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# Irish Court of Appeal

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## Ruling

**Title:** Gusa -v- Minister for Social Protection & ors

**Neutral Citation:** [2016] IECA 237

**Court of Appeal Record Number:** 1023/14

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**Composition of Court:** Finlay Geoghegan J., Peart J., Irvine J.

**Ruling by:** Finlay Geoghegan J.

**Status:** Approved

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## THE COURT OF APPEAL

### CIVIL

**Finlay Geoghegan J.  
Peart J.  
Irvine J.**

**2014/1023**

**(Article 64 transfer)**

**FLOREA GUSA**

**APPLICANT/APPELLANT**

**AND**

**MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

## **Interim Ruling of the Court delivered by Ms. Justice Finlay Geoghegan on the 13th day of July 2016**

1. This appeal concerns the entitlement of a Romanian national and EU citizen who carried on a business as a self employed plasterer in the State for approximately four years, during which time he paid tax and PRSI to continue to have a right to reside in the State and receive a jobseekers allowance after he ceased his self employed activities due to the economic downturn.

### **Background facts**

2. The facts are not in dispute. The appellant is a Romanian and EU national who arrived in Ireland in October 2007. He was initially supported by his adult children in the State from October 2007 to October 2008. From October 2008, until October 2012, he worked as a self employed plasterer and made returns and paid his tax and PRSI and other levies on his income. He ceased working by reason of the economic downturn in October 2012. He has deposed that he then had no income and his son and daughter-in-law were leaving Ireland for Canada and were no longer in a position to financially support him. In November 2012, he applied for a jobseekers allowance. By decision of the 22nd November, 2012, he was refused. The reason given for the refusal was that one of the qualifying conditions is that he must be habitually resident in the State and that this requires him to demonstrate that he has a right to reside in accordance with the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (SI 656/2006) which he had not done. The decision identifies that on cessation of his self employment he no longer satisfied the conditions in Article 6(2)(a)(i) to (iv) of the 2006 regulations and as a self employed person is not entitled to the protection of Article 6(2)(c)(ii).

3. The appellant was informed in the same decision that he could apply to the Minister for Justice, Equality and Law Reform for a permanent residence certificate under Article 15 of the 2006 Regulations in order to demonstrate his right to reside.

4. The appellant sought an internal appeal within the Department of Social Welfare against that decision. That was refused upon the basis that the appellant had not established a continued right to reside in Ireland and therefore had not established habitual residence. In each decision reference was made to the similarity of the appellant's circumstances with those, the subject of the judgment of the High Court (Dunne J.) in *Solovastru v. Minister for Social Protection* [\[2011\] IEHC 532](#).

5. On the 25th February, 2013, leave was granted to seek by way of judicial review orders of *certiorari* of the decisions of the 22nd November, 2012 and 21st February, 2013, disallowing the application for jobseekers allowance and a number of related declarations including a declaration that the appellant retained the status of a self employed person and a right to reside in the State in November 2012, pursuant to Article 7 of Directive 2004/38/EC and/or: the Treaty on the Functioning of the European Union (TFEU) and in particular pursuant to Articles 18, 20, 45, 48 and 49 thereof.

6. It is important to emphasise that the appellant has never contended that he has resources to sustain himself and his family in the State or has sickness insurance cover. On the contrary he has deposed he is unable to sustain himself and his family in the State. He also does not contend that he was entitled to apply for permanent residence in November 2012 but that he would be entitled to apply if lawfully resident until October 2013.

7. For the reasons set out in a written judgment delivered on the 11th July, 2013, the High Court (Hedigan J.) dismissed the applicant's claim (with the claim of another

applicant who is not an appellant).

8. Subsequent to the delivery of the High Court judgment, but prior to the finalisation of any order of the High Court dismissing the appellant's claim the Court of Justice of the European Union (CJEU) delivered judgment on the 19th September, 2013, in case C-140/12 *Pensionsversicherungsanstalt v. Peter Brey*. An application was made to the High Court judge on behalf of the appellant to vary the judgment already delivered by reason of the judgment of the CJEU in *Brey*. That application was refused on the 17th October, 2013.

