S52

Supreme Court of Ireland Decisions

Judgment

Title:	Ogieriakhi -v- Minister for Justice & Equality and ors
Neutral Citation:	[2017] IESC 52
Supreme Court Record Number:	34/2016
Court of Appeal Record Number:	51/2015
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Date of Delivery:	13/07/2017
Court:	Supreme Court
Composition of Court:	Denham C.J., O'Donnell Donal J., McKechnie J., Clarke J., O'Malley Iseult J.
Judgment by:	O'Malley Iseult J.
Status:	Approved
Result:	Appeal dismissed

Judgments by	Link to Judgment	Concurring
O'Malley Iseult J.	Link	Denham C.J., O'Donnell Donal J., McKechnie J., Clarke J.

THE SUPREME COURT
[Supreme Court Appeal No. 34/2016]
[Court of Appeal No. 51/2015]
[High Court Record No: 2012/ 15 SP]

Denham C.J.
O'Donnell J.
McKechnie J.
Clarke J.
O'Malley J.
BETWEEN:

EWAEN FRED OGIERIAKHI

APPELLANT

AND
THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND, ATTORNEY GENERAL AND AN POST

RESPONDENTS

JUDGMENT of Ms. Justice O'Malley delivered the 13th day of July 2017.

Introduction

1. This appeal concerns, firstly, the right to damages (often referred to as "*Francovich"* damages) that may in some circumstances be claimed by a person who suffers loss as the result of the incorrect application of European Union law by the authorities of a Member State. Secondly, there is a question as to whether domestic Irish law can provide a separate remedy in damages for what occurred to the appellant.
2. The appellant is a foreign national who has, since the events described in this judgment, become an Irish citizen. His claim arises from the fact that in 2007 he was refused permission to remain in the State, and lost his job with An Post, as a direct result of the misinterpretation of the relevant residence regulations by the Minister for Justice and Equality. He has always argued, and the State parties now accept, that he did in fact have a right to reside here at that time by virtue of a European Union Directive. The core issue in the case is whether the European Union law criteria for a claim of this nature, set out in *Francovich, Bonifaci & Ors. v. Italian Republic (C-6/90 & C-9/90)* [1991] ECR I-5357 and subsequent authorities, are satisfied.
3. The appellant also claims that the misinterpretation of the relevant provisions resulted in a breach of his constitutional rights, in particular the right to work and the right to his good name, entitling him to damages if no other remedy is adequate.
4. The Regulations in question (made under the powers conferred by the European Communities Act 1972), which came into effect on the 30th April, 2006, were intended to implement a European Union Directive (2004/38/EC). The Directive dealt with, *inter alia*, the right of residence of third-country nationals married to EU citizens who exercise freedom of movement rights within the Union. The Regulations introduced a new right of permanent residence for such EU citizens and their spouses, exercisable when they have lived in the State for a five year period.
5. The appellant's wife, a French national, lived and worked in the State between 1999 and the end of 2004, and the appellant resided here throughout that period and beyond. The Minister's belief was that the Regulations did not give him an entitlement to permanent residence as of the time of his application in 2007, primarily because his wife had left the State at the end of 2004. This interpretation was based on a mistaken view of the effect of the Directive, a fact that became indisputable when the judgment of the Court of Justice of the European Union in *Secretary of State for Work and Pensions v. Lassal (Case C-162/09)* [2010] E.C.R. I-9217 was delivered on the 7th October, 2010.
6. If the correct view had been taken of the appellant's application it would have been clear (subject to certain other arguments that were ultimately disposed of in the appellant's favour and are no longer in issue) that he was entitled to permanent residence and was therefore entitled to continue to work without the need to obtain a work permit.
7. The appellant was dismissed by An Post in October, 2007 because he did not have a work permit. He initiated a claim for unfair dismissal in the Employment Appeals Tribunal ("EAT"). On the morning of the hearing he was informed that the Minister had decided to grant him "Stamp 4" permission to remain, and counsel for An Post confirmed that it was prepared to re-employ him in those circumstances. He refused this offer, because at the time he wished to engage in a business project. In this appeal he has argued that he was not obliged by the principles relating to mitigation of loss to accept an oral rather than written offer.
8. The High Court (Hogan J.) decided to refer certain questions to the Court of

Justice of the European Union **(**see [2013] IEHC 133). After receipt of that Court's ruling, Hogan J. held that the appellant was entitled to damages for loss suffered by reason of the failure on the part of the State to properly implement the Directive (see [2014] IEHC 582**)**. In so holding, he found that the appellant's claim satisfied the criteria set out in *Francovich and Others (C-6/90 and C-9/90)* and *Brasserie du Pêcheur v. Federal Republic of Germany and R v. Secretary of State for Transport ex parte Factortame (C-46/93 & C-48/93)* [1996] ECR I-1029. He considered it appropriate to award damages for six years loss of earnings. Having taken account of certain matters that went to the issue of mitigation he awarded €107,905 under this heading as against Ireland and the Attorney General. He also awarded €20,000 in respect of the dismissal, on the basis that it constituted a breach of the appellant's constitutional right to a good name.

9. This decision was overturned in its entirety by the Court of Appeal (see [2016] IECA 46). That Court considered that the conditions for the jurisdiction to award damages for failure to implement EU measures had not been met. In finding that the breach by the State was not sufficiently serious, the Court ruled that the mistake had been honest and excusable, and found that the Directive had not been sufficiently clear and precise to give rise to liability for the error in interpretation. The Court of Appeal further held that there was no applicable national legal principle under which the appellant was entitled to damages for what had happened to him.

10. By determination dated the 16th June, 2016, (see [2016] IESCDET 66) the appellant was granted leave to appeal to this Court on the following questions:

a. Whether an honest and excusable misunderstanding on the part of the State officials as to the requirements of a Directive is a significant factor in considering whether or not the breach of the Directive was serious.

b. Whether a person who has suffered damage as a result of the incorrect transposition of a Directive in this State is entitled to claim damages under domestic law, or is confined to the criteria established by the Court of Justice of the European Union in *Francovich* and *Brasserie du Pêcheur.*

c. Whether the finding that the failure of the State to implement the Directive correctly did not give rise to damages under the principles set out in *Francovich* and *Brasserie du Pêcheur* necessarily entailed a finding that the applicant had no right to damages under domestic law, including under the Constitution.

d. Whether the applicant, as a person who was dismissed because of the application to him of regulations which failed to properly implement the Directive, had any remedy under domestic law.

e. Whether the obligation to mitigate loss can require a person in the applicant's position to accept an unwritten offer of employment.

