APPROVED

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 748 J.R.

BETWEEN

GEORGETA VOICAN

APPLICANT

AND

CHIEF APPEALS OFFICER
SOCIAL WELFARE APPEALS OFFICE
MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered electronically on 29 May 2020

INTRODUCTION

1. These proceedings concern the extent of the rights enjoyed by the dependent family members of an EU citizen who has taken up employment in Ireland. The principal issue for determination is whether the mother of an EU citizen worker is entitled to receive a form of social assistance, i.e. disability allowance, notwithstanding that she herself has not been economically active in the Irish State and has been resident here for less than five years.

2. For ease of exposition, I will refer to the applicant, throughout this judgment, as "***the mother***", and to her daughter as "***the daughter***".

3. It is asserted on behalf of the mother that she enjoys certain derived rights under the Citizenship Directive by virtue of her relationship with a migrant worker, namely her

daughter, upon whom she is financially dependent. These derived rights include, it is said, an entitlement to claim disability allowance.

4. The respondents dispute this, saying that the mother's very right to reside within the State is predicated upon her *continuing* to be dependent upon her daughter. If the mother were to be entitled to receive disability allowance, then she would become financially dependent upon the State instead. This, it is said, would negate her right to reside within the State. The domestic regulations which implement the Citizenship Directive expressly provide that the retention of a right of residence is contingent on a person not becoming an "unreasonable burden" on the social assistance system of the State. It is submitted that this requirement is consistent with the Citizenship Directive. The social welfare authorities acted lawfully, therefore, in refusing the claim for disability allowance.

5. The validity of this requirement of the domestic regulations has been challenged by the mother in these proceedings. It is pleaded that it represents an unlawful transposition of the Citizenship Directive on the premise that no such condition is set out in, or permitted by, the Directive. In the alternative, it is pleaded that it is inconsistent with the equal treatment imperatives under the Constitution of Ireland and the European Convention on Human Rights in that such a requirement discriminates against the mother on the grounds of her nationality.

LEGISLATIVE CONTEXT

6. The resolution of these proceedings necessitates consideration of three interconnected legislative measures as follows.

Citizenship Directive (Directive 2004/38/EC)

7. The Citizenship Directive lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by European

Union citizens and their family members. A distinction is drawn between (i) residence for an initial period of less than three months; (ii) residence for a period of longer than three months; and (iii) permanent residence, which is a status that can be acquired after five years. Different conditions attached to each, with the strongest rights being conferred on a person who has the status of permanent residence. These proceedings are concerned with the second type of residence, i.e. residence for a period of longer than three months.

8. The Citizenship Directive also distinguishes between (i) economically active citizens, i.e. those who are workers or self-employed; (ii) economically inactive citizens; and (iii) students. The right of residence conferred upon the latter two categories is conditional upon their having 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.

9. This is provided for under Article 7(1) of the Citizenship Directive as follows.

> 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:
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> (a) are workers or self-employed persons in the host Member State; or
>
> (b) 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; or
>
> (c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
>
> — have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they 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; or
>
> (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
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> 2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).
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> […]
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> 4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

10. As appears, a migrant worker's right of residence—and that of their family members—is not conditional on their having sufficient resources so as not to become a burden on the social assistance system ("***self-sufficiency***"). The requirement for self-sufficiency is confined to economically inactive citizens and their family members; and to students and their family members. In respect of the latter, the category of family members of a student who are entitled to residency is restricted under Article 7(4).

11. It is common case that the applicant's daughter is an EU citizen, and is lawfully resident in the State as a "worker" for the purposes of Article 7(1)(a).

12. (It seems that the daughter's right of residence may actually have an even stronger legal basis, in that not only is she a Union citizen (as a national of Romania), she is also a naturalised Irish citizen. No argument has been addressed to me as to whether this status affects the mother's derived rights. This judgment does not therefore address the status of a dependant of an Irish Citizen).

13. The dispute between the parties centres on the extent of the mother's derived rights as a "family member" of a migrant worker. To properly understand this dispute, it is

necessary to consider the definition of "family member" under Article 2(2) of the Citizenship Directive as follows:

> 'family member' means:
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> (a) the spouse;
>
> (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;
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> (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);
>
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

14. As appears, for an ascendant, such as a parent, to qualify as a "family member" of an EU citizen, they must be dependent. The concept of dependency has been explained as follows by the Court of Justice in *Reyes*, Case C-423/12, ECLI:EU:C:2014:16, paragraphs 19 to 25. Dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the EU citizen who has exercised his right of free movement or by his spouse. A situation of real dependence must be established. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the family member is not in a position to support himself. The need for material support must exist either (i) in the State of origin of that family member, or (ii) in the State whence he came, at the time when he applies to join that citizen. There is no need to determine the reasons for that dependence nor the reasons for the recourse to that support.

15. The fact that an EU citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is

such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.

16. It should be noted that the judgment in *Reyes* had been delivered in the context of a direct *descendant* over the age of twenty-one, as opposed to a direct *ascendant* as on the facts of the present case. This distinction does not affect the analysis as the concept of dependency has the same meaning in both contexts. This is confirmed by the judgment of the Court of Appeal in *V.K. v. Minister for Justice and Law Reform* [2019] IECA 232. The Court of Appeal applied the principles in *Reyes* to a claim for dependency by the parents of an EU citizen, i.e. a relative in the ascending line. Baker J., delivering the unanimous judgment of the Court of Appeal, summarised the test for dependence as follows.