### **Further decisions of CJEU**

9. Between the High Court judgment and the hearing in the Court of Appeal there were two further judgments of the CJEU relevant to the issues on appeal: case C-333/13 *Dano* (11th November, 2014) and case C-67/14 *Alimanovic* (15th September, 2015). Since the hearing in the Court of Appeal the CJEU has delivered judgment in two matters in which the opinion of the Advocate General had been available at the time of the hearing: case C-299/14 *Garcia-Nieto* (25th February, 2016) and case C-308/14 *European Commission v. United Kingdom* (14th June, 2016). The latter two judgments do not appear to raise any new issue which would require further submissions from the parties.

10. Prior to considering the issues on this appeal it is necessary to set out the statutory framework, both Irish and EU.

### **Statutory framework**

11. Section 139 of the Social Welfare Consolidation Act 2005 (as amended) provides *inter alia* for a "jobseekers allowance" amongst a list of social assistance payments. Section 141 sets out the criteria according to which a person may be entitled to jobseekers allowance. Under subs. (1) this includes a means test. Subsection (9) provides:-

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

12. Section 246(5) of the 2005 Act provides that:-

". . . 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."

13. Section 246 lists in paras. (a) to (h) persons who are for the purposes of subs. 5 to be taken to have a right to reside in the State. They include at para. (a) an Irish citizen and at (b) "a person who has a right to enter and reside in the State under the European Communities (Free Movement of Persons) (No. 2) Regulation 2006 (SI No. 656/2006) . . ."

14. Section 246(6) is not in its express terms an exclusive list of the category of persons who may have a right to reside but rather a list of the persons who will be presumed to have a right to reside. Section 246(7) lists categories of persons who shall not be regarded as being habitually resident for the purposes of the Act. None of those categories are relevant to the issues on appeal. However it is not contended that the appellant has any right to reside in the State other than pursuant to his right as an EU citizen and primarily pursuant to Directive 2004/38 as implemented in the State.

15. The Communities (Free Movement of Persons) (No. 2) Regulation 2006 (SI No. 656/2006) ("the 2006 Regulations") were made for the purpose of giving effect to Directive 2004/38. Regulation 6 insofar as relevant provides:-

“6(1) Subject to Regulation 20, a person to whom these Regulations apply may reside in the State for up to 3 months on condition that he or she -

- (a) (i) where the person is a Union citizen, holds a valid national identity card or passport,
- (ii) where the person is not a Union citizen, holds a valid passport, and
- (b) does not become an unreasonable burden on the social welfare system of the State.

(2)(a) Subject to Regulation 20, a Union citizen may reside in the State for a period longer than 3 months if he or she -

- (i) is in employment or is self-employed in the State,
- (ii) has sufficient resources to support himself or herself, his or her spouse and any accompanying dependants, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants,
- (iii) . . .
- (iv) . . .

2(b) . . .

2(c) Subject to Regulation 20, a person to whom subparagraph (a)(i) applies may remain in the State on cessation of the activity referred to in that subparagraph if -

- (i) he or she is temporarily unable to work as the result of an illness or accident,
- (ii) 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,
- (iii) subject to subpara. (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, or
- (iv) except where he or she is involuntarily unemployed, he or she takes up vocational training related to the previous employment.

2(d) In a case to which subparagraph (c)(iii) applies, the right to remain referred to in para. (c) shall expire 6 months after the cessation of the activity concerned unless the person concerned enters into employment within that period.”

Directive 2004/38/EC.

17. It is not in dispute that the appellant has registered as a jobseeker with the Department of Social and family Affairs and FÁS for the purposes of Regulation 6(2)(c) (ii). Nor is it disputed that a self employed person who is habitually resident is eligible for jobseekers allowance (subject to the means test).

### **EU provisions**

18. The EU provisions relevant to the issues on appeal were primarily Articles 18, 20, 21, 45, 48 and 49 TFEU and Regulation 883/2004 and Directive 2004/38/EC. The Treaty Articles insofar as relevant provide:-

Article 18(ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. . . .

Article 20 (ex Article 17 TEC)

(1) Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

(2) Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

(a) The right to move and reside freely within the territory of the Member States;

. . .

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21 (ex Article 18TEC)

(1) Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

. . .

Article 45 (ex Article 39 TEC)

(1) Freedom of movement for workers shall be secured within the Union.

