined that a Dutch Social Security Fund was entitled to refer Article 267 questions on the following basis:

‘It is the duty of the minister... to appoint the members of the Scheidsgerecht, to designate its chairman and to lay down its rules of procedure The Scheidsgerecht is a permanent body charged with the settlement of the disputes... and it is bound by rules of adversary procedure similar to those used by the ordinary courts of law. Finally, the persons referred to in the RBFM are compulsorily members of the Beambtenfonds... are bound to take any disputes between themselves and their insurer to the scheidsgerecht as the proper judicial body. The Scheidsgerecht is bound to apply rules of law.’

²⁷⁶ Case C-62/91 *Gray* [1992] ECR I-02737.

²⁷⁷ Case C-246/80 at para 17.

²⁷⁸ *ibid.* at para 18.

the appellant would have recourse to the High Court. This, however, is unlikely as, by example, in this State there is access to ordinary courts from decisions of the EAT and in the UK there is access to the ordinary courts from the Social Security tribunals.²⁷⁹

Paragraph 3 of Article 267 provides that a tribunal against whose decisions there is no judicial remedy under national law shall bring the matter before the Court of Justice. This provision does not apply to appeals officers as there is judicial remedy via an appeal to the High Court on a question of law²⁸⁰ and judicial review.

Can it be said that the Chief Appeals Officer *must* –on the basis of the third paragraph of Article 267(b) – make a reference? There are, as noted by academics²⁸¹ two theories covering the bodies covered by the third paragraph of Article 267(b): the concrete theory and the abstract theory, the latter which holds that only courts and tribunals against which there is no appeal are obligated to make a reference and the former –which appears to have found favor with the Court of Justice²⁸²– where the test is whether or not the court of tribunal’s decision is subject to appeal in the type of case in question. There is clearly no obligation on the Chief Appeals Officer to make a reference where he or she has revised a decision, on the basis that either the appellant or Minister may appeal the revised decision to the High Court on a point of law.²⁸³ Where there is no revised decision only the Minister may appeal to the High Court on a question of law.²⁸⁴ However,

²⁷⁹ See Case C-363/11 *Epitropos tou Elegktikou Synedriou* (not yet reported in the ECR) for a more recent discussion on tribunals.

²⁸⁰ In Case C-2010/06 *Cartesio Okato es Szolgaltato bt* [2008] ECR I-9641, at para 98:

‘...where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.’

See Paul Craig and Grainne De Burca, *EU Law*, (5th Edn, Oxford, 2011) at 444-445.

²⁸¹ Paul Craig and Grainne De Burca, *EU Law*, (5th Edn, Oxford, 2011) at p 446-447.

²⁸² See Case C-64/ *Costa* [1964] ECR 585 and Case C-99/00 *Lyckeskog* [2002] ECR 4839.

²⁸³ Social Welfare Consolidation Act 2005, s 327.

²⁸⁴ *ibid.*

the appellant may, in these circumstances, in the appropriate case, as confirmed by the Supreme Court in *Castleisland*,²⁸⁵ seek judicial review, though strictly speaking, this is not an appeal per se.

There is, however, an important proviso: a court or tribunal has an absolute discretion, not subject to appeal or national legislative restriction, as to whether or not to make a preliminary reference.²⁸⁶ This is clearly in keeping with the wording of Article 267 which provides that a ‘court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.’

The circumstances in which a reference may be made are relatively straightforward: interpretation of the Treaties and questions concerning the validity and interpretation of the acts of the institutions and bodies of the EU.²⁸⁷ In terms of social welfare law it usually, as in *Joined Cases Czop and Punakova*²⁸⁸ and *Kelly v Minister for Social Protection*,²⁸⁹ are useful examples. The circumstances in which a court or tribunal ought to decline to make a reference has been set out by the Court of Justice in a number of judgments and may be summarised as follows:

Where a preliminary reference is not required in order for the national court to rule on the matter;²⁹⁰

Where the Community law issue is governed by previous authority;²⁹¹

Where the application of Community law is so obvious as to leave no doubt to the national court.²⁹²

²⁸⁵ *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs* [2004] IESC 40.

²⁸⁶ *Campus Oil v Minister for Industry* [1983] 1 I.R. 82, where it was held that:

‘It is not within the power of the Oireachtas, or of any rule-making authority, to give any national court the power to modify or to control the unqualified jurisdiction conferred upon the national judge by article 177 of the Treaty. The national judge has an untrammelled discretion as to whether he will or will not refer questions for a preliminary ruling under article 177. In doing so, he is not in any way subject to the parties or to any other judicial authority.’

²⁸⁷ TFEU, art 267(1).

²⁸⁸ Cases C-147/08 and 148/08.

²⁸⁹ Unreported, High Court, White J., 16 Feb. 2012.

²⁹⁰ Case C-428/93 *Monin Automobiles-Maison de Deux-Roues* [1994] ECR I-195).

²⁹¹ Cases C-28/62 to C-30/62, *Da Costa and CILFIT* [1963] ECR 31 and Case C-244/80 *Foglia* [1981] ECR 3045).

These rules have been consistently applied by the Superior Court in Ireland.²⁹³ In relation to the last rule, Murphy J., in *Friends of the Irish Environment Limited & Anor v The Minister for the Environment Heritage and Local Government & Ors*,²⁹⁴ suggested that where the point was already before the Court of Justice, a reference would not be necessary.²⁹⁵ For the sake of completeness, it is worth stating that, in the event of the SWAO adopting the position that it is not a referring body for the purpose of Article 267 TFEU, an appellant has three options:

- (1) Convince the SWAO to make the reference with a preliminary question as to its jurisdiction²⁹⁶ or;
- (2) Appeal the refusal on a question of law to the High Court or;
- (3) Judicially review the refusal in the High Court.

One interesting point which remains to be considered is whether an appellant in the SWAO is entitled to access to previous decisions of appeals officers as occurs in respect of decision of the Refugee Appeals Tribunal on foot of the decision of the Supreme Court in *Atanasov*.²⁹⁷ The matter was heard before Hedigan J. in *Jama v Minister for Social Protection*²⁹⁸ who declined to follow *Atanasov* on the basis that the decisions would be of little use to appellants and on the basis of public policy, straitened times outweighing the right to access to such information.²⁹⁹ Hedigan J. also

²⁹² Case C-283/81 *CILFIT* [1982] ECR 3415.

²⁹³ See by example *Digital Rights Ireland Ltd v Minister for Communications & Ors* [2010] IEHC 221.

²⁹⁴ [2005] IEHC 123.

²⁹⁵ Murphy J. held that:

‘It is submitted that a similar principle applies with equal force where it is known in advance that the Court of Justice will be interpreting a provision of Community law. Thus in the submission of the defendants, any application to the national court for a reference will be met with the response that a reference is not necessary given that precisely the same matter is before the Court of Justice.’

See also, in this regard, *Gogolova v MJELR* [2008] IEHC 131.

²⁹⁶ Such as occurred in Case 61/65 *Vaasen Goobbels* (n 271).

²⁹⁷ *Opesyitan & ors -v- Refugee Appeals Tribunal & ors, Fontu -v- Refugee Appeals Tribunal & ors, Atanasov -v- Refugee Appeals Tribunal & ors* [2006] IESC 53, where the Supreme Court granted the following declaration:

‘The court doth declare that the refusal of the named respondent to make available to the applicant relevant tribunal decisions as requested by the applicant is an unlawful exercise of the discretion afforded it under the 2003 Act as well as being in breach of the applicant’s rights to fair procedures and natural and constitutional justice under Article 40.3 of the Constitution.’

²⁹⁸ [2011] IEHC 379.

²⁹⁹ Hedigan J. held, at para 6.7, that:

correctly noted that some decisions were already available in the SWAO annual reports.³⁰⁰

It is useful to briefly recap on the first instance decision-making and appeals process. Following a first instance decision of a Departmental deciding officer, a claimant has four options: seek a revision of decision or revision of determination; appeal the decision to the Social Welfare Appeals Office; make a new application or; judicially review the first instance decision. If the claimant seeks a revision of decision or determination the claimant may judicially review that decision or appeal that decision to the SWAO. If the claimant appeals the decision to the SWAO, the decision of an appeals officer –who may refer a question to the Court of Justice– can be subject to a revision by either the same appeals officer or another appeals officer or the claimant can appeal the decision to the High Court on a question of law (with a further appeal to the Supreme Court if necessary). Further, the claimant can seek to have the appeals officer’s decision revised by the Chief Appeals Officer – who may refer a question to the Court of Justice. There are other statutory options outside the control of the claimant whereby the Chief Appeals Officer can refer a case directly to the High Court or the Circuit Court.