> "81. The test for dependence is one of EU law and an applicant must show, in the light of his financial and social conditions, a real and not temporary dependence on a Union citizen. The financial needs must be for basic or essential needs of a material nature without which a person could not support himself or herself. A person does not have to be wholly dependent on the Union citizen to meet essential needs, but the needs actually met must be essential to life and the financial support must be more than merely 'welcome' to use the language of Edwards J. in *M. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 500.
>
> 82. The concept of dependence is to be interpreted broadly and in the light of the perceived benefit of family unity and the principles of freedom of movement."

17. Article 14 of the Citizenship Directive provides for the retention of the right of residence as follows.

> 1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
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> 2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

> In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.
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> 3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.
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> 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:
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> (a) the Union citizens are workers or self-employed persons, or
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> (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not 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.

18. As appears, a distinction is drawn between (i) residence for a period of less than three months (Article 6); (ii) residence for a period of longer than three months (Articles 7, 12 and 13). The right of residence for the initial period of three months is contingent on the EU citizen and their family members not becoming an "unreasonable burden" on the social assistance system of the host Member State. There is no such blanket requirement in the case of residence which extends beyond three months. Rather, the EU citizen and their family members must comply with the conditions applicable to their category of residence. On the facts of the present case, the mother asserts a right of residence under Article 7(1)(d) which is derived from her daughter's residence under Article 7(1)(a). This category of residence is not subject to a self-sufficiency requirement.

19. Article 24 of the Citizenship Directive ensures that Union citizens residing in another Member State are entitled to equal treatment with the nationals of the host State. The Court of Justice has held that the principle of non-discrimination, laid down generally in

Article 18 TFEU, is given more specific expression in Article 24 of the Citizenship Directive. (See *Dano*, Case C-333/13, EU:C:2014:2358, at paragraph 61).

20. Article 24 reads as follows.

> 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens 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 within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
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> 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), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

21. As appears, the right of equal treatment applies not only to EU citizens, but also extends to family members who are third country nationals with the right of residence or permanent residence in the host State.

22. The derogation under Article 24(2) provides, relevantly, that the host Member State shall not be obliged to confer entitlement to "social assistance" during the first three months of residence. Again, this reflects the distinction made throughout the Citizenship Directive between (i) residence for an initial period of less than three months (Article 6); (ii) residence for a period of longer than three months (Articles 7, 12 and 13).

23. The concept of "social assistance" has been interpreted by the Court of Justice as referring to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family, and who by reason of that fact may, during his period of residence, become a burden on the

public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State. (See *Dano*, Case C-333/13, EU:C:2014:2358, at paragraph 63).

24. The Court of Justice has emphasised that, insofar as access to social assistance is concerned, an EU citizen can claim equal treatment with nationals of the host Member State only if his or her residence in the territory of the host Member State complies with the conditions of the Citizenship Directive. (*Dano*, paragraph 69).

25. There is thus an organic link between the conditions prescribed under Article 7, and the right to equal treatment conferred by Article 24 of the Citizenship Directive.

European Communities (Free Movement of Persons) Regulations 2015

26. The Citizenship Directive has been transposed into domestic law by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) ("***the domestic regulations***").

27. The domestic regulations use the terms "qualifying family member" and "permitted family member" to distinguish between what might be described as "core" family members (including dependent direct ascendants), and "extended" family members, respectively. This distinction reflects that provided for under Articles 3(1) and (2) of the Citizenship Directive.

28. Relevantly, the definition of "qualifying family member" under regulation 3(5) of the domestic regulations includes "a dependent direct relative in the ascending line of the Union citizen, or of his or her spouse or civil partner". The domestic regulations do not provide a definition of "dependent" or "dependency" in this context. Pointedly, however, such a definition is provided for in the specific context of family members whose right of residence derives from an EU citizen who is enrolled in an educational establishment for the principal purpose of following a course of study, i.e. a student. It will be recalled

that, under Article 7(4) of the Citizenship Directive, the derived family rights of a student are more limited than those of workers or the self-employed. (See paragraph 9 above). First, dependent direct relatives in the ascending line do not automatically benefit from a right of residence. Rather, such relatives fall to be treated as members of what might be described as the "extended" family. Secondly, even in the case of what might be described as "core" family members, a student must (i) have comprehensive sickness insurance cover in the host Member State, and (ii) assure the relevant national authority that they 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 (Article 7(1)(c)).

29. In order for a direct relative in the ascending line of a student who is dependent on the student (or their spouse) to obtain a right of residence it is necessary to apply to the Minister for Justice and Equality for permission to remain in the State. The criteria governing the determination of such an application are prescribed as follows at regulation 6(5)(c) of the domestic regulations.