(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.

(3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health;

(a) To accept offers of employment actually made;

(b) To move freely within the territory of Member States for this purpose;

(c) To stay in the 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;

(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.

(4) The provisions of this Article shall not apply to employment in the public service.

#### Article 48 (ex Article 42 TEC)

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 dependents:

(a) Aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taking into account under the laws of the several countries;

(b) Payments of benefits to persons resident in the territories of Member States.

‘ ‘ ‘

#### Article 49 (ex Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the

second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

19. At this point it is relevant to note that Article 45 relates to the freedom of movement of workers, Article 49 relates to the freedom of establishment i.e. the right of persons to take up and pursue activities as self employed persons and then Article 48 refers to making arrangements to secure for "employed and self employed migrant worker" the aggregation and payment of benefits. This appears to envisage a self employed person in certain circumstances being considered to be a worker.

20. Regulation 883/2004/EC of the 29th April, 2004, on the coordination of social security systems (as amended) is made pursuant to Article 42 TEC (now Article 48 TFEU). In broad terms pursuant to Article 3 it covers social security benefits set out in Article 3.1 but does not apply to social assistance and certain other matters set out in Article 3.5. In accordance with Article 3.3 the Regulation also applies to what are termed "special non-contributory cash benefits covered by Article 70".

21. Article 4 expressly applies the principle of equal treatment providing

"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".

22. Article 70 insofar as relevant provides:

"(1) This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3.1 and of social assistance.

(2) For the purposes of this Chapter, 'special non-contributory cash benefits' means those which:

(a) Are intended to provide either:

(i) 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;

Or

(ii) . . .

and

(b) Where the financing exclusively derives for 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. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefit for this reason

alone,

and

(c) Are listed in Annex X.

(3) Article 7 and the other Chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

(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.

23. Jobseekers allowance payable pursuant to the Social Welfare Consolidation Act 2005, is listed by Ireland in Annex 10 to the Regulation and is a special non-contributory cash benefit within the meaning of Article 70. Hence in accordance with Article 70.4 of the Regulation it is to be provided exclusively in the Member State in which the person concerned resides and in accordance with its legislation. Article 4 of the Regulation is applicable and it provides that the persons to whom the 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".

24. The final EU provision of relevance is Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States. It amends and repeals certain earlier provisions. It is made *inter alia* pursuant to Article 18 TEC (now Article 21 TFEU) and in its recital (1) reflects the provisions of that article by providing "Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and the measures adopted to give it effect". Counsel for the respondent laid great emphasis on the latter part of this phrase submitting that the appellant's right to reside is subject to the provisions of Directive 2004/38/EC. Articles 7, 14 and 24 insofar as relevant provide:

Article 7

Right of residence for more than three months

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; 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) - . . .



(d) . . .

2. . . .

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:

(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;

(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;

(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.

4. . . .

#### Article 14

##### Retention of the right of residence

1. . . .

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.

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.

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:

(a) the Union citizens are workers or self-employed persons, or

(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.

## Article 24

### Equal treatment

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.

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.

### **High Court judgment**

25. The appellant's claim in the High Court was dismissed essentially upon two grounds:

1. The appellant did not have a right to reside in the State at the time of his application for job seekers allowance; and

2. The right to reside condition imposed by the Irish legislation as an effective condition for eligibility for job-seekers allowance whilst indirectly discriminatory was objectively justifiable on grounds other than the nationality of the appellant and hence not inconsistent with EU law.

### **Issues on appeal**

26. The Court has had the benefit of written and oral submissions by counsel for the appellant and respondent. In addition as already outlined there have been further relevant judgments of the CJEU in relation in particular to the second issue identified and determined in the High Court. It remains the position that one of the issues which require a decision on the appeal is whether or not the appellant at the time he applied for jobseekers allowance had a right in accordance with EU law to reside in Ireland. I put the question in that way as counsel for the appellant submitted in the first instance that he had a right under Article 7 of the Directive as implemented in Ireland by the

Regulation 6 of the 2006 Regulations, but failing that had a right pursuant to the TFEU and in particular Articles 21 and 49.