4. Judicial Review

4.1 Purpose of judicial review

The purpose of judicial review³⁰¹ –succinctly set out by Murray CJ (as he was then) in the Supreme Court in *Meadows v MJELR*:³⁰²

‘Information, even for the purposes of maintaining a claim, may be refused on public policy grounds, see *The State (Williams) v. Army Pensions Board & Anor* [1983] IR 308. On the evidence herein, the maintenance of such an anonymized database would be very expensive. This must be balanced against the somewhat doubtful benefit that might accrue from the ability of applicants for social welfare entitlement to access such information. Public policy in this regard, notably in these straitened times, must surely outweigh a right of access to such information.’

³⁰⁰ The Northside Community Law Centre also has a Casebase of decisions, available on <http://www.nclc.ie/casebase/default.asp>.

‘is to provide a remedy to persons who claim their rights have been prejudiced by an administrative decision which has not been taken in accordance with law or, the principles of constitutional justice...’

There are, however outer limits in so far as judicial review permits the courts to place limits on the exercise of executive or legislative power ‘but not to exercise it themselves’.³⁰³ The purpose of judicial review is rarely to invite the court to examine the merits of the case.³⁰⁴ On the basis of the Supreme Court decision in *O’Keeffe v An Bord Pleanala*³⁰⁵ decisions will only be set aside on the merits where the decision is irrational or unreasonableness. The threshold for which, as set out in *O’Keeffe*, is very high:

‘I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.’³⁰⁶

There are, of course, good and valid reasons for this: a Court does not, in judicial review, act as an appellate court but ‘reviews the decision-making

³⁰¹ See generally: Mark De Blacam, *Judicial Review*, (2nd Edn, Tottel, 2009); *Hogan and Morgan, Administrative Law* (n 9), Conleth Bradley, *Judicial Review* (Round hall, 2000); Hilary Delaney, *Judicial Review of Administrative Action*, (2nd Edn, Round Hall, 2009).

³⁰² [2010] IESC 3. See further: *Albatros Feeds v Minister for Agriculture and Food*. [2006] IESC 52, where Fennelly J. held that:

‘Where the rule of law governs relations between government and citizens, an individual person or company will reasonably expect that decisions purporting to be made under governmental authority will be clothed with the necessary legislative powers’.

See further, *Browne v Attorney General* [2002] IEHC 47:

‘...every executive of administrative act which affects legal rights, interests or legitimate expectations must be legally justified.’

³⁰³ Murray CJ., in *TD v Minister for Education* [2001] 4 IR 259.

³⁰⁴ *cf.* In *Kiely v Minister for Social Protection* [1977] 1 IR 267, the Supreme Court appeared to countenance a merits-based argument:

‘The burden of proving that the death resulted from the accident rested on Mrs. Kiely, and her medical witnesses had made out a *prima facie* case on that issue.’

However, this judgment pre-dates *O’Keeffe* (n 305).

³⁰⁵ *O’Keeffe v An Bord Pleanala* [1993] 1 IR 39.

³⁰⁶ *ibid.* at 39.

process³⁰⁷ or ‘considers the procedure adopted.’³⁰⁸ A further limitation arises insofar as judicial review is a discretionary remedy³⁰⁹ and, as noted above, as such may be denied to an appellant. The distinction between judicial review and an appeal on a question of law was usefully set out by Costello J. in *Dunne v Minister for Fisheries*:³¹⁰

‘As pointed out in Wade’s *Administrative Law* (5th Ed., p.34): ‘the system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the court is concerned with its legality. On an appeal the question is ‘right or wrong?’ On review the question is ‘lawful or unlawful? However, this does not mean that in every case the court’s jurisdiction on a statutory appeal is the same, in every case the statute in question must be construed. In construing a statute it does not seem to me to be helpful to apply by analogy the rules of judicial review since, by granting a statutory appeal, the legislature must have intended that the court would have powers in addition to those already enjoyed at common law.’³¹¹

There are a number of reliefs³¹² available to applicants seeking judicial review, the most common being certiorari, where the court is invited to

³⁰⁷ Griffin J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, quoted with approval the speech of Lord Brightman in *R. v. The Chief Constable of North Wales Police, ex p. Evans*, [1982] 1 W.L.R. 1155 where he stated as follows at p. 1160:

‘Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power . . . Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.’

³⁰⁸ *ibid.*

³⁰⁹ Denham J. in *De Roiste v. Minister for Defence* [2001] 1 I.R. 190, at 208, observed that: ‘Judicial review is an important legal remedy, developed to review decision-making in the public law domain. As the arena of public law decision-making has expanded so too has the volume of judicial review. It is a great remedy modernized by the Rules of the Superior Courts, 1986, and by precedent. However, there is no absolute right to its use, there are limitations to its application. The granting of leave to apply for judicial review and the determination to grant judicial review are discretionary decisions for the Court.

³¹⁰ [1984] IR 230.

³¹¹ *ibid.* at 230.

³¹² Order 84 Rule 18 provides that:

‘(1) An application for an order of certiorari, mandamus, prohibition or quo warranto shall be made by way of an application for judicial review in accordance with the provisions of this Order.

quash an impugned decision³¹³ on the basis that it is tainted with some illegality, such as an error of law, where the decision maker misapplies the law to any given decision, or a breach of fair procedures or failure on the part of the decision maker to have regard to factors which should have been considered.³¹⁴ An order of certiorari is usually supplemented by seeking declaratory³¹⁵ relief. Here, the applicant is asking the court to declare that the applicant's position on the law is the correct one. The court, of course, in cases where the applicant is successful, stops short of making a decision, where that decision is properly made by a deciding officer or other decision maker, but normally gives a declaration and remits the matter back to the deciding officer for reconsideration.³¹⁶

Judicial review functions on a two-stage process: *leave* and the full or substantive *hearing*. At the leave stage, which is *ex parte* with just the applicant represented in court, who, as noted by Denham J. in *G v DPP*:³¹⁷

‘...is required to establish that he has made out a storable case, an arguable case in law.’³¹⁸

(2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed...’

³¹³ It is essential to have a decision to quash. Dunne J. was critical of the applicants approach in *Solovastru v Minister for Social Protection* [2011] IEHC 532, where a failure to consider a revision could not be considered a decision.

³¹⁴ In *Sweetman v An Board Pleanála & Ors* [2007] IEHC 153, Clarke J. held that:

‘Firstly it is important to remember that a court, in judicial review proceedings, is not confined to the irrationality test identified in *O’Keeffe v. An Bord Pleanála* (reference). That is but one ground which can be advanced. A court is also entitled (and indeed is duty bound) to consider matters such as whether the decision maker had regard to factors which ought not properly have been included in the consideration or failed to have regard to factors which should properly have been considered.’

³¹⁵ Some doubt remains in this jurisdiction as to whether or not declaratory relief may be sought as a stand-alone remedy. However, it is a stand-alone remedy in the UK, *Equal Opportunities Commission v Secretary of State for Employment* [1995] 1 AC 1 (see *Hogan and Morgan* (n 10) at 831).

³¹⁶ Order 84, Rule 27(4) provides that:

‘Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.’

See further, *Brightwater Selection [Ireland] Ltd -v- Minister for Social and Family Affairs* [2011] IEHC 510, where Gilligan J. observed that there was a power of remittal in appeals on a question of law.

³¹⁷ *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374.

³¹⁸ *ibid.*

The burden of proof is light, the court does not go into the matter in any great depth, requiring, as noted by Lord Diplock in *R. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.*³¹⁹ ‘a quick perusal of the material then available.’ The burden however, is heavier during the second stage hearing where a greater degree of scrutiny will be applied by the court.³²⁰ There is, however, a significant onus on the applicant in judicial review to disclose all material facts at the ex parte stage. This ensures that a court, when granting leave, does so with a complete picture. Failure to be candid can be fatal at the substantive hearing.³²¹

4.2 Requirement to exhaust alternative remedies

It was previously submitted that the Social Welfare Consolidation Act 2005, with its numerous amendments and attendant regulations, provides a comprehensive appeal system. Why then, and in what circumstances is a claimant permitted to step outside appeals process and enter the Court system? These are complex questions which regularly trouble the Superior Courts in this State.

Though not a ground in itself –other than where mandamus is being sought to compel a decision which has not be made promptly– *delay* in the appeals system is probably the single most compelling reason why claimants seek judicial review over the appeals system.

As a general principle, it can be safely said that there are four circumstances in which an applicant may seek judicial review rather than exhausting a statutory or other appeal –commonly referred to by the courts as an

³¹⁹ [1982] AC 617.