The principles of European Union law applicable to liability of a Member State

11. The joined cases *Francovich, Bonifaci & Ors. v. Italian Republic (C-6/90 & C-9/90)* [1991] ECR I-5357 established the principle that Member States are obliged to make good loss and damage caused to individuals by breaches of Community (now Union) law for which they can be held liable.

12. The conditions for liability were considered and authoritatively set out in cases *Brasserie du Pêcheur v. Federal Republic of Germany* and *R v. Secretary of State for Transport ex parte Factortame (C-46/93 and C-48/93)* [1996] ECR I-1029. In its answers to questions referred by courts in Germany and the United Kingdom, the Court of Justice reached the following conclusions:

> *"1. The principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where*

the national legislature was responsible for the breach in question.

2. Where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

3. Pursuant to the national law which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.
4. Reparation by Member States of loss and damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.

5. The obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question."

13. Liability thus arises where the rule breached was intended to confer rights on individuals, the breach is "sufficiently serious" and there is a direct causal link between the breach and the damage. There is really no question in the instant case as to the existence of the first and third conditions and the debate has centred on the second. That concept is the subject of paragraphs 55 to 57 of the ruling of the Court of Justice, which read as follows:

"55. As to the second condition, as regards both

Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

57. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement."

14. The CJEU made it clear that national courts have sole jurisdiction to find the facts and to decide how to characterise a breach of Community law.

Council Directive 2004/38/EC

15. Before the adoption of this Directive the residence rights of third-country nationals married to Member State citizens who were exercising freedom of movement rights were governed by a number of different instruments. The one of most relevance to the instant case was Regulation (EEC) No. 1612/68 of the Council of 15th October, 1968, which clearly linked the entitlement to residence of those persons to the ongoing activities of the EU citizen spouse. Articles 10 and 11 of the Regulation read as follows:

"Article 10.

1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependant relatives in the ascending line of the worker and his spouse.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however, must not give rise to discrimination between national workers and workers from other States.

Article 11.

Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children

who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State."

16. According to the recitals, Directive 2004/38/EC is intended to simplify and strengthen the right of free movement and residence of all Union citizens by codifying and reviewing existing instruments that dealt separately with workers, self-employed persons, students and other economically inactive persons. Recital (5) states that if the right of Union citizens is to be exercised under objective conditions of freedom and dignity, it should also be granted to their family members irrespective of nationality. Recital (15) refers to the necessity for legal safeguards for family members in the event of the death of the Union citizen; or in the event of divorce, annulment of marriage or termination of a registered partnership. Measures should be taken to ensure that in such circumstances family members are to retain their right of residence, albeit on an exclusively personal basis. Beneficiaries of the right of residence should not be expelled so long as they do not become an unreasonable burden on the social assistance system.

17. Recital (17) is highly relevant to the issues in this case and states as follows:

"Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure."

18. Article 12 of the Directive deals with the retention of the right of residence by family members in the event of the death or departure of the Union citizen. By virtue of Article 13, a family member who is not a national of a Member State does not lose the right of residence by reason of divorce or annulment of marriage if, *inter alia*, the marriage lasted at least three years including one year in the host Member State. A family member in this category must show that he or she is a worker or is self-employed, or has sufficient resources not to become a burden on the social assistance system of the host Member State, or is a member of a family, already constituted in the host Member State, of a person satisfying these requirements.

19. Article 16 of the Directive is the key provision for the purposes of this case. It is in Chapter IV of the Directive, which deals with the right of permanent residence, and is headed "General rule for Union citizens and their family members". It provides as follows:

1. *Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.*
2. *Paragraph 1 shall also apply to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.*
3. *Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or*

a third country.

4. *Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two years.*

20. Article 17 sets out various scenarios, relating to persons who reach retirement age or become permanently incapacitated, or who reside in one Member State but work in another, in which the five-year requirement may be reduced "*by way of derogation from Article 16*". It may be noted that recital (19) of the Directive refers to the necessity to make such provision, arising from the fact that rights had been acquired by some persons under previous instruments.

21. Article 38 repealed Articles 10 and 11 of Regulation (EEC) No. 1612/68 (set out above), while providing that references to the repealed provisions were to be construed as being made to the Directive.

22. Member States were obliged to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of the 30th April, 2004.

The Irish Regulations

23. The original implementation measure in this jurisdiction was the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 226/2006), which was revoked and replaced by the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. No. 656/2006) on the 1st January, 2007. It is the latter instrument that was in force when the decision impugned in this case was made.

24. Under the Regulations, a spouse of a Union citizen is described as a "qualifying family member". Importantly, under the transitional provisions in Article 3 of the Regulations a person already lawfully resident in the State pursuant to the provisions of earlier regulations was to be deemed to be lawfully resident in the State for the purposes of the 2006 Regulations.

25. A Union citizen is entitled under the Regulations to reside in the State for up to three months purely on the basis of possession of valid identification papers. Thereafter, the right to reside is, in summary, contingent on the Union citizen (i) being in employment or self-employment; or (ii) having sufficient resources to support himself or herself and any accompanying spouse or dependants and having comprehensive sickness insurance; or (iii) being enrolled in an educational establishment and having comprehensive sickness insurance.

26. A family member of the Union citizen is entitled to reside in the State where the citizen fulfils these conditions. A family member who is not an EU citizen must apply for a residence card. The period of validity of the residence card is the envisaged period of residence of the Union citizen, or a period of not less than five years, whichever is the lesser period. Validity is not affected by temporary absences from the State, for various specified reasons and specified lengths of time. Family members may retain a right of residence on an individual and personal basis in the event of the death or departure of the Union citizen provided, essentially, that they satisfy the same criteria as those applicable to a Union citizen wishing to remain longer than three months. Similarly, a right of residence may be retained in the event of divorce or annulment of marriage, if *inter alia* it is shown that the marriage had lasted at least three years, including one year in the State. A person entitled to reside in the State on foot of these provisions may remain as long as they satisfy the conditions.