27. If the appellant did not have a right to reside in Ireland, then a second issue arises for determination as to whether the imposition of the right to reside condition under Irish Law for eligibility to jobseekers allowance to a person in the situation of the appellant is compatible with EU law and in particular whether it is non discriminatory and proportionate.

28. Third, Counsel for the appellant submitted, in reliance on the judgment of the CJEU in *Brey* at para. 77, that the respondent was obliged to carry out an overall assessment of the specific burden which the grant of a jobseekers allowance to the appellant would place on the social assistance system as a whole by reference to his personal circumstances prior to deciding that he had no right to reside in the State.

29. The first matter to be considered is whether this Court needs the assistance of the CJEU to enable it decide the appeal.

### **Right to retain status or reside**

30. The appellant is an EU citizen as a national of Romania. It is not in dispute that he lawfully resided in Ireland and worked or conducted an economic activity as what is termed "a self employed person" or in some instances "a self employed worker" for four years from October 2008 to October 2012. He is a person to whom Article 7 of Directive 2004/38/EC and Regulation 6 of the 2006 Regulations apply. Having lived and worked lawfully in Ireland for four years, paid his taxes and PRSI (social insurance payments) as a self employed person, he ceased his work or economic activity by reason of the economic downturn in Ireland. It is also not in dispute that in making his application for the jobseekers allowance he has complied with the registration formalities required of such an applicant.

31. I am ignoring a short period of employment in 2010/11 referred to in the papers as at that point in time Romanian nationals were not entitled to enter into employment without a work permit in Ireland which he did not have. No point was made for or against the appellant's right to reside by reason of that employment. Since the 1st January, 2012, Romanian nationals are entitled to be employed without a work permit and accordingly in November 2012 when he applied for jobseekers allowance he was entitled to take up employment in the State.

32. Regulation 6 of the 2006 Regulations is intended to implement Article 7 of Directive 2004/38/EC in the State. The words used are similar. It must be construed so as to give effect to Article 7 and have similar meaning.

33. The primary contention on behalf of the appellant is that as a self employed person who has worked or been economically active for a period in excess of a year in the State and whose work or economic activity has ceased by reason of the downturn in the State that he is within the category of persons specified in Article 7(3)(c) of Directive 2004/38/EC and as such retains the status of self employed person in Ireland for he purposes of Article 7(1)(a) and hence a right to reside for a period longer than three months.

34. The submission for the appellant is that unless Article 7(3)(c) of the Directive is construed to include self employed persons who have worked or been economically active but whose work or activity had ceased by reason of absence of relevant work, or they are otherwise considered to remain self employed persons for the purposes of Article 7(1)(a) then such persons, unlike their employed worker colleagues, do not have a right to remain living in the host Member States pursuant to Directive 2004/38 unless they can meet the criteria in Article 7(1)(b) or (c) which require sufficient resources for

them and their family not become a burden on the social assistance system in the host Member State and to have comprehensive sickness insurance cover. This it is submitted is not consistent with the general intention of the TFEU provisions and implementing legislation that workers, whether employed or self employed, should have a right to remain residing in the Member State in which they have worked whether as an employed or self employed person. Further it fails to recognise the intention to align the rights of workers whether employed or self employed and the way in which workers in certain sectors may move from working as an employed or self employed person and would create an obstacle to the right of establishment. Also reliance was placed upon the fact that it is the host Member State which pursuant to Regulation 338/2004 is competent to pay social security benefits both during and after the pursuit of economic activity as an employed or self employed person.

35. The appellant is a person is a worker in the sense that he has worked for other people or firms but has done so in a self employed capacity in the sense of pursuant to a contract for services.

36. Counsel for the respondent relies primarily on the wording of Article 7(3)(b) to confine it to employed persons and the reasoning of the trial judge and judgments cited by him.

37. I have concluded that this Court requires to make a reference to the CJEU pursuant to Article 267 TFEU in order that it may decide whether or not the High Court was correct in determining that the appellant did not retain a right to reside in Ireland on the cessation of his self employed work or economic activity without the necessity of establishing that he had sufficient resources to support himself and his spouse and had comprehensive sickness insurance in respect of himself and his spouse i.e. meeting the criteria in Article 7(1)(b) or (c). The need arises for the following reasons.