³²⁰ Denham J., in *G v DPP* [2008] IESC 61, observed that:

‘Ultimately on the actual application for judicial review the applicant has an altogether heavier burden of proof to discharge’

³²¹ In *Star Homes (Middleton) Ltd v The Pensions Ombudsman* [2010] IEHC 463, Hedigan J. held that:

‘Thirdly the applicant withheld from the Judge hearing the ex parte application the existence of the remedy of an appeal and the consequent significance thereof in the light of the dispute being essentially a factual one. It failed thereby in its duty of disclosure as required in an ex parte application.’

‘alternative remedy’. Where the decision is invalid for want of jurisdiction on the part of the decision-maker,³²² a breach of fair procedures,³²³ an error of law³²⁴ or an unsustainable finding of fact.³²⁵ However, the presence of any one or more of these infirmities in any given case, will not, on their own, be sufficient. The applicant must go further and show that judicial review is the most effective or more appropriate remedy. This requirement was set out by the Supreme Court in *G v DPP*³²⁶ and expanded upon, in the High Court in *McGoldrick v. An Bord Pleanála*³²⁷ by Barron J. who held that:

‘It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind.’

³²² In *Sheehan v Minister for Social Welfare and HSE* [2010] IEHC 4, McMenamin J., at para 19, held that:

‘It is a well-established precept of judicial review that in general where the law provides for a code, or appeal mechanism prior to resorting to judicial review an applicant should exhaust his rights of appeal, unless want of jurisdiction or breach of fair procedures or error of law can be shown.’

³²³ *ibid.*

³²⁴ In *Henry Denny & Sons Ltd v Minister for Social Welfare* [1998] I IR at 38, Keane J. held that:

‘Equally, the High Court Judge was correct in the view she took that she should not interfere with his findings in this regard unless they were incapable of being supported by the facts or were based on an erroneous view of the law.’

Hamilton C.J. in *Henry Denny* held that:

‘Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected.’

³²⁵ *ibid.* More recently, in the Supreme Court in *Tomlinson v Criminal Injuries Compensation Tribunal* [2005] 1 ILRM 394, it was held that:

‘the fact that it is a question of law is a factor in favour of a decision by a court, and that it is appropriate that it be decided by a court of law.’

See further, *Sheehan v Minister for Social Welfare and HSE* [2010] IEHC 4 (n 293).

³²⁶ [2008] IESC 61, where Finlay C.J. held that:

‘the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.’

³²⁷ [1997] 1 I.R. 497 at 509.

This passage has been cited, approved and applied by the Supreme Court in a number of subsequent decisions: *Buckley v. Kirby*,³²⁸ *Stefan v. Minister for Justice*³²⁹ and *O'Donnell v Tipperary South Riding Council*.³³⁰ Applying the *McGoldrick* principles in *O'Donnell*, the Supreme Court declined to grant leave for Judicial Review in circumstances where there was an alternative remedy, in this instance the Employment Appeals Tribunal (EAT), which was capable of dealing with the issues –here a breach of fair procedures³³¹ and evidential issues deemed more suited to an appeal than a review– raised by the applicant and the absence of an error of law or error of jurisdiction.³³² The applicant in *O'Donnell* was also deemed to have taken a step in the process having had his EAT hearing part heard. This latter point was, interestingly –in light of extant case law set out below– deemed not to be a ‘determinative factor’ though was considered a ‘weighty factor’ by Denham J. This appears contrary to the finding of the Supreme Court in the earlier decision in *The State (Roche) v. Delap*,³³³ where the Court held that where an applicant had opened his appeal in the Circuit Court and had it part heard:

‘It was not within the competence of the High Court to intervene by certiorari to quash a conviction and sentence when an appeal had not alone been taken to the Circuit Court but that appeal was actually in the process of being heard in that court.’

The basis for the decision in *Roche* –followed in the Supreme Court in *Buckley v Kirby*³³⁴ and in the High Court in *(State (Wilson) v Judge Neilan*³³⁵– was that an applicant is obligated to elect as between Judicial

³²⁸ [2000] 3 I.R. 431.

³²⁹ [2001] 4 I.R.

³³⁰ [2005] IESC 18.

³³¹ Denham J held that:

‘Secondly, the issues which the applicant raises relate to natural justice and to fairness, which relate to the merits of the case also, which issues may be addressed and determined by the Employment Appeal Tribunal.’

³³² In *O'Donnell v Tipperary South Riding Council* [2005] IESC 18, Denham J. stated that:

‘Thirdly, the matters raised do not relate to net issues such as points of law or jurisdiction.’

³³³ [1980] I.R.170.

³³⁴ [2000] 3 IR.

³³⁵ Unreported, High Court, Carroll J. 18th April 1985. See De Blacam (n 148).

Review and an appeal to the Circuit Court³³⁶ –ostensibly, that you cannot ride two horses.³³⁷ It might perhaps be said that the general rule is set out in *Roche*, but that *O'Donnell* leaves room for exceptions to the rule. This was certainly the position adopted by Finlay Geoghegan J. in *Adan v. Refugee Applications Commissioner and the Refugee Appeals Tribunal*,³³⁸ who took the view that even where an appeal had been determined the court retained a jurisdiction to grant Judicial Review.³³⁹ This approach was approved by Dunne J. in *T R T -V- Minister for Justice & Ors*:³⁴⁰

‘...the normal position must be that where an appeal is determined an applicant has gone too far and the High Court will not interfere with the first instance decision by way of judicial review...The court retains a discretion to grant judicial review of a first instance decision where an appeal is determined, but the discretion to grant judicial review appeal, should only be exercised where there exist special circumstances such that the grant of judicial review at such a late stage is necessary to do justice for the parties.’³⁴¹

³³⁶ Henchy J. noted that:

‘The prosecutor elected to appeal to the Circuit Court. There he allowed the appeal to be opened and did not contend that his conviction (as distinct from the sentence) was other than correct. While that appeal was pending, it was not open to him to apply for certiorari: see *R. (Miller) v. Justices of Monaghan* (1906) 40 I.L.T.R. 51 which shows that he should have elected either for appeal or for certiorari.

³³⁷ In *Quinn v Athlone Town Council* [2010] IEHC 270, Hedigan J. held that:

‘In summary, I find that the applicant ought to have challenged the notice to quit, that she delayed in instituting the within judicial review proceedings, that she has not demonstrated adequate reasons for the relevant time limits to be extended and she acquiesced in the proceedings adopted by the first named respondent by participating in the District Court hearing.’

³³⁸ Unreported, Finlay Geoghegan J., 23rd February 2007, where it was held that:

‘Considering the three Supreme Court judgments *The State (Roche) v. Delap, Buckley v. Kirby and Stefan v. The Minister for Justice*, it does not appear to me that where there is both an application for certiorari and an appeal that the determination of the appeal automatically precludes the Court from considering or granting an application for certiorari. the High Court retains a jurisdiction to consider and determine an application for judicial review notwithstanding the determination of the related appeal...However in accordance with those decisions the normal position must be that where an appeal is determined an applicant has gone too far and the High Court will not subsequently interfere with the first instance decision by way of judicial review.’

³³⁹ On this point, Finlay Geoghegan J stated that:

‘Whilst the court retains a discretion to do so it should only exercise its discretion to grant certiorari of a decision which has been the subject of a decided appeal where there exist special circumstances which make such late interference necessary to do justice for the parties.’

³⁴⁰ [2007] IEHC 168.

³⁴¹ *Ibid.*

In *Buckley v Kirby* the applicant had brought an appeal, which had not yet been heard, and at the same time sought Judicial Review. Here, the Supreme Court, applying *McGoldrick*, held that where an appeal is pending but not yet heard, and but for that fact, judicial review would quite clearly be an appropriate remedy, the High Court, on an application for leave, is not 'bound to refuse leave merely because an appeal is pending.'³⁴² It was also accepted that there would be circumstances where appeal and judicial review would be equally appropriate remedies and that, where an appeal was the more appropriate remedy an applicant could be refused leave for judicial review even where he or she did not exercise the right to the appeal.³⁴³ Leave was refused in *Buckley* on the basis that Judicial Review did not lie from the decision in question.

There is also a line of authority –by example *Moran v O'Brien*³⁴⁴– that holds that a right of appeal, where there has been a failure of natural justice, cannot be cured by the application of natural justice in the appellate body.³⁴⁵ It may equally be said that there is a constitutional right of access to the courts and a right to litigate³⁴⁶ and, where Convention rights are asserted, a right to an effective remedy.³⁴⁷

³⁴² Geoghegan J., at 434.