27. Article 12 of the Regulations reads as follows:

"12. (1) Subject to paragraph (3) and Regulation 13, a person to whom these Regulations apply who has resided in the State in conformity with these Regulations for a continuous period of 5 years may remain permanently in the State.

(2) For the purposes of paragraph (1), continuity of residence in the State shall not be affected by temporary

absences not exceeding 6 months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of 12 consecutive months for important reasons such as childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

(3) The entitlement to remain permanently in the State pursuant to paragraph (1) shall cease to exist where the person concerned has been absent from the State for a period exceeding 2 consecutive years."

28. It may be noted here that where Article 16(1) refers to persons who have "legally resided with the Union citizen", the 2006 Regulations refer to persons who have resided "in conformity with these Regulations". This was the subject of criticism in 2008, in a report on transposition of the Directive by consultants to the European Commission. The report stated that Ireland (along with Belgium, Latvia and the United Kingdom) had wrongly linked the issue of legality of residence to the national legal framework as opposed to Community law (Milieu Ltd. (Belgium) & Europa Institute, University of Edinburgh - "*Horizontal analysis of the transposition of Directive 2004/38/EC on free movement of Union citizens*" - 18th December, 2008). The consultants also thought that the wording of the Regulations meant that a person could not acquire rights based on residence before the date on which the Regulations came into force, but in fact this was not the meaning attributed to it by the Minister - the issue here was never whether residence that began before the 30th April, 2006 could be counted, but whether a five year period **completed before** the 30th April, 2006, followed by absence from the State on the part of the EU national, gave rise to entitlement. For the purposes of this case, nothing turns on the difference in wording and the relevant regulations may in my view be regarded as identical to the terms of the Directive.

Background facts

29. There is a lengthy history to the case. The appellant, who is a Nigerian national, arrived in the State as an asylum-seeker in 1998. In May, 1999 he married a French national who was working in Ireland and who remained in the State, working on an almost continuous basis, until December, 2004. The appellant withdrew his asylum application in 1999 and was granted leave to remain in the State on the basis that he was the spouse of an EU citizen who was exercising freedom of movement rights. The initial period of leave was for twelve months, followed by an extension up to October, 2004. As it happens the marriage broke down in 2001 and the appellant formed a new relationship with an Irish citizen. A child was born of this second relationship in 2003, but it appears that the appellant did not seek to rely on right of residence available under the Irish Born Child Scheme until after the closing date for applications had passed. He has at all times maintained that he has a right of residence derived from his marriage in 1999.

30. The appellant began working for An Post as a postal sorter in 2001.

31. An application for further leave to remain, made in September, 2004, was refused by the Minister in November, 2004 because the appellant had not provided sufficient evidence that his wife was continuing to exercise her Treaty rights (i.e. that she was residing and working here) at that time. That refusal was subsequently quashed by the High Court (MacMenamin J.), apparently because the Department itself was in possession of information showing that the wife was working in the State, and the matter was remitted for reconsideration by the Minister.

32. It is worth noting that MacMenamin J. said in the course of his initial judgment, delivered on the 11th March, 2005, that the appellant had resided lawfully in the State "for upward of five years". That does not appear to have been in dispute in those proceedings. However, he refused to make a declaration that the appellant was entitled to remain within the jurisdiction or to grant an

order of *mandamus* to the same effect. A claim for damages on foot of the invalid decision was adjourned for separate hearing and was later rejected by MacMenamin J. in May, 2007.

33. Meanwhile a further refusal of leave to remain issued from the Minister in April, 2005, after the reconsideration ordered by the High Court. This time it was on the basis that the available evidence indicated that the appellant's wife had not worked in the State since December, 2004, when she appeared to have returned to France. The appellant did not bring a fresh judicial review challenge but rather sought relief by way of motion in the still extant proceedings before MacMenamin J.. That was ruled out as impermissible, on the basis that all issues in those proceedings had been determined apart from the question of damages.

34. The damages claim was ultimately rejected because MacMenamin J. found that there was no liability for what had occurred under the principles in either *Francovich* or *Glencar Explorations plc v. Mayo Council (No.2)* [2002] 1 IR 84*.*

35. At some stage in 2006 a petition was presented to the European Parliament on behalf of the appellant. In a notice to members of the Parliament dated the 7th May, 2007, it is recorded that the response of the Commission to the petition was that Directive 2004/38/EC introduced new rights for third-country family members. They were now entitled to permanent residence if they had legally resided with the Union citizen in the host Member State for a continuous period of five years. However, it was observed that there was a factual dispute between the appellant and the Irish authorities as to his residence.

36. By letter dated the 21st December, 2006, the head of the unit in the European Commission dealing with free movement issues wrote to the appellant about his case. It was stated that he was entitled to rely upon the Directive as of the 30th April, 2006. The letter continued:

> *"According to article 16 of the Directive 2004/38/EC, third country family members have the right of permanent residence in the host Member State if they have legally resided with the Union citizen in a host Member State for a continuous period of 5 years.* [Reference was made here to a previous letter to the appellant which had confirmed that a family member was not obliged to live permanently with the EU citizen under the same roof, and that a marriage was not to be regarded as dissolved until terminated by a competent authority.] *The Commission considers that this provision has to be understood as* ***obliging the applicant to prove that until the day of the application he had resided legally in the host Member State for 5 years****. A legal residence means in this respect a right to reside in the host Member State under the Community law.*
>
> *"You ascertain* [sic] *in your letter that your wife, who is a French national, has been residing in Ireland since October 2004 when your 5-year family member residence permit expired. You also confirm that you are still married and that it is only now that you are about to start divorce proceedings. On the basis of your statements, it seems that since October 2004 you had the right to reside in Ireland under Community law as a family member of an EU citizen who has exercised her right of free movement."* [Emphasis in the original.]