38. Regulation 6 of the 2006 Regulations is intended to implement Article 7 of Directive 2004/38/EC. Regulation 6(2)(a)(i) permits a Union citizen to reside in the State for a period longer than three months if he or she "is employed or is self employed in the State". This provision implements Article 7(1)(a). Accordingly if a person in the position of the appellant retains the status of self employed person for the purposes of Article 7(1)(a) then he must also be considered to be a self employed person for the purposes of Regulation 6(2)(a)(i) of the 2006 Regulations with a continued right to reside.

39. If this Court were to construe Regulation 6(2)(c)(ii) in accordance with the normal meaning of the phrase "after having been employed . . ." it would probably not include a person in the position of the appellant who has not worked as an employee, but rather has worked as "self employed"- a phrase which is almost a self contradictory - but more normally understood in Irish law to be a person working pursuant to a contract for services as distinct from an employee who works under a contract of service. The reasons for such a conclusion are set out by the trial judge herein and the judgment in *Solvastru v. Minister for Social Protection* [\[2011\] IEHC 332](#).

40. However the submissions of counsel for the appellant raise an issue as to whether Article 7 (3) of Directive 2004/38 should properly be construed as meaning that a self employed person who has worked or exercised an economic activity in a host Member State ceases immediately on the cessation of the work or economic activity in circumstances which may be considered to be "involuntary" in the sense of reasons beyond his control including an absence of work by reason of a general economic downturn in the State to lose the status of self employed person within the meaning of Article 7(1)(a) and thus his automatic right to continue to reside in the host Member State in contradistinction to his fellow worker who has been carrying on an economic

activity as an employed person.

41. Amongst the matters to which the Court were referred and which may be relevant to a determination of this question are first the change in wording in Article 48 TFEU (ex Art. 40 TEC). Article 42 TEC had provided:

The Council shall . . . 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 dependents:[emphasis added]

. . .

Article 48 TFEU now provides:

The European Parliament and the Council shall . . . 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 dependents . . [emphasis added].

42. Second, Regulation 883/2004 replaces Regulation 1408/71 which initially applied only to 'workers' but was subsequently extended to self employed persons by Regulation 1390/81 the preamble of which stated:

"Whereas Regulation (EEC) No. 1409/71, 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 . . ."

43. Third the judgment of CJEU in case C-300/84 *van Roosmalen* in which at para. 20 it considered that Regulation 139/81 was intended to guarantee to self employed persons the same protection as is accorded to employed persons and therefore must be interpreted broadly. Further at para. 23 it determined that the expression "self employed person, within the meaning of Article 1(a)(iv) of Regulation 1408/71 . . . applies to persons who are pursuing or have pursued . . . self employment . . ." A similar approach may now be required to Regulation 883/2004 and Directive 2004/38.

44. Counsel for the appellant also drew attention to the approach in Regulation 883/2004 of referring to activities as "an employed or self employed person".

45. There appears to be a lack of clarity as to whether in enacting Directive 2004/38/EC and in particular Article 7 thereof it was intended to differentiate between the persons termed a worker and a self employed person therein each of whom are involuntarily forced to cease working after having worked for a period of in excess of one year either as an employee or as self employed in the host Member State. There is no recital which indicates a justification for such a distinction in relation to retention of their status. Nevertheless, the words used in particular in Article 7(3)(b) insofar as they refer to "having been employed for more than one year" in their ordinary meaning would appear to refer only to a person who is in employment.

46. The CJEU does not appear to have considered in its judgments whether a self employed person in such a situation retains the status for the purposes of Article 7(1)(a) such that he continues to have a right to reside in the host Member State. Counsel for the appellant seeks to distinguish the approach taken by the Irish High Court (Dunne J.) in *Solvastru v. Minister for Social Protection* [[2011 IEHC 332](#)], which in turn relied upon

and followed the Court of Appeal of England and Wales in *R. (Tilianu) v. Secretary of State for Work and Pensions* [2010] EWCA Civ.1397, by pointing out that the UK Immigration (European Economic Area) Regulations 2006 implementing Directive 2004/38/EC in Regulation 6 expressly distinguishes the circumstances in which a person no longer in self employment shall not cease to be treated as a self employed person for the purpose of the equivalent of Article 7(1)(a) (Regulation 6(3)) with that of a worker who was employed (Regulation 6(2)). He also submitted that those decisions did not consider the travaux préparatoires for Directive 2004/38/EC which he submits indicate an intention to align the positions of employed and self employed persons in relation to the retention of their status as workers and self employed persons for the purposes of Article 7(1)(a). I have also noted from the judgment of the CJEU in *Alimanovic* that the German law on freedom of movement recorded at para. 22 (presumably intended to implement Directive 2004/38) may take a different approach insofar as it appears to include a retention of status of a self employed person on the "termination of self employment owing to circumstances beyond the control of the self employed person, after more than one year of work".