> (c) In order to decide whether to grant a permission under paragraph (a), the Minister shall cause to be carried out an extensive examination of the personal circumstances of the applicant and shall have regard to the following:
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> (i) the extent and nature of the dependency;
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> (ii) in the case of financial dependency, the extent and duration of the financial support provided by the Union citizen or his or her spouse or civil partner to the applicant prior to the applicant's coming to the State, having regard, amongst other relevant matters, to living costs in the country from which the applicant has come, whether the financial dependency can be satisfied by remittances to the applicant in the country from which he or she has come and other financial resources available to him or her;
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> (iii) in the case of dependency on serious health grounds which strictly require the personal care of the Union citizen or his or her spouse or civil partner, the nature of the serious health

grounds concerned and the duration of the period in which they have existed;

(iv) the capacity of the Union citizen concerned *to continue to support the applicant in the State** in the event that the Minister were to grant a permission.

*Emphasis (italics) added.

30. As appears, the Minister is required to have regard not only to the extent and duration of the financial support provided to the alleged dependant *prior* to their coming to the State, but also to the capacity of the student concerned *to continue to support* the dependant in the State. There is no equivalent provision under the domestic regulations in respect of the dependant of a worker.

31. Regulation 11(1) of the domestic regulations provides as follows.

> 11.(1) A person residing in the State under Regulation 6, 9 or 10 shall be entitled to continue to reside in the State for as long as he or she satisfies the relevant provision of the regulation concerned and does not become an unreasonable burden on the social assistance system of the State.

32. The validity of this regulation has been challenged in these proceedings on the basis that it is said to have improperly extended the no "unreasonable burden" requirement to the family members of an economically active citizen, i.e. a worker or self-employed person.

Social Welfare Consolidation Act 2005 (as amended)

33. Section 210 of the Social Welfare Consolidation Act 2005 can be summarised as providing that, in order to be eligible for disability allowance, a claimant must meet the following qualifying criteria.

(i). A claimant must have attained the age of 16 years, but not yet have attained pensionable age;

(ii). A claimant must be substantially restricted in undertaking suitable employment (as defined) by reason of a specified disability; and

> (iii). The claimant's weekly means must not exceed the amount of disability allowance (including any increases of that allowance) which would be payable to the person if that person had no means.

34. (This section has since been amended by the Social Welfare (No. 2) Act 2019, but the decision impugned in these proceedings had been made prior to these amendments coming into force).

35. Section 210(9) provides that a person shall not be entitled to disability allowance unless he or she is habitually resident in the State.

36. The concept of "habitual residence" is defined at Section 246 of the Social Welfare Consolidation Act 2005 (as amended). Insofar as relevant, subsection 246(1) provides *inter alia* that a person, who is a *family member* of a worker or a self-employed person from an EU Member State residing in the State pursuant to Article 7 of the Citizenship Directive, meets the requirement of being habitually resident in the State. Pointedly, neither economically inactive persons nor students (nor, by extension, their family members) are expressly included within this definition of "habitual residence". Put otherwise, the social welfare legislation properly observes the distinctions drawn under Article 7 of the Citizenship Directive discussed at paragraph 10 above.

37. Subsection 246(5) provides as follows.

> (5) 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.

38. Subsection 246(6) then provides *inter alia* that a person who has the right under the EC (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) to enter and reside in the State, or who is deemed under those Regulations to be lawfully resident in the State, shall, for the purpose of subsection 246(5), be taken to have a right to reside in the State. (These are the regulations referred to as "the domestic regulations" in this judgment).

PROCEDURAL HISTORY

39. This matter comes before the High Court in the form of judicial review proceedings. The proceedings seek to challenge a decision made by the Chief Appeals Officer on 23 July 2019 ("***the decision***"). The decision was made pursuant to section 318 of the Social Welfare Consolidation Act 2005. This section allows the Chief Appeals Officer to 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.

40. The applicant in the proceedings is a Romanian national, and, as such, an EU citizen. The applicant asserts that she is a "dependent direct relative in the ascending line" of a migrant worker, namely her daughter. As such, it is said that the applicant has a right of residency derived from her daughter's primary right of residence as a worker.

41. It has been accepted by the respondents that the applicant had been residing in Ireland between 2009 and 2011, and returned to Ireland in 2017 (at the latest). It is also accepted that the applicant's daughter is an EU citizen and has been living and working lawfully in this State for a considerable period of time, and is now a naturalised Irish citizen. (See affidavit of Ms Joan Gordon).

42. The operative part of the Chief Appeals Officer's decision reads as follows.

> "From my review of the Appeals Officer's decision of 26th June 2019 it is clear that the Appeals Officer was satisfied that Ms. Voican was a dependent direct relative in the ascending line of a Union citizen who is a worker in Ireland. The Appeals Officer was also satisfied that Ms. Voican had established that the dependency existed prior to Ms. Voican joining her daughter in Ireland. In this respect the Appeals Officer reported:
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> > *The appellant has adduced at the oral hearing that she was been supported by her daughter Angelica and her other daughter in Spain when she was living in Romania. At the hearing the appellant's daughter stated that she had always forwarded money on a weekly to a fortnightly basis to her mother, whenever she needed it. She has provided a number of Western Union Money Transfer Receipts to verify same. She has always done this since living in Ireland and this*

> *would cover her daily or medical needs. Her mother is separated from her spouse and this separation has been ongoing for approximately 15 years. She originally moved to live with her other daughter in Spain and was supported by her daughter there as well as her daughter living in Ireland who she resides with now. The appellant's daughter advised that she is fully supporting her mother since she came to Ireland to live with her. She advised that she also fully supported her when her mother was living in Romania and Spain. She has advised that she is finding it very difficult to financially support her having her own family to support. She states her mother is completely dependent upon her and that she takes her to all her medical and other appointments*.