37. The letter goes on to note, however, that the continued residence of the appellant's wife in the State after December, 2004 was contested by the Irish authorities. It was not possible, the writer said, for the Commission to resolve this dispute.

38. The appellant has relied upon this letter as supporting his position, although

it seems to be fairly clear that the Commission (or at least the writer of the letter) believed that the view of the Irish authorities would be correct if the factual situation was that the appellant's wife was no longer living in the State. However, it will be seen that this was not the approach taken by the Commission when the issue was litigated before the Court of Justice.

39. In March, 2007 the appellant applied to the Minister for permanent residency on the basis that he had been lawfully resident in the State for the period of five years between 1999 and 2004. He referred in his correspondence to Directive 2004/38/EC and contended that, as it had been agreed in the High Court that his wife was continuing to exercise her rights when his first five years residence expired, he had achieved the right to permanent residence. By letter dated the 19th September, 2007, the Department responded simply that he had been present illegally in the State since the renewal of his residency was refused in April, 2005. His more recent application could not be considered because he had failed to provide evidence that his spouse was "currently exercising EU Treaty rights within the State".
40. According to the oral evidence adduced in the instant proceedings, the view taken in the Department at that time was that the Directive granted a right of permanent residence on the basis of a continuous five year period that ended on or after the 30th April, 2006, but not in respect of such a five year period that had expired before that date. However, the Department's letter did not deal with appellant's reference to the Directive and did not mention the 2006 Regulations. It was followed within a short time by notification that the Minister was proposing to make a deportation order.
41. The appellant sought to initiate judicial review proceedings immediately after receipt of this correspondence but was refused leave to seek relief by the High Court (Charleton J.) after a contested application hearing on the 25th January, 2008. The appellant relied on the 2006 Regulations. The argument made on behalf of the Minister was that the regime under which the appellant had initially applied for residence was that established by Council Directive 68/360/EEC, Regulation (EEC) No. 1612/68 and the relevant Irish statutory instrument (the European Communities (Aliens) Regulations, 1977 (S.I. No. 393/1977)). Under that regime, the appellant had no further right to reside once his wife ceased to exercise her rights within the State.
42. As far as the new regime was concerned, the Minister said that it was not disputed that the appellant, as a separated but not divorced spouse of an EU national, was still a "family member" within the meaning of the Directive. The argument made was that a person in his position could only acquire a permanent right of residence in an EU State where *inter alia* he or she had legally resided in the host State "with" the Union citizen for a continuous period of five years.
43. The Minister accepted that Article 3(4)(a) of the Regulations permitted a person who was lawfully residing in the State at the time of coming into force of the 2006 Regulations to rely upon such earlier period of lawful residence as qualifying time for the purpose of calculating the necessary five years**.** However, it was not accepted that the appellant could rely upon this provision, since it was not accepted that he had been lawfully resident in compliance with the earlier regulations when the 2006 Regulations came into force. Any right to reside remained, therefore, contingent on the exercise by his spouse of her rights.
44. In his *ex tempore* ruling Charleton J. agreed with the Minister that any right of residence enjoyed by the appellant had ceased when his wife left the country in December, 2004. He accepted that if the Department had been aware of its own records as to the wife's work it would probably have granted a five year permit to the appellant in October, 2004. However, the permit would have depended on the continued presence of the wife and could have been withdrawn when she left.
45. Looking at the 2006 Regulations, Charleton J. said that a "qualifying family member" such as the appellant could only claim a right of residence so long as

he was "with" a Union citizen. That, he considered, required the spouses to be within the same territory. The right conferred by the Regulations began on the 30th April, 2006, and did not apply to events before that. When they came into force the appellant was not "with" his wife, since she was not here and had not been here for some 16 months. In the circumstances he ruled that the appellant's case was not reasonably arguable.

46. The appellant did not appeal this decision at that time.

47. Meanwhile, the issue of the appellant's status within the State had come to the attention of An Post management in the second half of 2007 and he was dismissed on the 24th October, 2007, because he did not have a work permit. It is clear that this was the only reason for the dismissal, and the letter of dismissal stated that if he obtained a permit in the future the company would re-employ him.

48. The appellant commenced a claim against An Post under the terms of the Unfair Dismissals Act 1977 in the Employment Appeals Tribunal. This was listed for hearing on the 4th April, 2008. In the meantime he also applied again for leave to remain. This time he was successful. On the morning of the EAT hearing the appellant received a phone call from the Department informing him that the Minister had granted him what is known as "Stamp 4" status, which entitled him to remain and work for a further period of three years. The Tribunal hearing was therefore adjourned to await written confirmation of this, which arrived in due course. The recommendation within the Department was that leave should be granted because of

> *"…the fact that Mr. Ogieriakhi was legally resident in the State for a five-year period, was employed by An Post for a period of six years approximately, is the father of an Irish citizen child and in a stable relationship with her mother, with whom he is joint owner of their home in which they all reside as a family…"*

49. On the resumed date, counsel for An Post confirmed to the EAT that the offer of re-employment was still open, dependent on a suitable vacancy arising. However, the appellant informed the Tribunal that he did not wish to accept it because he had established a company to carry on a business on his own account. In its determination, the Tribunal ruled that it could only consider the dispute about the dismissal on the basis of what had been known to the parties on the date of dismissal in October, 2007. An Post had not been involved in or aware of any of the court proceedings in being at the time, and the dismissal was not unfair in the circumstances.

50. The business set up by the appellant was unsuccessful and he did not manage to obtain other work, although on the evidence Hogan J. was satisfied that he had made many attempts to secure employment. He was financially dependent on his partner at this time, during which he furthered his legal studies.

51. The appellant divorced his first wife in 2009 and married his Irish partner in the same year.

The decision of the Court of Justice in *Lassal*

52. On the 7th October, 2010, the Court of Justice delivered judgment in *Secretary of State for Work and Pensions v. Lassal (Case C-162/09)* [2010] E.C.R. I-9217. The case concerned a French national who had worked in the United Kingdom between 1999 and February, 2005. She then went to France for 10 months. She returned to the UK in December, 2005 and sought work. In November, 2006 she was refused income support on the basis that she had no right of residence. The question referred to the Court of Justice was whether she had acquired a right to permanent residence on foot of the period of residence that had expired prior to the 30th April, 2006. The position of the United Kingdom

Government (supported by the Belgian Government) was the same as that adopted by the Irish authorities - that the period of residence had to end on or after the 30th April, 2006.