³⁴³ Geoghegan J., at 435, held that:

In a case where an appeal would clearly be the more appropriate remedy, an applicant ought not necessarily be granted leave to bring judicial review proceedings merely because he has not in fact appealed. If he ought to have appealed, the court in its discretion may refuse leave.'

³⁴⁴ [1976] 1 IR 400. See further: *Ingle v O'Brien* (1975) 109 I.L.T.R. 7 and *Irish Family Planning v. Ryan* [1979] I.R. 295.

³⁴⁵ In *Leary's Case* [1971] Ch. 34, Megarry J. held that:

'If a man has never had a fair trial by the appropriate trial body, is it open to an appellate body to discard its appellate functions and itself give the man the fair trial that he has never had? I very much doubt the existence of any such doctrine... As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.'

This was approved by Doyle J. in *Moran v O'Brien* (n 338).

³⁴⁶ Kenny J. in *Maccauley v. Minister for Posts and Telegraphs* [1966] I.R. 345, held that:

'That there is a right to have recourse to the High Court to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee in Article 40... If the High Court has this full original jurisdiction to determine all matters and questions (and this includes the validity of any law having regard to the provisions of the Constitution), it must follow that the citizens have a right to have recourse to that Court to question the validity of any law having regard to the provisions of the Constitution or for the purpose of asserting or defending a right given by the Constitution for if it did not exist, the guarantees and rights in the Constitution would be worthless...'

³⁴⁷ The ECtHR, in *Doran v Ireland* (Application no. 50389/99), 31 July 2003, at paras 55-56 held that:

More often than not, by the time a social welfare case reaches a legal practitioner, an appeal will have been entered by or on behalf of the claimant. This is not fatal –and clearly no *steps* have been taken– though it is prudent to withdraw the appeal, on the basis of *Roche*, prior to seeking leave for judicial review. The regulations make express provision for the withdrawal of an appeal.³⁴⁸ The real test in respect of social welfare cases is whether or not the SWAO has the ability to deal with the questions raised. Whilst the SWAO, as previously noted, is obligated to give effect to the primacy of EU law, it might be asking too much to expect an appeals officer to set aside, say, a High Court decision that went against the position of another claimant on the same point –they routinely refuse to do so. This may have been the scenario Hogan J. was alluding to in *Plesca* when he held that deciding officer and appeals officers do not have jurisdiction to determine the compatibility of EU law with national law. White J., in *Hrisca v Minister for Social Protection*³⁴⁹ –where the applicants elected for judicial review and where there was an extant High Court decision³⁵⁰ which went against them– accepted this point, approved *O'Donnell, Tomlinson v Criminal Injury Compensation Tribunal*³⁵¹ and *Plesca v HSE*,³⁵² and held that:

‘It is self-evident, in respect of the issues which have been argued before this Court, which are quite complex in their nature, that on appeal, any Appeals Tribunal would have to follow the reasoning of Mr. Reddy [the deciding officer] in accordance with the stated

‘ Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, Kudla v. Poland [GC], no. 30210/96, § 157, ECHR 2000-XI)... The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, İlhan v. Turkey [GC], no. 22277/93, § 97, ECHR 2000-VII). The term "effective" is also considered to mean that the remedy must be adequate and accessible (Paulino Tomás v. Portugal (dec.), no. 58698/00, ECHR 2003-...).’

³⁴⁸ Social Welfare (Appeals) Regulations, 1998 (S.I. 108/1998), art 9(5):

‘Any person wishing to withdraw an appeal may do so by sending a written notice to that effect to the Chief Appeals Officer or the health board, as the case may be.’

³⁴⁹ Unreported, High Court, White J, 16 February 2012.

³⁵⁰ *Solovastru v Minister for Social Protection* [2011] IEHC 532.

³⁵¹ [2005] 1ILRM 394.

³⁵² [2010] 1339/JR, unreported, Hogan J., 27th May 2011.

regulations and the High Court judgment referred to in the decision. The applicants did not have to exhaust their right of appeal through the social welfare system before taking judicial review proceedings.’

The question of jurisdiction was also raised in the Supreme Court in *P & F Sharpe Ltd v Dublin City Council*,³⁵³ where Finlay CJ. held that forcing an applicant down the statutory appeal route, where the powers of the appellate body could not address the validity of the first instance decision, was unjust.³⁵⁴ That said there have been instances where proceedings have been stayed pending entry into, and the determination of, a statutory appeal.³⁵⁵

It is abundantly clear that the appropriate place for complex issues of law, which are in controversy, is the courtroom –but what then of the statutory appeal on a point of law? Delay poses the greatest obstacle here as firstly an appellant must secure a decision from an appeals officer of the SWAO where average waiting times for an oral decision is in excess of twelve months. Appealing a case on a point of law thereafter will involve further delay of anything from three³⁵⁶ to thirty-six months.³⁵⁷ Clearly, there is no reality to such a process where a claimant has no source of income and the courts have, invariably, permitted such persons to step out of the statutory process. This is very much in keeping with the decision of O’Neill J. in

³⁵³ [1989] IR 701.

³⁵⁴ Finlay CJ held that:

‘The powers of An Bord Pleanála on the making of an appeal to it would be entirely confined to the consideration of the matters before it on the basis of the proper planning and development of the area and it would have no jurisdiction to consider the question of the validity, from a legal point of view, of the purported decision by the county manager. It would not, therefore, be just for the developers who are respondents in this appeal to be deprived of their right to have that decision quashed for want of validity.’

Cf. as against this, the Minister could assert that an appeal on a question of law to the High Court, pursuant to Social Welfare Consolidation Act 2005, s 320, would have the same effect.

³⁵⁵ In *D v Minister for Jobs, Enterprise & Innovation* [2012] JR, the proceedings were stayed pending a statutory review. This also appears to have occurred in *Last Passive Ltd t/a Aircoach -v- Revenue Commissioners & ors* 2010 263 JR.

³⁵⁶ In *Douglas v Minister for Social Protection* [2011] 406 MCA, the applicant, a lay litigant, challenged decisions of the Social Welfare Appeals Office, by way of an appeal to the High Court on a question of law, pursuant to s 327 Social Welfare Consolidation Act 2005. The SWAO decisions were made on 2 and 7 December 2011, respectively. The matter was heard in the High Court on 6 February 2012.

³⁵⁷ In *Brightwater Selection [Ireland] Ltd v Minister for Social and Family Affairs* [2011] IEHC 510, an appeal on a point of law against the decision of an Appeals Officer dated 15th April, 2008, judgment was delivered on 27 July 2011.

*Ayavoro*³⁵⁸ where it was held that claimants could not be left impecunious for more than a very short period of time.

Establishing a strong legal basis for judicial review is rarely difficult, given the statutory nature of virtually all social welfare payments, where the word *shall* prefixes almost all entitlements, meaning that where the qualifying conditions are met the deciding officer has no discretion and must grant the payment. The cases involving EU nationals, however, tend to be complex, particularly where Romanian and Bulgarian nationals are concerned,³⁵⁹ and are best viewed as jigsaw puzzles, requiring each piece to be in place. A useful illustration of the complexity of such cases may be found in *F v Minister for Social Protection*,³⁶⁰ where the applicant, a Romanian national and the sole carer of her two children, was part-time, but nonetheless lawfully, self-employed. The applicant earned less than the sum required to meet her ongoing needs. The Health Service Executive –who previously administered Rent Supplement and Supplementary Welfare Allowance– refused to pay Rent supplement to the applicant on the basis that she had no work permit and was thus illegally in the country. The Department of Social Protection then made a decision in respect of One Parent Family Payment, refusing to grant the payment to the applicant on the basis that she was not habitually resident in the State. The first issue to address was the lawful status of the applicant in the State. There were no restrictions on the Romanian nationals taking up self-employment.³⁶¹ However, in order to qualify for Rent Supplement, which is social assistance, it was necessary to establish a right to reside in the State for the purpose of s 246 of the Social Welfare Consolidation Act, 2005 –meaning, in effect, a right to reside under Directive 2004/38,³⁶² as an employed,³⁶³ self-employed³⁶⁴ or self-sufficient person.³⁶⁵ The applicant had reckonable earnings in excess of €5,000 per

³⁵⁸ *Ayavoro v HSE & Minister for Social and Family Affairs* [2009] IEHC 66.

³⁵⁹ For a comprehensive discussion on social welfare law as it pertains to Romanian and Bulgarian nationals see Chapter 3.

³⁶⁰ [2011] 286 JR.

³⁶¹ Annex VII, Treaty of Accession 2005.

³⁶² Transposed into Irish law as S.I. 656 of 2006.

³⁶³ Directive 2004/38, art 7(1)(a).