47. The questions which I propose for consideration of the parties on this issue are:

1. Does an EU citizen who (1) is a national of another Member State; (2) has lawfully resided in and worked as a self employed person in a host Member State for approximately four years; (3) has ceased his work or economic activity by reason of the economic downturn in the host Member State and (4) has registered as a jobseeker with the relevant employment office retain the status of self employed person pursuant to Article 7(1)(a) whether pursuant to Article 7(3)(b) of Directive 2004/38/EC or otherwise .

2. If not, does he retain the right to reside in the host Member State without being required to satisfy the criteria in Article 7(1) (b) or (c) or only permitted to remain pursuant to Article 14(4) (b) of Directive 2004/38/EC.

### **Compatibility of right to reside condition with EU Law**

48. If the CJEU answers the intended questions that appellant did have a right to reside in the State either because he retained the status of self employed person for the purposes of Article 7(1)(a) of Directive 2004/38 or had a continuing right to reside pursuant to Articles of TFEU independently of Articles 7(1) (b) or (c) or Article 14(4) (b) of Directive 2004/38/EC then it follows he is entitled to succeed on his appeal and be granted orders of certiorari.

49. If the answers are to the effect that he did not have a continuing right to reside (other than pursuant to Article 7(1) (b) or (c)) then the existing judgments of the CJEU suggest that the respondent was entitled to impose a right of residence condition for jobseekers allowance (or if he only remains pursuant to Article 14(4) (b) of Directive 2004/38 to refuse payment) and that this is compatible with EU for the following reasons.

50. Jobseekers allowance claimed by the appellant herein is a special non-contributory cash benefit within the meaning of Article 70(2) of Regulation 83/2004 but also appears to constitute social assistance within the meaning of Article 24(2) of Directive 2004/38. This follows from the nature of jobseekers allowance, the conditions attaching to eligibility therefore set out in ss. 139 and 141 of the Social Welfare Consolidation Act 2005, as amended and the judgments of CJEU in *Dano*, (para 63) and *Almanovic* (para 44).

51. In accordance with Article 70(4) of Regulation 883/2004, it is payable in the Member State in which the person resides in accordance with its legislation.

52. The judgments of CJEU in *Dano*, *Amonovic* and *Garcia-Neto* indicate that both Article 4 of Regulation 83/2004 and Article 24 of Directive 2004/38 apply to the refusal of a payment of such a social benefit or assistance to a person such as the appellant residing in a host Member State. Both reiterate the prohibition of discrimination on grounds of nationality, but rely on the derogation in Article 24(2) of Directive 2004/38 from the principle of non discrimination for their conclusions. Most recently in *Garcia-Neto* in which the CJEU considered questions referred in relation to a refusal by Germany to grant to Spanish nationals during the first three months of residence certain benefits considered to be special non contributory cash benefits within the meaning of article 70(2) of Regulation 883/2004 which also constitutes social assistance within the meaning of Article 24(2) of the Directive summarised the current position at paras. 36 to 40 of that judgment:-

36. By its second question, the referring court asks, in essence, whether Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are in a situation such as that referred to in Article 6(1) of that directive are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.

37. As a preliminary point, it should be recalled that, in the judgment in *Alimanovic* (C 67/14, [EU:C:2015:597](#), paragraphs 44 to 46), the Court held that benefits such as the benefits at issue cannot be considered to be benefits of a financial nature which are intended to facilitate access to the labour market of a Member State, but must be regarded as 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.

38. As regards access to such benefits, a Union citizen can claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38 (judgments in *Dano*, C 333/13, [EU:C:2014:2358](#), paragraph 69, and *Alimanovic*, C 67/14, [EU:C:2015:597](#), paragraph 49).