53. It may be noted that the European Commission supported the position of Ms. Lassal, arguing that the objective and *ratio legis* of the Directive required the full application of Article 16 to the earlier residence period. The Court agreed, repeating the observation made by it in *Metock and Others v. Minister for Justice, Equality and Law Reform (Case C-127/08)* [2008] ECR I-6241 that, having regard to the context and objectives of the Directive, its provisions could not be interpreted restrictively and must not in any event be deprived of their effectiveness.

54. The judgment then continues:

> *"32. As recital 17 in the preamble to Directive 2004/38 states, the right of permanent residence is a key element in promoting social cohesion and was provided for by that directive in order to strengthen the feeling of Union citizenship.*
>
> *33. It is true that it is common ground that the acquisition of the right of permanent residence on the ground of legal residence for a continuous period of five years in the host Member State, provided for in Article 16(1) of Directive 2004/38, did not appear in the EU law instruments adopted for the application of Article 18 EC prior to that directive.*
>
> *34. However, such a finding cannot lead to the conclusion that only continuous periods of five years' legal residence either ending on the 30 April 2006 or thereafter, or commencing after 30 April 2006 are to be taken into account for the purposes of acquisition of the right of permanent residence provided for in Article 16 of Directive 2004/38.*
>
> *35. In the first place, an interpretation to the effect that only continuous periods of five years' legal residence commencing after 30 April 2006 should be taken into account for the purposes of the acquisition of a right of permanent residence would mean that such a right could be granted only from 30 April 2011. Such an interpretation would amount to depriving the residence completed by citizens of the Union in accordance with EU law instruments pre-dating 30 April 2006 of any effect for the purposes of the acquisition of that right of permanent residence. It should be stated that prior to the adoption of Directive 2004/38 EU law already provided in certain specific cases for a right of permanent residence, which was included in Article 18 thereof.*
>
> *36. It must be stated that such a result is contrary to the purpose of Directive 2004/38…and would deprive it of its effectiveness.*
>
> *37. In the second place, an interpretation to the effect that only continuous periods of five years' legal residence ending on 30 April 2006 or thereafter should be taken into account*

for the purposes of acquisition of the right of permanent residence provided for in Article 16 of Directive 2004/38 is also contrary to the purpose and effectiveness of that directive. The EU legislature made the acquisition of the right of permanent residence pursuant to Article 16(1) of Directive 2004/38 subject to the integration of the citizen of the Union in the host Member State. As the Advocate General pointed out, in point 80 of her Opinion, it would be incompatible with the integration-based reasoning behind Article 16 of that directive to consider that the required degree of integration in the host Member State depended on whether the continuous period of five years' residence ended before or after 30 April 2006.

38. Furthermore, it should be noted that, in so far as the right of permanent residence provided for in Article 16 of Directive 2004/38 may only be acquired from 30 April 2006, the taking into account of periods of residence completed before that date does not give retroactive effect to Article 16 of Directive 2004/38, but simply gives present effect to situations which arose before the date of transposition of that directive.

39. It should be borne in mind in that regard that the provisions on citizenship of the Union are applicable as soon as they enter into force and therefore they must be applied to the present effects of situations arising previously (see Case C- 224/98 D'Hoop [2002] ECR I-6191, paragraph 25 and the case-law cited."

55. The UK and Belgian Governments had submitted that Article 16(4) (providing that the right of permanent residence, once acquired, could only be lost by an absence of two or more years) could not be relied upon by persons who left the host State prior to the 30th April, 2006. The argument was that such persons did not have the necessary continuous residence as of the date upon which the Directive came into force.

56. The Court accepted (at paragraph 48) that it did not expressly follow from Article 16(4) that temporary absences of less than two years, prior to the 30th April, 2006, did not prevent acquisition of the right of permanent residence as of that date. However, it was necessary to consider not only the wording but the context of the legislation. At paragraph 50 the Court said:

"50. In that sense, the enacting terms of an EU act are indissociably linked to the reasons given for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (Case C-298/00 P Italy v Commission [2004] ECR I-4087, paragraph 97 and the case-law cited, and Sturgeon and Others, paragraph 42).

51. Likewise, the Court held that, where a provision of EU law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (see Sturgeon and Others, paragraph 47 and the case-law cited).

52. It must be stated that an interpretation such as that advocated by the United Kingdom and Belgian Governments would be contrary to the effectiveness and

the purpose of Directive 2004/38 and the general scheme and spirit of Article 16 thereof."

57. The reason for this conclusion was that the objectives of facilitating the exercise of the primary right to move and strengthening that right, along with the promotion of social cohesion and the strengthening of the feeling of Union citizenship, would be "seriously compromised" if the right of residence was refused to EU citizens who had legally resided in a host Member State for five years before the 30th April, 2006, on the sole ground that there had been a temporary absence, before that date, after completion of that period of residence. The general schema and spirit of the Article required it to be applied to such absences.

Subsequent litigation between the parties

58. After the decision in *Lassal* the appellant applied to this Court for an extension of time within which to appeal the decision of Charleton J., made in January, 2008, refusing him leave to seek judicial review. That was refused (on the 18th February, 2011), essentially because it did not meet the well-established criteria for such applications. However, the Court noted a statement by the Minister that he would review the appellant's case within eight weeks of that date. It was subsequently denied that this amounted to an undertaking to the Court and in fact a decision on the application for a review of the September, 2007 refusal, submitted on the 23rd February, 2011, was not made until November, 2011, when the appellant was informed that he had been successful "*as you fulfil the relevant conditions set out in the regulations*". The refusal of the 19th September, 2007, was set aside.

59. The evidence offered by the Department in respect of this delay was that such reviews normally took six to eight months and it was considered that the appellant's case was "particularly complex". He was one of the first persons asserting a right to permanent residence based on a period of residence completed before the transposition of the Directive and the Department had believed that he had been residing unlawfully in the State after the refusal of renewal in 2004. The Department had requested an opinion of counsel in April, 2011 but unfortunately this request was not sent to the Chief State Solicitor until September, 2011.