³⁶⁴ *ibid.*

³⁶⁵ Directive 2004/38, art 7(1)(b)

annum. Consequently, she was self-employed for the purpose of national law.³⁶⁶ Equally, on the basis of the decision of the Court of Justice in Case 300/84 *van Roosmalen*,³⁶⁷ and Article 3 of Regulation 883/2004, the applicant was self-employed for the purpose of Union law. Once this was established, the decision in respect of Rent Supplement could no longer stand. One Parent Family Payment is a family benefit for the purpose of Regulation 883/2004³⁶⁸ and, as the applicant was paying PRSI in this State, she was entitled to the payment, without having to meet the habitual residence conditions.³⁶⁹ The case, not unnaturally, was resolved in the applicant's favour without proceeding to the second stage hearing.

Reference has previously been made to delay in the appeals system. Delay, of course, may also arise in the courts system and on the part of the applicant. To deal with the last point first, an applicant for judicial review was, under the old rules, required to act promptly and within six months of the date of the impugned decision.³⁷⁰ The new rules require that the applicant apply within three months of the impugned decision³⁷¹ –such rules are compatible with EU law³⁷² but cannot be applied where a Directive has

³⁶⁶ Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 (S.I. No. 312 of 1996), art 92 (as amended by the Social Welfare (Consolidated Contributions and Insurability) (Amendment) Regulations (S.I. No. 684 of 2010).

³⁶⁷ Case 300/84 *van Roosmalen* [1986] ECR 03097, at para 20:

‘Since Regulation No 1390/81 was adopted in order to achieve the same objectives as Regulation 1408/71, the concept of ‘self-employed person’ is intended to guarantee to such persons the same protection as is accorded to employed persons and must therefore be interpreted broadly. It is sufficient if he receives, in respect of that activity, income which permits him to meet all or some of his needs...’

³⁶⁸ Regulation 883/2004, art 3(1)(j).

³⁶⁹ Regulation 883/2004, arts 11-14.

³⁷⁰ Order 84, Rule 21(1), now repealed, stated:

‘An application for leave to apply for judicial review shall be made promptly...’

³⁷¹ Order 84, Rule 21(1), (as amended by S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011), provides that:

‘An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.’

³⁷² Case 208/90 *Emmott* [1991] ECR I-4269 at para 16:

‘As the Court has consistently held (see, in particular, the judgments in Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer fuer das Saarland* [1976] ECR 1989 and Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio SpA* [1983] ECR 3595), in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law.’

not been properly transposed³⁷³ where an applicant is entirely deprived of access to the national courts.³⁷⁴ An extension of time can be granted by the courts³⁷⁵ and must be sought at the leave stage³⁷⁶ and, even if granted at the leave stage, delay can still be –and routinely is³⁷⁷– raised at the substantive hearing. The applicant must show good reason for the delay. In *Dekra Éireann v. Minister for the Environment*³⁷⁸ the Supreme Court held that:

‘An applicant, who is unable to furnish good reason for his own failure to issue proceedings for judicial review ‘at the earliest opportunity and in any event within three months from the date when grounds for the application first arose’ will not normally be able to show a good reason for an extension of time. In particular, he cannot, without more, invoke the absence of any prejudice to the opposing party as the sole basis for the suggested good reason.’³⁷⁹

³⁷³ Case 208/90 *Emmott* [1991] ECR I-4269 at para 24:

‘The answer to the question referred to the Court must therefore be that Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by Article 4(1) of Directive 79/7, on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system.’

³⁷⁴ Case C-445/06 *Danske Slagterier* [2009] I-02119, at para 54:

‘However, as was confirmed in Case C-410/92 *Johnson* [1994] ECR I-5483, paragraph 26, it is clear from the judgment in Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475 that the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which a time-bar had the result of depriving the applicant in the main proceedings of any opportunity whatsoever to rely on her right to equal treatment under a directive.’

³⁷⁵ Order 84, Rule 21(3), (as amended by S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011). Denham J. in *De Roiste v. Minister for Defence* [2001] 1 I.R. 190, at 208, held that:

‘In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the Court may take into account factors such as: the nature of the order or actions the subject of the application; the conduct of the applicant; the conduct of the respondents; the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; any effect which may have taken place on third parties by the order to be reviewed; public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive.’

³⁷⁶ Order 84, Rule 21(5), (as amended by S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011).

³⁷⁷ Order 84, Rule 21(6), (as amended by S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011), which provides that:

‘Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant’s delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party.’

³⁷⁸ [2003] 2 I.L.R.M. 2010, Fennelly J. at 239.

³⁷⁹ *Ibid.*

Those within the social welfare system, however, are rarely, if ever, permanently bound by an original, out-of-date decision, as a statutory revision of decision³⁸⁰ or determination³⁸¹ may be sought at ‘any time’ as confirmed in the High Court decision in *Corcoran*.³⁸² Any revised decision is then open to challenge.

After leave is granted the case is given a return date for mention before the President of the High Court. This is usually within seven weeks³⁸³ of the leave application. However, the court has discretion to abridge this period³⁸⁴ and routinely does in urgent cases. There were important changes in the rules, effective from January 2012, whereby, once the papers are served on the respondent, there is an obligation to file and serve opposition papers within three weeks – in practice this usually takes longer. The purpose of the new rules is to ensure that the majority of the paperwork is exchanged between the parties prior to the case being in for mention on the return date. The effect of the new rules, if applied in practice, is to radically speed up the process of early settlement of strong cases. The new rules have been particularly beneficial to social welfare applicants whose cases demand early resolution.

4.3 Interlocutory relief

For those cases which do not settle shortly or quickly enough –taking account of the immediacy of the applicant’s needs– after leave, a more difficult fate awaits, in so far as the applicant may be forced down the route of seeking interlocutory relief. This is where the court is asked to take measures to protect the applicant, pending the full determination of the case. Where a social welfare payment is at risk of being stopped it would not be unusual to ask the court, during the leave application, for an interim order

³⁸⁰ Social Welfare Consolidation Act 2005, s 301.

³⁸¹ Social Welfare Consolidation Act 2005, s 324.

³⁸² *Corcoran v The Minister for Social Welfare and The Attorney General* [1992] 2 I.R. 175.

³⁸³ Order 84, Rule 22(4), (as amended by S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011).

³⁸⁴ Order 84, Rule 22(3), (as amended by S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011).

prohibiting the cessation of the payment and such an order would not be difficult to obtain, on the basis that the purpose of an injunction in these circumstances is to maintain the status quo.³⁸⁵ Where an interim order is given the matter would be made returnable within a week to hear the other side, who would then have two options: consent to the continuation of the interim order or contest the matter.

The legal principles applied to a prohibitory injunction are relatively straightforward having been stated in classic and oft-repeated form by the Supreme Court in *Campus Oil v. Minister for Industry and Energy (No. 2)*:³⁸⁶ (a) is there a fair bona fide question to be tried; (b) are damages an adequate remedy and; (c) does the balance of convenience fall in favor of the granting of an injunction? Invariably, with social welfare cases, there is a bona fide question to be tried and damages are rarely adequate where, by example, a family of EU nationals may be facing the loss of their home or even forced to leave the State, entailing the uprooting of children who may be in school. The balance of convenience clearly favors the applicant. A useful example of a prohibitory injunction, albeit not related to social welfare, may be found in two related cases: *L v Minister for Jobs, Enterprise & Innovation*³⁸⁷ and *C v Minister for Jobs, Enterprise & Innovation*.³⁸⁸ The applicants in both cases were Romanian nationals who were working in Ireland without an employment permit³⁸⁹ and who were challenging various statutory provisions and administrative rules.³⁹⁰ McGovern J. granted a prohibitory injunction preventing any emanation of the State or non-State body or persons –the applicants were committing a criminal offence and the employer wished to terminate the employment– from interfering with the applicants’ employment. The learned judge granted the injunction on the basis that the respondent Minister could come

³⁸⁵ In *O’ Murchu t/a Talknology v Eircell Limited* [2001] IESC 15, the Supreme Court referred to:

‘...retaining the status quo pending the outcome of the action, which is the normal purpose of a prohibitive injunction.’

³⁸⁶ [1983] 1 I.R. 88.

³⁸⁷ [2012] JR.

³⁸⁸ [2012] Judicial Review.

³⁸⁹ Employment Permits Acts 2003-2006.

³⁹⁰ For a comprehensive discussion on Employment Permits see Chapter 2, section 4.3.

into court at any point, at four days' notice to the applicants, and seek to have the order lifted.