The Appeals Officer further reported that *in light of the foregoing I have concluded that the appellant does have a right to reside in accordance with Article 6 of Statutory Instrument 548/2015 however is not entitled to receive assistance under the Social Welfare Acts*.

The Appeals Officer considered that Ms. Voican, who is herself a Union citizen, has a right to reside on the basis of being a dependent direct relative in the ascending line of a Union citizen who is a worker in Ireland. In those circumstances the provisions of Article 6(3)(a)(iv) of S.I. 548 of 2015 applies.

Ms. Hetherington, acting on behalf of Ms. Voican, asserts that as Ms. Voican has established a right to reside her appeal should be allowed on those grounds.

However, in accordance with the Directive 2004/38/EC and the Regulations of 2015 (S.I. 548 of 2015) giving further effect to the Directive, the right to reside is not unconditional. The Directive and the Regulations draw a distinction between economically active persons and those who are not.

Article 11 of S.I. 548 of 2015, dealing with the retention of rights of residence, provides:

> *A person residing in the State under Regulation 6, 9 or 10 shall be entitled to continue to reside in the State for as long as he or she satisfies the relevant provision of the regulation concerned and does not become an unreasonable burden on the social assistance system of the State*.

While Ms. Voican is residing in the State under Article 6 the right to reside is not unconditional and she may continue to reside for as long as she satisfies the provisions of Article 6 and does not become an unreasonable burden on the social assistance system of the State.

I therefore do not consider that the Appeals Officer has erred in law on the grounds submitted by Ms. Hetherington on behalf of Ms. Voican and in those circumstances I must decline to revise the decision of the Appeals Officer."

43. In their written legal submissions, the respondents contend that the decision should be understood as meaning that the Chief Appeals Officer did not accept that the mother would have a right to reside in the State in circumstances where she sought social assistance and thus was no longer dependent on her daughter.

> "6. It is clear from the decision of the Chief Appeals Officer that she did not accept that the Applicant would have a right to reside in the State under either the Directive or the Regulations in circumstances where she sought social assistance and thus was no longer dependant on her daughter. In that regard, the characterisation of the Decision by the Applicant as not disturbing the findings of the Appeals Officer on the question of a right to reside is inaccurate. This will be addressed further below but the decision of the Chief Appeals Officer is premised on a central conclusion that the Applicant does not meet the criteria contained in the 2015 Regulations or the Directive and therefore, does not have a right to reside in the State.

44. The written submissions return to this point at §28 as follows.

> "[…] As outlined above, in considering the 'retention of rights of residence' the Chief Appeals Officer expressly stated that the right to reside was not unconditional and only continued to exist for as long as the Applicant satisfied the requirements of Article 6 and also does not become an unreasonable burden on the social assistance system of the State. This can only be read as a finding that there was a failure by the Applicant to continue to comply with the requirements of Article 6 of the 2015 Regulations and, consequently, that she does not have a right to reside in the State for that reason."

45. It is noted in the affidavit of Ms Joan Gordon, the Chief Appeals Officer, filed on behalf of the respondents that disability allowance is paid without an individual having to have made any social insurance contributions, i.e. it is a social assistance payment.

DETAILED DISCUSSION

46. The respondents' defence to these proceedings is striking in its simplicity. It is contended that the mother only meets the definition of a "family member" because she is currently dependent on her daughter. In the absence of *continuing* dependency, it is said that the Applicant would not meet the definition contained in the Citizenship Directive, and would have no right to reside within the State. The argument is encapsulated as follows at §44 of the respondents' written submissions.

> "[…] The position of the State is that in order for the Applicant to establish a right to reside in the State she must be dependent on her daughter and that such dependency must be ongoing and continuing. The position of the State is, further, that where the Applicant is reliant on the social assistance system of the State she can no longer be said to be dependent on her daughter and, thus, does not fulfil a specific requirement of the Directive. It is a matter between the Applicant and her daughter whether the daughter wishes to or is in a position to maintain the Applicant. The State's position is simply that the Applicant cannot claim a right to reside in this State as a dependant of her daughter's and then insist that the State provide the financial resources necessary to maintain her."

47. The correctness or otherwise of this argument turns largely on the definition of "family member" under Article 2(2)(d) of the Citizenship Directive. This provides, in effect, that the term "family member" includes dependent direct relatives in the ascending line of the EU citizen with primary residence rights. The dispute between the parties centres on whether the definition requires that such dependency must be ongoing and continuing.

48. The case law of the Court of Justice is unequivocal on this point. See, in particular, *Reyes*, Case C-423/12, ECLI:EU:C:2014:16, paragraphs 19 to 25. The need for material support must exist either (i) in the State of origin of the family member, or (ii) in the State whence he came, at the time when he applies to join the EU citizen. The fact that an EU citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is enough to show that the descendant is in a real situation of dependence vis-à-vis that citizen.