60. Meanwhile, on the 17th February, 2011, the appellant wrote to An Post claiming that his dismissal had constituted an unlawful breach of his rights under EU law. He sought reinstatement, back pay and damages. The response was that the matter had been dealt with in the Employment Appeals Tribunal.

61. These proceedings were then instituted.

The High Court judgment

62. As noted above, the appellant's claim is for damages for breach of European Union law and for breach of constitutional rights.

63. The appellant relied upon *Lassal* for the purpose of arguing that his wife must be deemed to have acquired permanent residence in the State by October, 2004, under Article 16 of the Directive, since she had resided here legally for a continuous period of five years at that stage. On that basis he claimed that he had acquired an autonomous right of residence in his own right. The denial of that right had brought about a breach of his constitutional right to work.

64. Despite the fact that the Minister had concluded in 2011 that the appellant did fulfil the conditions set out in the Regulations it was now argued that they had not, in fact, been satisfied. Counsel for the Minister did not fundamentally challenge a great deal of the appellant's analysis but argued, rather, that it was

not enough for him to show that he had been legally resident in the State during the period. He was also obliged to show that this pre-April 2006 residence satisfied the requirements of the 1968 Regulation. This argument, accepted by Hogan J., was grounded on the Court of Justice decisions in *Secretary of State for Work and Pensions v. Dias (Case C- 325/09)* [2011] ECR I-6387 and *Ziolkowski v. Germany (Case C-424/2010)* [2011] E.C.R. I-14035*,* where it had been ruled that if residence in a particular Member State was considered lawful only because of the national provisions of that State, and did not constitute the exercise of a right conferred by EU law, it could not be regarded as lawful residence for the purpose of the acquisition of a right of residence under EU legislation.

65. With reference to the facts of the case, the Minister's contention was that the appellant's wife had not worked for the whole of the five year period, and that she had not supplied the appellant with accommodation for the whole of that period. The latter argument arose from the requirement in the 1968 Regulation that a worker "must have available for his family housing considered as normal for national workers in the region where he is employed".
66. On the first of these issues, Hogan J found as a fact that the wife had either been working or actively seeking work at all times, and therefore must be regarded as having been a "worker" for the entirety of the five years between 1999 and 2004.
67. On the second, Hogan J. decided to refer two questions, arising from the evidence as to the separation of the appellant and his wife, for preliminary ruling pursuant to Article 267 TFEU. These centred on the issue whether the appellant could be said to have legally resided "with" his wife after they separated (which, it will be remembered, occurred less than five years after the marriage) and the appellant had commenced living in accommodation not provided by her.
68. Hogan J. also decided to refer a third question, arising from a submission made on behalf of the Minister to the effect that, even if it were to be held that the refusal to grant the appellant permanent residence amounted to a breach of EU law, that would not necessarily satisfy the *Francovich* criteria for an award of damages. The argument was that the breach, if it was such, could not be said to have been obvious. Hogan J. therefore posed a question as to whether the fact that he had found it necessary to make a reference on the substantive issue was itself a factor to which he could have regard in determining whether the breach of Union law was an obvious one.
69. The Court of Justice delivered its ruling on the 10th July, 2014, *Ogieriakhi v. Minister for Justice and Equality (Case C-244/13)* [2014] E.C.R. I-2068*.* The first two questions were answered in the appellant's favour and are not live before this Court. In relation to the third, the Court referred to its earlier judgments in *Francovich, Brasserie du Pêcheur and Factortame* and *R v. HM Treasury, ex parte British Telecommunications plc (Case C-392/93)* [1996] ECR I-1631*.* These established that State liability for loss and damage caused by infringements of EU law for which the State could be held responsible was inherent in the system of the Treaty. The right to reparation arises when three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the infringement must be sufficiently serious; and there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party.
70. The debate in the instant case has centred on the second factor - whether the breach was "sufficiently serious". The Court of Justice referred to the content of this condition as elaborated upon in *Brasserie du Pêcheur*. In that case it had said that the decisive test for finding that an infringement of EU law was sufficiently serious was whether the Member State concerned "manifestly and gravely disregarded the limits of its discretion". The standard was not as high as that required for the establishment of misfeasance in public office, since that concept was inconceivable in the case of a legislature. To impose that standard

would, in practice, make it impossible or extremely difficult to obtain reparation for a breach where it was attributable to a national legislature.
71. The Court went on to repeat that national courts had sole jurisdiction to find the facts and to decide how to characterise the infringement at issue. In so doing, a national court may take into account factors such as the degree of clarity and precision of the rule infringed. It could not be a decisive factor, in determining this latter issue, whether or not the national court found it necessary to seek a preliminary ruling on the provision in question. To hold otherwise would be to limit the discretion of national courts to make a reference and would compromise the system, the purpose and the characteristics of the preliminary reference procedure.
72. Having received the ruling of the Court of Justice, Hogan J. resumed the hearing. The State defence at this stage relied, essentially, on arguing that the *Francovich* criteria were not met in respect of EU law because the error had not been obvious, that domestic law did not provide a separate remedy for breach of Union law and that the test in *Pine Valley Developments Ltd. v. Minister for the Environment* [1987] I.R. 23 and *Glencar Explorations plc v. Mayo Council (No.2)* [2002] 1 IR 84 for an award of damages for an error of law by a State agency was not met.
73. The learned trial judge delivered a second judgment (see [2014] IEHC 582) on the 22nd December, 2014. He found that the evidence adduced by the Department and by An Post established that all decision-makers had acted honestly, by reference to their understanding of the requirements of the Directive. However, objectively the breach of Article 16(2) was very serious, with grave consequences for the appellant. Having regard to the observation by the CJEU that the standard applicable to misfeasance in public office was too onerous, he considered that his finding of an absence of malice, and the presence of *bona fides*, did not necessarily exempt the State from liability.
74. Hogan J. cited the following passage from *Brasserie du Pêcheur*:

> *"55.As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.*
>
> *56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.*
>
> *57. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement."*