Prohibitory injunctions in social welfare cases are rare,³⁹¹ primarily because the applicants have either been refused social welfare, having never been given it in the first instance or, by the time the matter reaches a legal practitioner, the payment has been ceased for a period of many weeks or months and it is too late to seek to have the cessation prohibited. In these circumstances the applicant must seek a mandatory injunction, compelling the Department of Social Protection to pay social welfare payments to an applicant. These applications are common-place in social welfare cases and are often made for tactical reasons, routinely bringing early resolution to a case. A striking example of this made be found in *B v Minister for Social Protection*,³⁹² where the applicant, a Romanian national –and main breadwinner in a family of three young children– was unlawfully refused Jobseeker's Benefit and Rent Supplement.³⁹³ A statutory revision was unsuccessfully sought. Shortly thereafter, an application for leave for Judicial Review was made on a Monday in the High Court before Peart J. The learned judge, on hearing the facts of the case and having had the law opened to him, gave the applicant leave to seek Judicial Review and, crucially, liberty to file a notice of motion seeking interlocutory relief which was returnable to court on the Friday of the same week. The Minister, on the return date on Friday, gave the court an undertaking to immediately make exceptional needs³⁹⁴ payments to the applicant, before settling the case in favor of the applicant shortly thereafter. This result, which ensured that the applicant was put into payment promptly, must be set against a potential

³⁹¹ Whyte refers to a case, *Boland v Eastern Health Board*, unreported, High Court, 9 May 1988, where Lardner J. granted an interlocutory injunction prohibiting the Eastern Health Board from withdrawing the applicant's Supplementary Welfare Allowance, pending the determination of the proceedings, on the basis that, as the applicant had no other source of income, the balance of convenience lay in favour of continuing the payment. Gerard Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2000) at 129.

³⁹² [2012] Judicial Review.

³⁹³ This case is discussed in more detail in Chapter 2.

³⁹⁴ Social Welfare Consolidation Act 2005, s 201.

waiting time of in excess of twelve months, for an oral hearing, in the SWAO, with no guarantee of the same outcome.

The outcome in *B* was possible because of two important elements, significant prejudice and an error of law which was both clear and unambiguous. Some cases, however, are not so straightforward and are hotly contested, putting the court –which is hearing the matter on an interlocutory basis– in a very difficult position, as the rules, applicable to mandatory injunctions, are far more restrictive than those pertaining to prohibitory injunctions. The *Campus Oil* test, discussed above, is applicable to mandatory injunctions, but, unlike prohibitory injunctions, a mandatory injunction is an exceptional measure, but one which, nonetheless, as noted by the Supreme Court in *Denis Riordan v An Taoiseach, The Minister for the Environment and Local Government and The Attorney General (No. 6)*,³⁹⁵ a Court has a wide discretion to grant or refuse, though a court will rarely,³⁹⁶ if ever,³⁹⁷ grant a mandatory injunction which effectively resolves a case in favour of an applicant. In a social welfare case the applicant, of course, argues that the granting of an interlocutory injunction requiring the respondent make social welfare payments until the case is heard and finally determined does not resolve the case in the applicants favor, merely protects his rights pending a full hearing.

Whilst the test applied in respect of prohibitory injunctions is a bona fide or fair case or serious issue for trial, it is unclear as to which test is applicable to a mandatory injunctions. This uncertainty is evident from the judgment of

³⁹⁵ [2002] 4 IR 404:

‘...the granting of a mandatory injunction on an interlocutory application is exceptional though not unknown... subject to the recognition of the propositions established in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88, the application of the general equitable principles confers upon the trial judge a wide discretion as to whether he or she will grant injunctive relief.’

³⁹⁶ *O’Murchu t/a Talknology -v- Eircell Limited* [2001] IESC 15:

‘There are different kinds of mandatory injunctions. Undoubtedly, if a plaintiff is looking for a mandatory injunction requiring a wall to be knocked down he may in fact be attempting to obtain at an interlocutory stage what effectively is his final relief. Once the wall is gone it may not be practicable to rebuild it. That is the classic form of mandatory injunction which a court will rarely grant.’

³⁹⁷ In *O’Donoghue v Clare County Council*, unreported, Supreme Court 6th November 2003, Keane CJ., in dealing with a housing case held that it was inappropriate on an interlocutory injunction to effectively resolve a case in favour of a plaintiff.

Kelly J in *Shelbourne Hotel Holdings Limited v Torriam Hotel Operating Company Limited*³⁹⁸ where the learned judge identified ‘an inconsistency of approach’ on the standard that must be met in order to obtain a mandatory injunction at the interlocutory stage, referring to the two tests as: a fair case or serious issue for trial and; a strong case likely to succeed at the hearing of the action or a strong and clear case. Kelly J. cited in favor of the former, *Cronin v Minister for Education*,³⁹⁹ *A&M Pharmacy Limited v. United Drug Wholesale Limited*⁴⁰⁰ and *Sheehy v. Ryan*⁴⁰¹ and, in favor of the latter, *Shepherd Homes Limited v. Sandham*,⁴⁰² *Boyhan v. Tribunal of Enquiry into the Beef Industry*,⁴⁰³ and *Lingam v. Health Service Executive*.⁴⁰⁴ Kelly J. noted that the approach taken in *Boyham and Lingham* seemed ‘very different to that adopted in *Campus Oil...and in...Cronin’s case*’, that it was more in harmony with the English approach in *Zockoll Group Limited v. Mercury Communications*.⁴⁰⁵

Kelly J. then identified a third test from *Zockoll* and held that the Court would adopt whatever course would carry the lower risk of injustice if it turns out to be the wrong decision.⁴⁰⁶ This approach appears to be consistent

³⁹⁸ [2008] IEHC 376.

³⁹⁹ [2004] 3 IR 205. Where Laffoy J., citing the *Supreme Court in Westman Holdings Ltd. v. McCormack*, held that the court was not entitled to make a:

‘judgment at this juncture as to the strength of the respective cases of the plaintiff and the...defendant.’

⁴⁰⁰ [1996] 2 ILRM 46.

⁴⁰¹ Unreported, Peart J., High Court, 29 August 2002.

⁴⁰² [1971] Ch. 340. Where Magerry J spoke of the necessity for the case to be ‘unusually sharp and clear’ before a mandatory injunction would be granted.

⁴⁰³ [1993] 1 I.R. 210. Denham J. in the High Court, referred to:

‘a strong and clear case - so that the court can feel a degree of assurance that at a trial of the action a similar injunction would be granted.’

⁴⁰⁴ [2006] 17 E.L.R. 137. Where Fennelly J. held that:

‘...where the injunction sought is in effect mandatory... it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action.’

⁴⁰⁵ [1998] F.S.R. 354. It was held that:

‘even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage... where the risk of injustice if the injunction is refused sufficiently outweighs the risk of injustice if it is granted.’

⁴⁰⁶ Kelly J. held that:

‘Faced with these conflicting approaches and pending a final determination of the issue by the Supreme Court, I am much attracted by the approach of Hoffman J. (as he then was) in the *Films Rover* case [1987] 1 WLR 670 where he took the view that the fundamental principle on interlocutory applications for both prohibitory and mandatory injunctions is that the court should adopt whatever course would carry the lower risk of injustice if it turns out to have been the ‘wrong’ decision.

with the views expressed by Hardiman J. in the Supreme Court in *Dunne v Dun Laoghaire-Rathdown County Council*,⁴⁰⁷ where he spoke of balancing the risks of injustice to the respective parties.

Consequently, there are three widely differing tests which might, depending upon the judge hearing the matter, be applied by a court. Although not recorded in written judgment, at interlocutory hearing in *Solovastru*,⁴⁰⁸ Charleton J., was willing to apply the *lower risk of injustice* test applied in *Shelbourne*, whereas in *Hrisca*, White J. required a *strong and clear case*. It is prudent, therefore, where social welfare is at issue, to prepare for an interlocutory hearing as though it were the full hearing. Putting your best foot forward, at this early stage, has the effect of creating further pressure on the respondent to settle the case. A recalcitrant department, faced with a convincing set of legal submissions, backed up with a strong book of legal authorities, will sometimes concede a case at this juncture. In *S v Minister for Social Protection*⁴⁰⁹ the applicant, a Romanian national, who had been unlawfully denied Supplementary Welfare Allowance, was given exceptional needs payments by the respondent on the first day an interlocutory motion was before the court and this payment continued until the case was resolved.

In reality, a mandatory injunction should only be sought where there is a truly strong legal case, as opposed to a case where there are unresolved evidential issues⁴¹⁰ or which is being run on the basis of some human rights element, as the latter is inevitably doomed to failure. Any applicant seeking such an order will be required to give an undertaking that he or she will pay

⁴⁰⁷ 2003 1IR 567:

‘The difficulty for a court in dealing with any case on an interlocutory basis is that there is an ever present risk, either in granting or in withholding relief, of doing an injustice to the party who succeeds in the end. One has to balance the risks of injustice to the respective parties’.