39. To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social assistance under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State (judgments in *Dano*, C 333/13, [EU:C:2014:2358](#), paragraph 74, and *Alimanovic*, C 67/14, [EU:C:2015:597](#), paragraph 50).

40. Consequently, in order to determine whether social assistance, such as the benefits at issue, may be refused on the basis of the derogation in Article 24(2) of Directive 2004/38, it is necessary to determine beforehand whether the principle of equal treatment referred to in Article 24(1) of that directive is applicable and, accordingly, whether the Union citizen concerned is lawfully resident on the territory of the host Member

State (judgment in *Alimanovic*, C 67/14, [EU:C:2015:597](#), paragraph 51).

53. Whilst the judgment in *Garcia-Neto* refers to a person in a situation referred to in Article 6(1) of Directive 2004/38 (during first three months of residence) *Alimanovic* related to a person who formerly had the status of worker under Article 7(1)(a) but no longer retained that status.

54. Article 24(1) of Directive 2004/38 provides for the equal treatment of all Union citizens residing on the basis of the Directive with nationals of the host Member State. However, Article 24(2) provides by way of derogation from para. 1 that the host Member State is not obliged to confer entitlement to social assistance either during the first three months of residence or "where appropriate the longer period provided for in Article 14(4)(b)". Accordingly for the principle of equal treatment to apply to an entitlement to social assistance the appellant must be residing in Ireland on the basis of Directive 2004/38 ie. lawfully resident in the State in accordance with the terms of the Directive and other than being permitted to remain pursuant to Article 14(4)(b) (so as to avoid the derogation in Article 24(2)).

55. The appellant, in his application to the respondent only relied upon his entitlement to be present as a self employed person who had carried out an economic activity in that capacity for approximately four years. His contention is that he retains the status of self employed person. On a consideration of the terms of the Directive in accordance with Article 14.2 he only has a right of residence as provided for in Articles 7, 12 and 13. Articles 12 and 13 are not relevant on the facts. Article 14(4)(b) provides by way of a derogation that if the appellant is properly considered to have entered the State "in order to seek employment" then he may not be expelled for so long as he "can provide evidence that [he is] continuing to seek employment and that [he has] a genuine chance of being engaged". Even if the appellant may not be expelled from the State in reliance upon that Article nevertheless pursuant to Article 24.2 by way of derogation from the principle of equal treatment the State in accordance with the above judgments is not obliged to confer an entitlement to social assistance during such a period in which he might be entitled to remain in the State, but does not have a right to reside pursuant to Article 7(1)(a).

56. Notwithstanding, the position indicated by the current judgments of the CJEU it appears to me that as this Court needs to refer the questions identified above in order to determine the appeal it should also include a question in relation to the compatibility with EU law of the right to reside condition in relation to the entitlement of a person in the position of the appellant to jobseekers allowance in the State under the 2005 Act. The approach of the CJEU to the difficult issues concerning the interrelationship of Regulation 883/2004 and Directive 2004/38 in relation to Article 70 non-contributory special benefits appears to be the subject of continuing refinement and there may be further relevant judgments prior to the determination of this reference. The question of the prohibition on discrimination in Article 4 of Regulation 883/2004 as distinct from that in Article 24.1 of Directive 2004/38 in relation to an Article 70 non-contributory special benefit which is also social assistance may require further consideration as submitted by Counsel for the appellant.

57. The question I suggest for consideration of the parties on this issue is :

In relation to a person who has worked as a self employed person in a host Member State for a period of four years (but does not retain that status pursuant to Article 7(1)(a) of Directive 2004/38) is a refusal of a jobseekers allowance (which is a non-contributory special benefit within the meaning the meaning Article 70 of Regulation 883/2004) by reason of a failure to establish a right to reside in the host Member State compatible



with EU law.