75. Applying this analysis, Hogan J. addressed the issue of the clarity and precision of Article 16. He held that Articles 16(1) and 16(2) were "absolutely unambiguous". He considered that the error was not objectively excusable, even

if the issue was only ultimately clarified by the Court of Justice in *Lassal*. The Minister had adopted an interpretation of the Article that was "always inherently unlikely to prevail", because it was at odds with the key objectives of the Directive as set out in the recitals. The language of those recitals was "perfectly apt" to capture past events, and if this was not the intention one might expect an express exclusion of pre-2006 residence. If such residence could not be taken into account some striking anomalies would arise, as noted by the CJEU in *Lassal.* The repeal of the pre-existing legal entitlements contained in Articles 10 and 11 of the 1968 Regulation, with effect from the 30th April, 2006, was another indication that it was expected that residence before that date would be taken into account. It was scarcely to be supposed that Union citizens who had acquired rights of residence prior to April, 2006 were to find themselves without rights under either the old, repealed regime or under the new one. The express preservation of certain rights under Article 17 "by way of derogation from Article 16" would have had no purpose if Article 16 did not apply at all to pre-April 2006 events.

76. Hogan J. acknowledged that the Minister's interpretation would have included pre-April 2006 residence provided at least some of the period of residence crossed over the 30th April, 2006, date. However, there was nothing in the text to warrant a distinction between, for example, a five year period ending in March, 2006 and one ending in June, 2006. The Article was either capable of embracing pre-April 2006 residence or it was not.
77. Accordingly, Hogan J held that the breach of EU law was sufficiently serious to give rise to a liability for damage caused.

78. The judge then turned to the question of damages. He found, firstly, that if the appellant had not been dismissed he would have continued in his job with An Post and would have worked regular overtime. He estimated his gross loss as having been €22,324 per year. Since he had been more or less unemployed since his dismissal, Hogan J. felt that he should be permitted to claim for six years from October, 2007 to October, 2013 - "*i.e. the maximum period tacitly permitted by the Statute of Limitations"*. The gross loss was therefore €133,944.
79. Consideration was also given to the obligation on the part of the appellant to mitigate his loss. Hogan J. referred to the fact that the appellant had been offered his job back in 2008, and considered that if he had accepted the offer he would have been re-engaged by or before October, 2008. It was "objectively unreasonable" not to accept the offer. However, An Post were also at fault in that the verbal offer made at the EAT was not followed up by a formal offer in writing. In the circumstances the appellant could not properly assess the terms upon which he would be employed. The trial judge considered it appropriate to measure the appellant's "contributory negligence by reason of failure to mitigate" at 50% for the period from October, 2008 to February, 2011. The reduction was terminated at that point because of the failure by An Post to reinstate the appellant when he contacted them after the decision in *Lassal.*
80. The total award for loss of earnings was therefore calculated at the figure of €107,905, to be subject to payment of appropriate income tax and fiscal charges.
81. Hogan J. then went on to hold that the appellant was entitled to further damages for breach of his constitutional right to a good name by reason of the injury to his reputation because of the circumstances of his dismissal. Having referred to *Addis v. Gramophone Co. Ltd.* [1909] AC 488, which is generally thought of as authority for the proposition that damages are not recoverable in contract for the manner in which an employee is dismissed, and to more recent decisions in the United Kingdom on this issue, he considered the case of *Garvey v. Ireland (No.2)* [1979] I.L.R.M. 266. He criticised the reasoning in that case, and went on to hold that a rule excluding damages for loss of reputation would be *prima facie* incompatible with the guarantee imposed on the State by Article

40.3.2. In the circumstances of the instant case, he considered that the *Addis* rule would be "basically ineffective" (quoting Henchy J. in *Hanrahan v. Merck, Sharp & Dohme Ltd.* [1988] ILRM 629) for the purpose of protecting the constitutional right to a good name. Accordingly, the appellant was entitled to sue directly for damages under this heading. Neither an action in contract nor an action for defamation would have afforded sufficient protection. The sum of €20,000 was awarded in this respect.

82. In this regard, Hogan J. referred to a potential argument that this particular heading of loss should have been dealt with as part of the main *Francovich* claim, rather than as a remedy for breach of a constitutional right. He considered that since, in his opinion, Irish law afforded the remedy in a case of this kind, the principle of equivalence required that it be made available even if the claim was exclusively regarded as a claim for damages arising from a breach of EU law.

The judgment of the Court of Appeal

83. The Court of Appeal rejected Hogan J.'s analysis comprehensively. It ruled, firstly, that there was no liability in relation to the breach of EU law by reference to any of the criteria set out in *Brasserie du Pêcheur*. The argument of the Minister - that there had been substantial uncertainty about the issue until the ruling in *Lassal* - was accepted, with the decision of the Court of Justice in that case being described as demonstrating the complexity of the matter. It was relevant that Ireland was not alone in its interpretation.

84. Ryan P. said (at p.18):

> *"It is difficult to understand how there could be a finding that the State manifestly and gravely disregarded the limits on its discretion when all the relevant personnel were working honestly to implement the Directive, which is precisely what the court found. The most that can be said, and the worst that can be said, is that the State made a mistake. And insofar as it did so, it was not alone….*
>
> *However, it seems to me that in the case of an honest mistake or an honestly differing interpretation that is not actuated by any wrongful motive, it would be absurd to declare that the State on the 'losing' side manifestly and gravely disregarded the limits of its discretion."*

85. The judgment goes on to refer to the finding of fact that all decision-makers had acted honestly, and that the officials had genuinely believed that their national measures "faithfully reflected the regime contained in the Directive".

86. The Court found that the error of law was excusable, in that the State had not adopted a "bizarre or eccentric" understanding of what was required. A number of Member States had understood the Directive to mean something different, and in the absence of any basis for considering that their view was untenable it had to be considered as excusable.

87. It was accepted that it could not be said that a Community institution contributed to the error. However, it was observed that the Commission had made no adverse comment on the Irish regulations. That fact was seen as being of some relevance to some of the other considerations such as the obviousness of the omission, or whether it was intentional or excusable.