⁴⁰⁸ There is no reported judgment of the interlocutory application.

⁴⁰⁹ [2013] Judicial Review.

⁴¹⁰ In *Kinsella v. McAleer* (High Court, 24th April, 2009), Clarke J. at para. 10, held that:

‘An interlocutory injunction involves a quick and early hearing designed to determine what is the proper way to leave the affairs of the parties until there has been a full trial. It is not practical, therefore, for the Courts to become involved in deciding contentious issues of fact or complicated legal questions as to the rights of the parties at this stage because the information and evidence is not available.’

damages⁴¹¹ to the respondent, should an order be made against the respondent at interlocutory stage, which, upon full hearing, turns out to be the wrong decision. Conversely, a claim for damages, provided it is pleaded,⁴¹² will also lie against the respondent.

4.4 Preliminary Reference from a national court during interlocutory application

One further point ought to be canvassed at this point is the question of whether or not a national court can make a preliminary reference to the Court of Justice during an interlocutory hearing. This point arose in *Hrisca v Minister for Social Protection*,⁴¹³ where the applicants, faced with an extant High Court judgment –*Solovastru*⁴¹⁴– which went squarely against them and being aware of an existing reference from the UK,⁴¹⁵ expressly sought a Preliminary Reference from the High Court. This application was strongly opposed by the respondent, who argued that it was inappropriate for the court to make such a reference at the interlocutory stage of a case. This argument –unsuccessfully run by the respondent in *Kelly v UCD*⁴¹⁶– was unsustainable, as the Court of Justice, in *Hoffman-La Roche*,⁴¹⁷ held that a preliminary reference may be made in the course of an interlocutory application,⁴¹⁸ and there were several Irish Superior Court cases⁴¹⁹ where a

⁴¹¹ Order 84 rule 20(7) (as amended by S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011).

⁴¹² Order 84 rule 25(1) (as amended by S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011). Rule 25(2) provides that the claim for damages must comply with Order 19 rules 5 and 7.

⁴¹³ Unreported, High Court, White J., 16 February 2012.

⁴¹⁴ *Solovastru v Minister for Social Protection & ors* [2011] IEHC 532.

⁴¹⁵ Joined Cases C-147/11 and 148/11 *Czop and Punakova* (not yet reported in ECR).

⁴¹⁶ [2008] IEHC 464. Kelly J., at para 39, citing Case C-107/76 *Hoffmann-La Roche AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse* [1977] ECR 957, held that:

‘It has also been claimed that the application pending is truly an interlocutory matter and therefore a reference would be inappropriate; I cannot agree that this is so.’

⁴¹⁷ Case 107/76 *Hoffman-La Roche* [1977] ECR 957.

⁴¹⁸ *ibid.* at para 5:

‘In the context of article 177, whose purpose is to ensure that community law is interpreted and applied in a uniform manner in all the member states, the particular objective of the third paragraph is to prevent a body of national case-law not in accord with the rules of community law from coming into existence in any member state. The requirements arising from that purpose are observed as regards summary and urgent proceedings, such as the proceedings in the present case, relating to interim measures, where an ordinary main action, permitting the re-examination of any question of law provisionally decided in the summary proceedings, must be instituted, either in all circumstances, or when the unsuccessful party so requires. In these circumstances the specific objective underlying the third paragraph of article

reference had been made at the interlocutory stage. It is also clear from the Supreme Court decision in *SPUC v Grogan & Ors*⁴²⁰ that a preliminary reference can be made together with other interlocutory relief, which is not postponed for the purpose of the reference.⁴²¹

5. Conclusion

There are significant shortcomings at all levels of the social welfare system. Half of all decisions by Department of Social Protection deciding officers are overturned on appeal. This raises significant questions over the standard of decision-making and should prompt a comprehensive, preferably independent, review of the first-instance decision-making process. Improvements at this level would benefit claimants and, in turn, reduce the number of appeals going to the Social Welfare Appeals Office.

Ireland is the host Member State for many EU citizens. The law governing their social welfare rights is complex and difficult, routinely troubling national courts and the Court of Justice. Social welfare law is ever evolving. Deciding officers are expected to grasp complex issues in the absence of

177 is preserved by reason of the fact that the obligation to refer preliminary questions to the court applies within the context of the main action.’

⁴¹⁹ *Campus Oil* (n 283) was an interlocutory application. Further, Carroll J. in *SPUC v Grogan & Ors*, High Court, unreported, 11 October 1989, made a Preliminary Reference in an interlocutory application. In *Digital Rights Ireland Ltd v Minister for Communications & Ors* [2010] IEHC 221, the Plaintiff brought a motion calling for a Reference to the CJEU under Article 267 of TFEU. The Defendants argued, unsuccessfully, that where the legal and factual context in the case had not yet been defined a reference should be refused. McKechnie J. made the reference in the premises that it was possible to define the context of the reference (*Irish Creamery Milk Suppliers Association v Ireland* [1981] ECR 735).

⁴²⁰ unreported, Supreme Court, 19 December 1989:

‘It is clear from the decision of this Court in *Campus Oil Limited & Ors. v. The Minister for Energy & Ors.* (No. 2) 1983 IR 88, that it was open to the learned High Court Judge in this case to grant an interlocutory injunction at the same time as she decided to refer questions of law for the determination of the European Court of Justice... It is quite clear that where the courts of a Member State decide to refer a question pursuant to Article 177 of the Treaty, for a preliminary ruling by the European Court of Justice, that both the question as to the stage of the action in the Member State at which that reference is made and what steps, if any, other than a final determination of the action the courts of the Member State may take pending that determination is peculiarly a matter for the national courts to be considered and decided in accordance with national law.’

⁴²¹ *SPUC v Grogan & Ors*, Supreme Court, unreported, 19 December 1989:

‘There is, therefore, in my view, no question of her decision to make a reference under Article 177 having automatically the effect of postponing a decision on the application for an interlocutory injunction.’

formal legal training. The establishment of a small but specialised legal section within the Department of Social Protection, capable of dealing with the more difficult legal issues arising in the decision-making process, would be of considerable assistance to both claimants and decision-makers and would reduce the growing number of judicial review applications.

The Social Welfare Appeals Office is overwhelmed by the sheer volume of appeals which have steadily increased since the economic downturn in 2008, resulting in significant delays. The waiting time for an oral appeal in 2012 was twelve months. Few social welfare claimants can sustain themselves financially for this period of time. The Social Welfare Appeals Office remains the responsibility of the Minister for Social Protection, who determines the level of resources it receives. It is hopelessly under-resourced and requires additional funding as a matter of urgency. The absence of regulations providing for the interim payment of social welfare for those in the appeals process is also a matter for the Minister for Social Protection. There is evidence from the UK that Courts are now willing to intervene where there is prejudice resulting from delay and grant applicants interim payments.

Excessive delay, in this jurisdiction, entitles a prejudiced applicant to have recourse to the High Court for the purpose of expediting the appeals process. Whilst there have been a number of judicial reviews taken for this purpose, the question of precisely constitutes 'prompt consideration' of an appeal has not been determined in Ireland.

Applicants must exhaust alternative remedies before coming to Court. However, the Superior Courts in Ireland accept that there are circumstances where this rule can be set aside. Judicial review, thus, remains a powerful tool for any disaffected applicant and one which is being used increasingly.

CONCLUSION

Conclusion

The importance of the role that social security would play in protecting free movement rights within the Union was recognised in the very first Treaty in 1951. Those limited obligations¹ were significantly enhanced just six years later in 1957 by the Treaty establishing the Economic Community, which required the Union's legislature to adopt such measures as were necessary to protect social welfare rights for migrant workers and their families. Regulation 3/58 was replaced by Regulation 1408/71 which in turn was replaced by Regulation 883/2004. In the context of social security, these regulations are the Union's flagship legislation and have been fleshed out by the Court of Justice over the last fifty years. Within the impressive body of case law on Regulation 1408/71 there is a rich seam of jurisprudence underscored by the protection and enhancement of free movement. Added to this is the considerable body of case law which has grown out of Regulation 1612/68 and the directives which were the precursors of Directive 2004/38.