49. The principle that the dependency need only exist in the State of origin was ultimately determinative of the outcome of the proceedings in *Reyes*. By its second question, the referring court had asked whether, at the time of assessing the status of the family member asserting dependence, the national authorities must assign any importance to the fact that that family member is well placed to obtain employment in the host Member State. The implication here being that if the family member did, indeed, obtain gainful employment in the host Member State, they would, in consequence, no longer be a *dependent* family member, and might forfeit their derived right of residence.

50. The Court of Justice held that the situation of dependency must exist in the country of origin and *at the time* when the family member applies to join the Union citizen on whom they are dependent. See paragraphs 29 to 32 of the judgment as follows.

> "29. By its second question, the referring court asks, in essence, whether, in interpreting the term 'dependant' in Article 2(2)(c) of Directive 2004/38, any significance attaches to the fact that a family member – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State, which would mean that the conditions for him to be regarded as a relative who is a dependant under the provision are no longer met.
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> 30. In that regard, it must be noted that the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent (see, to that effect, *Jia*, paragraph 37, and Case C-83/11 *Rahman* [2012] ECR, paragraph 33).
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> 31. It follows that, as, in essence, has been stated by all the parties which have submitted observations to the Court, any prospects of obtaining work in the host Member State which would enable, if necessary, a direct descendant, who is 21 years old or older, of a Union citizen no longer to be dependent on that citizen once he has the right of residence are not such as to affect the interpretation of the condition of being a 'dependant' referred to in Article 2(2)(c) of Directive 2004/38.
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> 32. Furthermore, as the European Commission has rightly pointed out, the opposite solution would, in practice, prohibit that descendant from looking for employment in the host Member State and would accordingly infringe Article 23 of that directive, which expressly

> authorises such a descendant, if he has the right of residence, to take up employment or self-employment (see, by analogy, *Lebon*, paragraph 20)."

51. The same logic applies where a *subsequent* loss of dependence is caused by the family member being granted social assistance in the host Member State. Provided that the requisite dependence has been established in the State of origin at the time the derived right of residence is sought, then the residency status is not affected by the grant of social assistance thereafter.

52. The contrary interpretation advanced on behalf of the respondents is not only inconsistent with the case law discussed above, it would also be inconsistent with Article 24 of the Citizenship Directive. It will be recalled that Article 24 provides that all EU citizens residing on the basis of the Citizenship Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State. The mother is a Romanian national and thus an EU citizen. Having established a right of residence on the basis of her dependence, while in Romania, upon her daughter, who is a migrant worker under Article 7(1)(a), the mother is lawfully residing in the State on the basis of Article 7(1)(d) and is entitled to equal treatment under Article 24. Yet on the respondents' argument, the mother is precluded from pursuing a claim for social assistance on the same basis as an Irish national.

53. An argument in similar terms to that being relied upon by the respondents in these proceedings had been attempted—and rejected by the Court of Justice—in *Lebon*, Case 316/85, EU:C:1987:302.

54. The proceedings in *Lebon* concerned Regulation 1612/68 on freedom of movement for workers within the Community ("***the Workers Regulation***"). (This legislation is no longer in force, and has been replaced, in part, by the Citizenship Directive).

55. Article 10(1) of the Workers Regulation, insofar as relevant, had provided that (i) descendants under the age of twenty-one years, and (ii) dependent descendants, of a migrant worker and his spouse were to have the right to "install themselves" with the worker in the territory of another Member State. Article 7(2) had provided that such a migrant worker shall enjoy the same social and tax advantages as national workers.

56. The facts in *Lebon* were as follows. Ms Lebon, a French national, had lived in Belgium since her birth (except for a period from 1979 to 1981, during which she worked in France). At the time of the legal proceedings, she had been living with her parents and her child. Her father, who was also a French national, had worked in Belgium from 1949 to 1976, and had been in receipt of a retirement pension since 1977. (To avoid any confusion, it should be noted that—although expressly raised by the referring court—the fact that Ms Lebon's father had been *retired* did not affect the legal analysis. It had been accepted that, as a former migrant worker, the father continued to enjoy a right of residence in Belgium).

57. In circumstances where Ms Lebon was over twenty-one years of age, her derived right to reside in the host Member State was contingent on her being a dependant of her father.

58. Ms Lebon had applied for a form of social assistance known as "the minimax". This was the minimum means of subsistence provided for by Belgian Law.

59. As appears from the report for the hearing and from the judgment itself, the Netherlands Government had sought to argue that the making of a claim for social assistance was inconsistent with the dependency requirement under Article 10(1) of the Workers Regulation. This argument was, however, rejected by the Court of Justice. See paragraphs 18 to 21 of the judgment as follows.