### **Unreasonable Burden**

58. Counsel for the appellant sought to rely upon the *Brey* decision to submit that the respondent was obliged to make an assessment as to whether the appellant is placing an unreasonable burden on the social assistance system of the State before determining that he has no right to reside in the State. However that principle does not appear to be applicable to the appellant for the following reasons. The judgment in *Brey* relates to a quite different set of facts. That reference to the CJEU concerned proceedings in Austria in relation to a person who was not economically active and whose right to reside there was asserted to be pursuant to Article 7(1)(b) of Directive 2002/38. The relevant criteria under Article 7(1)(b) include that the person has "sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State . . ." On the facts of this appeal the appellant in his application for jobseekers allowance did not contend that he had any income or resources for himself or his family and at no point in time either in the application to the Department or in the High Court did he contend that he had a right to reside in Ireland pursuant to Article 7(1)(b) as implemented by Regulation 6 (2) (b) of the 2006 Regulations. At all times his position has been that he has a right to reside in Ireland as a self employed person who has worked or been economically active in Ireland for a period of four years and who either retains that status pursuant to Article 7(3) of Directive 2004/38 or retains a right to reside in Ireland pursuant to TFEU provisions as a person or worker who was economically active as a self employed person and the cessation of the activity was for reasons beyond his control.

59. The difference in approach, between a person in the position of the appellant and Mr *Brey* appears confirmed by the CJEU in *Alimanovic* which concerned persons who had been workers for less than twelve months in Germany and who under the terms of Article 7(3)(c) of Directive 2004/38 retained the status of worker for at least six months, but thereafter no longer retained the status of worker. At para. 59 the CJEU stated:-

"59. It must be stated in this connection that, although the Court has held that Directive 2004/38 requires a Member state to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (judgment in *Brey*, C-140/12 [EU:C:2013:565](#) paragraphs 64,69 and 78) no such individual assessment is necessary in circumstances such as those at issue in the main proceedings."

60. Similarly as there is no contention on the facts of this appeal that the appellant should have been entitled to be considered as having a right to reside pursuant to Article 7(1)(b) as implemented by Regulation 6(2)(a)(ii) of the 2006 Regulations there can be no requirement for an individual assessment in relation to the imposition of an unreasonable burden on the Irish social assistance system.

61. I would not propose referring any question to the CJEU on this issue as it does not arise on the facts of this appeal and hence not necessary to decide the appeal.

### **Conclusion**

62. The Court proposes to refer the following questions to the Court of Justice of the European Communities prior to deciding the appeal.

1. Does an EU citizen who (1) is a national of another Member State; (2) has lawfully resided in and worked as a self employed person in a host Member State for approximately four years; (3) has ceased his work or economic activity by reason of the economic downturn in the host Member

State and (4) has registered as a jobseeker with the relevant employment office retain the status of self employed person pursuant to Article 7(1)(a) whether pursuant to Article 7(3)(b) of Directive 2004/38/EC or otherwise .

2. If not, does he retain the right to reside in the host Member State without being required to satisfy the criteria in Article 7(1) (b) or (c) or only permitted to remain pursuant to Article 14(4) (b) of Directive 2004/38/EC.

3. If not, in relation to such a person is a refusal of a jobseekers allowance (which is a non-contributory special benefit within the meaning the meaning Article 70 of Regulation 883/2004) by reason of a failure to establish a right to reside in the host Member State compatible with EU law

63. The Court will give the parties an opportunity of considering the proposed questions in the context of this judgment prior to finalising the order for reference.

### **Addendum**

Having heard the parties on the wording of the questions to be referred to the CJEU the Court decided that they should be as follows:

1. Does an EU citizen who (1) is a national of another Member State; (2) has lawfully resided in and worked as a self employed person in a host Member State for approximately four years; (3) has ceased his work or economic activity by reason of absence of work and (4) has registered as a jobseeker with the relevant employment office retain the status of self employed person pursuant to Article 7(1)(a) whether pursuant to Article 7(3)(b) of Directive 2004/38/EC or otherwise .

2. If not, does he retain the right to reside in the host Member State not having satisfied the criteria in Article 7(1) (b) or (c) of Directive 2004/38/EC or is he only protected from expulsion pursuant to Article 14(4) (b) of Directive 2004/38/EC.

3. If not, in relation to such a person is a refusal of a jobseekers allowance (which is a non-contributory special benefit within the meaning the meaning Article 70 of Regulation 883/2004) by reason of a failure to establish a right to reside in the host Member State compatible with EU law, and in particular Article 4 of Regulation 883/2004.