The Union has many fine principles, such as equality, sincere co-operation and solidarity. They are not aspirational and create legal obligations on Member States, which the Court of Justice is ever willing to give effect to. Social security entitlements were premised upon economic activity, as was entitlement to social assistance. This requirement has been slowly eroded over time. Citizenship is now the fundamental status of the Union. In *Brey*² Advocate General Wahl posed the question, may a Union citizen say 'civis europeus sum' and invoke that status against hardship endured in a host Member State? He did so against a backdrop of unprecedented economic upheaval and yet the Court of Justice said yes, that no Member State could automatically exclude a Union citizen from its social assistance system in the absence of an examination of the personal circumstances of the Union citizen and the application of the principle of proportionality. *Brey* is a watershed judgment which, it is submitted, effectively overrules Superior Court decisions in the UK and Ireland, and brings an end to the automatic

¹ Treaty establishing the European Coal and Steel Community, 1951, art 69.

² Case C-140/12 *Brey* (not yet reported in the ECR).

exclusion of claimants through the reside to reside provision in Ireland and the UK. *Brey* may also be said to represent a significant step towards a *social* rather than *economic* Union.

The European Commission will have to reconsider its position on Regulation 883/2004 and Directive 2004/38, the long-awaited challenge to the right to reside test in the UK will have to be recalibrated in light of *Brey*. The outcome of the *Genov* and *Gusa*³ cases remains to be determined in light of the *Brey* judgment. What are the rights of the self-employed? Do they retain status for the purpose of Directive 2004/38? Whatever the answer ultimately is, they cannot have any less right to social welfare than the applicant in *Brey* who had never engaged in any economic activity in the host Member State and yet was deserving of the protection of Directive 2004/38. This issue is repeatedly coming before the Courts in both Ireland and the UK, where that very protection is being denied. This gives rise to an absurd situation whereby a jobseeker, entering a host Member State for the first time, has more social welfare rights than a person formerly self-employed for several years in a host Member State and whose social insurance contributions give rise to no entitlement, contrary to EU law. This anomaly exists in circumstances where the status of workers and the self-employed have been assimilated. This raises further doubt as to the distinction between workers and the self-employed identified in Directive 2004/38 in the *Tilianu*⁴ and *Solovastru*⁵ judgments.

The rights accorded to Union citizens in Member States are, by and large, co-extensive with host Member State nationals, provided the claimant can show economic activity, the degree to which is set so low that under Regulation 883/2004 five hours work per week is sufficient to invoke the equal treatment provision of the Regulation in Ireland. The self-employed must earn €96 per week to engage the Regulation. The effect of which is to

³ *Genov v Minister for Social Protection and Gusa v Minister for Social Protection* [2013] IEHC 340.

⁴ *The Queen on the application of M Tilianu v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397.

⁵ *Solovastru v Minister for Social Protection & ors* [2011] IEHC 532.

grant a range of Family Benefits which are payable in respect of the families of migrant workers irrespective of whether or not the families reside in the host or another Member State.

Jobseekers, moving within the Union for the purpose of seeking employment have been afforded continued protection by the Court of Justice, being entitled to equal treatment with job seeking nationals of host Member States, for a period of at least 6 months, their rights being unaffected by Directive 2004/38. The status of worker is obtained and retained with extraordinary ease, two weeks full-time employment being deemed sufficient to retain status for six months.

A worker may aggregate his or her social security contributions in two or more Member States to qualify for social security benefits in the state of residence, the purpose of aggregation being to bring about a unified career for migrant workers. Aggregation does not even require contributions in the Member State of residence. If the worker has moved Member State he or she is entitled to use their contributions from the previous Member State to qualify for social welfare in the new Member State.

There is now a sliding scale of social welfare protection ranging from those in the position of the non-economically active applicant in *Brey*, who must not become an unreasonable burden on a host member State, to those who have permanent residence and unrestricted access to all the social welfare entitlements in a host Member State. There are, however, many categories of persons who fall between these two extremes, who enjoy protection.

Identifying tangible rights in an esoteric area of the law is problematic for claimants, decision-makers and lawyers and creates considerable difficulties in ensuring compliance within Member States such as Ireland. That EU law is supreme is not in doubt, what is routinely in doubt is precisely how EU law applies to any given situation. Challenging economic conditions also have a detrimental effect on compliance, Member States social welfare expenditure is increasingly constrained and EU nationals are a soft target.

Ireland's statutory presumption against habitual residence, in the absence of two years presence in the Common Travel Area, is highly questionable, as workers and the self-employed enjoy a presumption of habitual residence under EU law. Equally, it may be incompatible with the rights enjoyed by jobseekers entering a host Member State for the first time, the test for whom is that they are genuinely seeking employment. The requirement of habitual residence as a qualifying condition for social assistance may also now be in doubt in light of the decision of the Court of Justice in *Brey*, where the Court of Justice required an examination of the personal circumstances of such claimants and the application of the principle of proportionality.

Ireland failed to comply with EU law governing the rights of Romanian and Bulgarian nationals, resulting in shameful treatment of the citizens of these Member States by this State's administrative bodies. Ireland's unlawful derogation from Article 23 of Directive 2004/38 restricted the labour market access of categories of persons neither permitted nor envisioned by the Treaty of Accession, 2005. Those who did take up employment were wrongly exposed to criminal sanctions, removed from their employment and denied social welfare entitlements. The Department of Enterprise, Trade and Innovation's rules governing the rights of Romanian and Bulgarian nationals, were, by and large, contrary to EU law –in particular the stand-still clause– and national law. The result of which was that those affected had to force compliance upon this State. This was effected through judicial review. The State refused to stand over their position in Court, accepting that the applicants' rights had been breached and in July 2012 quietly lifted the restrictions two years early. Many of the applicants were vulnerable people with little understanding of the complex issues that cast such a dark shadow on their lives. They were ordinary people who simply wished to get on with their lives in this State and yet they had the courage to challenge the State. In so doing deserve enormous credit for their contribution to the early lifting of restrictions which benefited all citizens of Romania and Bulgaria.

Croatia acceded to the Union on 1 July 2013⁶ and the Treaty of Accession 2012 provided for the same optional transitional measures⁷ which affected Romanian and Bulgarian nationals. However, Ireland has not opted to apply those derogations. Future Member States may not be so fortunate, Turkey's accession, if it proceeds, will pose a potentially greater challenge than the accession of Romania and Bulgaria.

Transitional measures affect fundamental Union rights and create a second class of Union citizenship, yet are immune to review by the Court of Justice, other than in respect of application. The European Court of Human Rights is not so restricted and doubt must arise as to the compatibility of transitional measures with the European Convention on Human Rights. This issue remains to be canvassed in the future.

An EU citizen's ability to ensure compliance with his or her social welfare rights in a host Member State is contingent upon that Member State's internal enforcement mechanism. In Ireland that means recourse to either the Social Welfare Appeals Office or the Superior Courts for those whose rights have been infringed at first instance decision-making level. Low standards in first instance decision-making, evidenced by the success rate of appellants at appeals level, has the knock-on effect of placing additional burdens on the Social Welfare Appeals Office. A consequence of which is significant delay, with an average waiting times of more than a year for an oral appeal, contrary to the statutory requirement of promptness, and there is no system of prioritisation. The prejudice to claimants, caused by this delay, is compounded by the failure of successive Ministers for Social Protection to enact regulations providing for interim payments pending appeal. However, appellants prejudiced by delay may bring judicial review for the purpose of expediting the process.

⁶ Treaty of Accession 2012, OJ L 112, 24.4.2012, art 3(3):

'This Treaty shall enter into force on 1 July 2013 provided that all the instruments of ratification have been deposited before that date.'

⁷ Treaty of Accession 2012, Annex V.

It is also open to affected claimants to utilise the court system to enforce their rights, provided their case comes within one of the categories which permits the applicant to step outside the appeals process. The High Court has, on many occasions, been utilised by social welfare claimants to expedite a positive outcome. In *B v Minister for Social Protection*⁸ leave for judicial review was granted on a Monday, with interim relief secured by Friday of the same week. The number of judicial reviews being brought in respect of decisions by both deciding officers and the appeals officers is steadily increasing. More comprehensive training in the area of EU law and the creation of a specialist legal unit within the Department of Social Protection would benefit both claimants and the Department.

In the absence of compliance, rights have little value. The Department of Social Protection routinely refuses or fails to give effect to the rights of EU nationals in this State, denying them important social security and social assistance benefits. Compliance in respect of the rights accorded to Romanian and Bulgarian nationals during the period of the transitional measures was pitiful. Those rights were enforced in the national court.

However, it remains open to those affected to call attention to their plight in the form of a direct complaint to the European Commission, who may act upon that complaint or of its own motion and engage with any given Member State via the infringement procedure set out in Article 258 of the Treaty on the Functioning of the European Union. The complainant is entitled to say 'civis europeus sum' and to invoke that status in order to oppose any violation of his or her fundamental rights.

⁸ [2012] JR.

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