> "According to the Netherlands Government, the term 'dependent' means that the worker must 'wholly or largely support' the descendant. In its view, the claim by a descendant for the grant of the minimex means that that person is no longer dependent on his

> ascendant and, consequently, no longer comes within the scope of the definition in Article 10 (1) of Regulation No 1612/68.
>
> The government of the Federal Republic of Germany maintained at the hearing that the status of dependent member of the family presupposes not only the existence of a situation in which the person concerned is unable to support himself but also the existence of a right to maintenance on the part of the worker himself.
>
> It must be pointed out, in the first place, that a claim for the grant of the minimex submitted by a member of a migrant worker's family who is dependent on the worker cannot affect the claimant's status as a dependent member of the worker's family. To decide otherwise would amount to accepting that the grant of the minimex could result in the claimant forfeiting the status of dependent member of the family and consequently justify either the withdrawal of the minimex itself or even the loss of the right of residence. Such a solution would in practice preclude a dependent member of a worker's family from claiming the minimex and would, for that reason, undermine the equal treatment accorded to the migrant worker. *The status of dependent member of a worker's family should therefore be considered independently of the grant of the minimex*.*
>
> It must be pointed out, secondly, that the status of dependent member of a worker's family does not presuppose the existence of a right to maintenance either. If that were the case, the composition of the family would depend on national legislation, which varies from one State to another, and that would lead to the application of Community law in a manner that is not uniform."
>
> *Emphasis (italics) added.

60. The rationale for rejecting the argument that the making of a claim for social assistance was inconsistent with dependency is even more clearly stated by Advocate General Lenz in his Opinion as follows (at paragraph 35).

> "How untenable the Netherlands argument is becomes clear, however, if it is borne in mind that it would mean that if indigent members of the families of migrant workers were to claim social assistance benefits they would lose the right of residence (because they would no longer be supported by the worker) or, to express it differently, in such situations they could have a right of residence only if they forwent essential benefits available to nationals, that is if they accepted a serious disadvantage."

61. The respondents have sought to diminish the importance of the judgment in *Lebon* by drawing attention to the answer provided by the Court of Justice to *another* question

raised by the referring court. This question, in brief, had asked whether the descendants of a (retired) worker, who were living with him, retained the right to equality of treatment granted by the Workers Regulation when they have reached the age of majority, were no longer dependent upon him, and did not have the status of workers?

62. The Court of Justice answered the question as follows (at paragraphs 13 and 14).

> "It follows that, where a worker who is a national of one Member State was employed within the territory of another Member State and exercised the right to remain there, his descendants who have reached the age of 21 and are no longer dependent on him may not rely on the right to equal treatment guaranteed by Community law in order to claim a social benefit provided for by the legislation of the host Member State and guaranteeing in general terms the minimum means of subsistence. In the circumstances, that benefit does not constitute for the worker a social advantage within the meaning of Article 7 (2) of Regulation No 1612/68, *inasmuch as he is no longer supporting his descendant*.*
>
> The answer to the first question must therefore be that, where a worker who is a national of one Member State was employed within the territory of another Member State and remains there after obtaining a retirement pension, his descendants do not retain the right to equal treatment with regard to a social benefit provided for by the legislation of the host Member State and guaranteeing in general terms the minimum means of subsistence where they have reached the age of 21, are no longer dependent on him and do not have the status of workers."
>
> *Emphasis (italics) added.

63. This answer simply confirms that a child who has passed the age of twenty-one years must demonstrate actual dependency in order to assert an indirect right to equal treatment. In contrast to a child aged under twenty-one years, an adult-child is not automatically treated as a dependant. This is so even where the adult-child had previously enjoyed an automatic status as a dependant, and continued thereafter to live with the worker. Put otherwise, a child who has "aged out" cannot rely on their previous right of residence based on presumed dependence, but must instead demonstrate actual dependence.

64. The provision of social assistance to a *non-dependent* descendant would not be a "social advantage" to the worker precisely because it would not relieve him of any existing financial liability, i.e. in circumstances where he was not actually supporting the descendant. It is only in the case of actual dependence by an adult relative that the worker would obtain a "social advantage" within the meaning of Article 7(2) of the Workers Regulation.

65. Thus, in order to determine whether Ms Lebon was a dependant of her father, it would be necessary to consider her factual situation. It was in this context that the Court of Justice held that the status of a dependent member of a worker's family should be considered *independently* of the grant of social assistance.

66. There is no inconsistency between the two answers given by the Court of Justice in *Lebon*. The first question was expressly predicated on the worker's relative *not* being dependent upon the worker. The response to the second question answered (this had been the third question referred) then addressed the legal test for determining whether a factual situation of dependence existed.

67. There is nothing in the judgment in *Lebon* which stands as authority for the proposition that the requirement for dependency in the State of origin under the Citizenship Directive must be read as containing an implicit requirement for ongoing or continuing dependency in the host Member State.

68. The respondents have sought at §40 of their written submissions to make something of the fact that the judgment in *Lebon* concerned a dependent relative in the *descending line*, whereas, in the present case, the claim for social assistance is made in respect of a dependant in the ascending line. With respect, this is a distinction without a difference. As appears from the judgment of the Court of Appeal in *V.K. v. Minister for Justice and Law Reform* [2019] IECA 232, the concept of dependency is the same in both contexts.

69. The respondents also ventured to suggest that the payment at issue in *Lebon* had been a minimal payment, whereas the disability allowance at issue in the present case is intended to meet all of a person's basic subsistence needs, and, if granted, would result in full dependency upon the State. With respect, any distinction between the quantum of the two forms of social assistance—and such a distinction has not been clearly demonstrated—is not relevant to the principle established in *Lebon*, which is to the effect that the status of a dependent member of a worker's family should be considered independently of the grant of social assistance. This principle is founded upon the migrant worker's right to equal treatment, and does not turn on the quantum of the social assistance being claimed.

70. Finally, counsel for the respondents submits that the judgment in *Lebon* has to be read in the context of the then legislation, and observes that a person with a period of residence equivalent to that of Ms Lebon would now have a right of permanent residence under Chapter IV of the Citizenship Directive. A permanent resident is not subject to any self-sufficiency requirement.

DECISION OF THE COURT

71. The legal issue to be determined in these proceedings is net. The length of this judgment is more a testament to the careful and comprehensive submissions of the parties, than the result of any inherent complexity in the legal principles.

72. The case turns largely on the definition of "family member" under Article 2(2)(d) of the Citizenship Directive. The mother asserts that she is a "dependent direct relative in the ascending line", and that, as such, she has a right of residency derived from her daughter's primary right of residence as a migrant worker. The case law of the Court of Justice is unequivocal: the situation of dependency must exist in the country of origin and *at the*

time when the family member applies to join the EU citizen on whom they are dependent. (The case law is discussed at paragraphs 14 to 16 above).

73. It is common case that the mother had been dependent on her daughter, a migrant worker, for financial support prior to the mother joining the daughter in Ireland. It follows, therefore, that the mother fulfilled the dependency criteria. The mother thus has a right of residence within the State based on Article 7(1)(d) of the Citizenship Directive and retains this right under Article 14.

74. The mother also fulfils the requirements under section 246(1) of the Social Welfare Consolidation Act 2005. This is because, as discussed at paragraphs 36 to 38 above, the definition of habitual residence expressly addresses the position of workers and family members.

75. Article 24 of the Citizenship Directive provides that all EU citizens residing on the basis of the Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. This extends to family members—such as the mother in this case—who are themselves EU citizens. This is subject always to the family member complying with the conditions of residence prescribed under the Citizenship Directive. (See *Dano*, Case C-333/13, EU:C:2014:2358, at paragraph 69).

76. The mother complies with the requirements under Article 7(1)(d) and Article 14. In particular, she meets the requirement of having been dependent, in her State of origin, upon an EU citizen who is a migrant worker, i.e. her daughter. There is no requirement under Article 7(1)(a) or 7(1)(d) for self-sufficiency in the case of a worker and dependent family member. Such a family member can rely on the principle of equal treatment to claim social assistance. This is to be contrasted with the requirements applicable to

economically inactive citizens and to student citizens (and their family members) under Articles 7(1)(b) and 7(1)(c).

77. The respondents have—mistakenly—sought to pigeon-hole the mother as an economically inactive citizen, rather than as a dependent family member. At §37 of their written submissions, the respondents go so far as to say that Article 7(1)(b) of the Citizenship Directive envisages that the daughter will have sufficient resources to support her mother.

> "[…] The Applicant is a person who is not, and has never been, economically active in the State and is not a person who has paid social insurance contributions. In these circumstances, the requirements of her right to reside includes a requirement to continue to be dependent on the relevant Union Citizen – and indeed Article 7(b) of the Directive envisages that the Applicant's daughter, being the Union citizen, will have sufficient resources to support her mother – i.e. to prevent her family members becoming a burden on the social assistance system of the State. If a person has recourse to the social assistance system of the State, it cannot be said that they are dependent on the Union Citizen. In these circumstances, a fundamental qualification requirement of the Directive is not met and, therefore, that individual is no longer in compliance with the requirements of the Directive."

78. This audacious attempt to invoke the requirements of Article 7(1)(b) in order to justify the refusal of social assistance to the mother is telling. Article 7(1)(b) has no application whatsoever to the circumstances of a migrant worker and a dependent family member. Rather, it is directed to circumstances where the *primary* right of residence is that of an economically inactive citizen. In such a scenario, the rights of residence of the citizen and family members (the latter may not necessarily be citizens themselves) is contingent on the citizen having 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 on having comprehensive sickness insurance cover.

79. As explained in judgments such as, for example, *Dano*, the Citizenship Directive distinguishes between (i) persons who are working and (ii) those who are not. See paragraph 75 of *Dano*, as follows.

> "It should be added that, as regards the condition requiring possession of sufficient resources, Directive 2004/38 distinguishes between (i) persons who are working and (ii) those who are not. *Under Article 7(1)(a) of Directive 2004/38, the first group of Union citizens in the host Member State have the right of residence without having to fulfil any other condition.** On the other hand, persons who are economically inactive are required by Article 7(1)(b) of the directive to meet the condition that they have sufficient resources of their own."
>
> *Emphasis (italics) added.

80. Article 7(1)(b) is not applicable to the facts of the present case, and certainly cannot be relied upon by the respondents to rewrite the definition of dependency for the purposes of Article 2(2) of the Citizenship Directive, as interpreted in the case law of the Court of Justice.

81. The rationale for allowing a *dependent* family member to access social assistance is similar to that explained by the Court of Justice in *Lebon*, Case 316/85, EU:C:1987:302. It would undermine the equal treatment accorded to the migrant worker to deny his dependants access to social assistance.

82. It is worth recalling the manner in which Advocate General Lenz dismissed an argument that the term "dependent' means that the migrant worker must wholly or largely support the family member, and that the grant of social assistance would mean that that person is no longer dependent. See paragraph 35 of the Opinion in *Lebon* as follows.

> "How untenable the […] argument is becomes clear, however, if it is borne in mind that it would mean that if indigent members of the families of migrant workers were to claim social assistance benefits they would lose the right of residence (because they would no longer be supported by the worker) or, to express it differently, in such situations they could have a right of residence only if they forwent essential benefits available to nationals, that is if they accepted a serious disadvantage."

83. The rationale underlying the judgment in *Lebon*, namely that the pursuit of a claim for social assistance is not inconsistent with dependency, applies *a fortiori* to the Citizenship Directive. This is because under the Workers Regulation, members of a worker's family had qualified only *indirectly* for equal treatment. Article 7 of the Workers Regulation had been directed to the worker himself. Any entitlement to social assistance on behalf of a family member was conditional on the payment of same being a "social advantage" to the worker. By contrast, under the Citizenship Directive, the person claiming social assistance, namely the mother, has an entitlement to equal treatment in her own right under Article 24.

84. I turn now to apply these principles to the decision of the Chief Appeals Officer impugned in these proceedings. The Chief Appeals Officer had accepted the earlier finding of the appeals officer to the effect that the mother had been dependent on her daughter prior to her joining her daughter in Ireland. The Chief Appeals Officer went on, however, to rely on regulation 11 of the domestic regulations to find that the mother's right of residence was conditional on her not becoming an unreasonable burden on the social assistance system of the State.

85. Both the Chief Appeals Officer's reasoning, and the provisions of regulation 11 upon which she relied, are inconsistent with the requirements of the Citizenship Directive. The EU legislature has ordained that it is <u>not</u> an unreasonable burden for a Member State to allow the dependent family members of a migrant worker a right to equal treatment in respect of social assistance. The requirement for self-sufficiency does not apply to dependent family members of a migrant worker who are lawfully resident in the State for a period of more than three months.

86. Whereas it is consistent with EU law to impose a requirement for self-sufficiency in respect of other categories of EU citizens in accordance with Articles 7(1)(b) and 7(1)(c)

of the Citizenship Directive, regulation 11 of the domestic regulations goes too far and is invalid insofar as it purports to extend such a requirement to a *dependent family member* of a migrant worker who is lawfully resident in the State. This aspect of regulation 11 must be disapplied as it is inconsistent with the provisions of the Citizenship Directive which have direct effect.

CONCLUSION AND PROPOSED FORM OF ORDER

87. The applicant in these proceedings has a right of residence within the State based on Article 7(1)(d) and Article 14 of the Citizenship Directive. Prior to joining her daughter in Ireland, the applicant, while living in Romania and Spain, had been financially dependent on her daughter, an EU citizen, who is a migrant worker lawfully resident in the State. The applicant thus fulfilled the dependency criteria under Article 2(2)(d). (See, by analogy, *Reyes*, Case C-423/12, ECLI:EU:C:2014:16, paragraphs 19 to 25).

88. The respondents are not entitled to impose a "self-sufficiency" requirement on the applicant nor to deny her equal treatment in the context of an application for social assistance in the form of a disability allowance. The EU legislature has ordained that it is <u>not</u> an unreasonable burden for a Member State to allow the dependent family members of a migrant worker a right to equal treatment in respect of social assistance. (Different considerations apply in respect of the initial three months of residence).

89. I propose therefore to make an order of *certiorari*, in terms of paragraph (d) (1) of the amended statement of grounds, quashing the decision of the Chief Appeals Officer dated 23 July 2019. The matter is to be remitted, pursuant to Order 84, rule 27, to the Chief Appeals Officer with a direction to reconsider it and reach a decision in accordance with the findings of the High Court. I propose to direct that the reconsideration be carried out and completed within six weeks of the date of perfection of the High Court order.

90. I also propose to make a declaration to the effect that regulation 11 of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) is inconsistent with the requirements of the Citizenship Directive. I invite written submissions from the parties on whether regulation 11 should be set aside or whether the offending words "and does not become an unreasonable burden on the social assistance system of the State" should be struck out.

91. In circumstances where the proceedings have been resolved in favour of the applicant by reference to the grounds pleaded in respect of the Citizenship Directive, it is unnecessary to address the alternative grounds of challenge advanced by reference to the Constitution of Ireland and the European Convention on Human Rights. To do so now would be inconsistent with the principle of judicial self-restraint.

92. The attention of the parties is drawn to the practice direction issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

93. The parties are requested to correspond with each other on the question of the appropriate form of order, and on the question of costs. In default of agreement between the parties on these issues, short written submissions should be filed in the Central Office within twenty-one days of today's date.

Appearances

Derek Shortall for the applicant instructed by KOD Lyons Solicitors
Nuala Butler, SC and Aoife Carroll for the respondents instructed by the Chief State Solicitor

Approved
Garrett Simons