88. The State was described as having abided by the judgment in *Lassal*. It had changed its rules. There had been no effort to retain a national measure or practice contrary to EU law.

89. Finally, on this aspect, the Court of Appeal considered that the fact that the

trial judge had found it necessary to seek the assistance of the Court of Justice could not be ignored. It was not decisive, but was "self-evidently" relevant on the question of obviousness. Ryan P. said in this regard:

> *"It seems to me to be more or less obvious that if one has to refer the matter to Europe - the test in Article 267 is 'necessary' - one cannot simply declare that the matter is so clear that it constitutes manifest and grave disregard of the obligation."*

90. On the constitutional issues, the Court of Appeal held that the protection afforded by Article 40.3.2 was provided by statute and by the common law of tort and contract. Ryan P. said (at paragraph 37):

> *"There are occasions when common law and legislation fail to provide a remedy in particular circumstances where it is open to the courts to invoke the constitution as a free-standing source of legal remedy. But it is not a bolt-on cause of action when there is no case otherwise; neither is it available as an alternative when all fruit fails at common law."*

91. Reference was made here to the judgment of Barrington J. in *McDonnell v. Ireland* [1998] 1 I.R. 134, where it was observed that constitutional rights should not be regarded as "wild cards" that could be played at any time to defeat existing rules. If the general law provides an adequate remedy, an injured party may not ask the court to devise a new and different cause of action.

92. On the facts of the case, the appellant had been dismissed by An Post because the law did not permit him to be employed. The dismissal was distressing but there was nothing about it that was humiliating, demeaning or disrespectful. The approach taken by the High Court judge would have meant that there was a parallel constitutional right to damages in every case of unfair or wrongful dismissal.

93. The injury suffered was because of EU law, not domestic law, and if there was no entitlement to damages under European law it followed that there could be no claim under domestic law.

Discussion

94. Dealing firstly with the breach of EU law, it must be determined whether the criteria set out in *Brasserie du Pêcheur* have been met. It has been clear throughout this case that there is no element of discretion on the part of the State in implementing the Directive, and accordingly the question really is whether there was a manifest error by the State in its interpretation of the relevant measures. It seems to me that the first consideration for a court engaged in an assessment of the seriousness and excusability of an admitted breach must be the precise identification of how the breach arose. What exactly was the error of law on the part of the Minister? The answer to this question is not as clear as might have been desirable, and it has to be observed that when the appellant claimed in correspondence in 2007 that he had an entitlement under the Directive no part of the response addressed the argument.

95. To start with the obvious, the problem in this case was not the result of a failure to legislate, or a failure to legislate within the stipulated time. Nor did it arise from the wording of the statutory instrument. This is not a case of defective transposition - the Regulations are almost identical to the relevant parts of the Directive, and the issue did not arise from such differences in wording as can be identified. Despite the criticism of those differences by the consultants engaged by the Commission, and despite the submissions made by the Commission in the preliminary reference, the evidence is that the Minister never took the view that pre-30th April, 2006, residence had no legal effect as far as the new rules were

concerned. There was, therefore, no disregard of the principle that the rules were to be applied to the present effects of situations that arose prior to transposition. Article 3 of the 2006 Regulations made it clear that previous lawful residence could be relied upon for the purpose of the new rights.
96. It does seem clear that there was an issue raised in both this case and in the application before Charleton J. as to whether a person could be said to be "residing with" an EU citizen spouse who had left the State and from whom he was separated. That question was dealt with in the reference by Hogan J. It was also argued before Hogan J. that, in order to establish lawful residence prior to the introduction of the 2006 Regulations, the third-country spouse had to be actually provided with accommodation by the EU citizen spouse. That too was dealt with in the reference. However, having regard to the evidence adduced in the High Court, the primary issue seems to have arisen from the fact that the appellant's five year period of lawful residence had been completed before the Directive and the implementing regulations came into force, that his wife had left the State prior to that date, and that the continued presence of the appellant in the State after her departure was unauthorised. The logic of the Minister's position then was that, had the wife remained in the State and been present here exercising EU rights on the 30th April, 2006, there would have been no issue as to her entitlement to permanent residence. That being so, the personal right to residence on the part of the appellant, to whom she was still married, would not have been in question.

97. The problem in the appellant's case therefore arose from the absence of his wife after December, 2004. There was an acceptance that the Regulations could encompass pre-30th April, 2006, residence, but not, it seems, that Regulation 12(3) of the statutory instrument might apply to her absence. Under that Regulation, as under Article 16(4) of the Directive, the right to permanent residence, once acquired, can only be lost by an absence of more than two consecutive years. The appellant's wife had not been absent from the State for that length of time when the Regulations came into force. Applying the principle that "present effect" was to be given to situations that arose prior to the making of the Regulations, she therefore acquired a right to permanent residence on the 30th April, 2006, and could have returned to invoke it at any stage between that date and December, 2006. The appellant's rights derived from hers, and he therefore was entitled to claim a right of residence as of the 30th April, 2006.
98. The question then is whether the error on the part of the Minister when making the decision against the appellant in September, 2007 was excusable or inexcusable.
99. On one view, it might be argued that the mistake was obvious in that, while there was an undoubted acknowledgement that pre-April, 2006 residence was capable of attracting the application of the Regulations, there was a failure to follow through on that by applying the *entirety* of the Regulations to the situation. One might further argue that the Minister could not complain of imprecision or difficulties in interpreting the Directive, or in this State's implementing legislation, when the issue arose from a failure to fully apply relevant rules that were set out identically in both instruments.
100. However, it would have to be accepted that this particular analysis has not been considered at any stage in this litigation. That fact in itself could be considered a strong argument to the effect that the matter was not clear-cut. More importantly, the Court of Justice did not approach the issue in this manner in *Lassal*. As noted in paragraph 54 above, that Court's view was that it did not *expressly* follow from the terms of Article 16 that absence from the host State (for less than two years) at the relevant date did not prevent the acquisition of the right of residence. In other words, the Court's ruling proceeded on the basis of a contextual analysis with reference to the objectives, scheme and spirit of the Directive rather than on any finding that the terms of the Directive expressly mandated a particular result.

101. The issue of liability in damages falls to be considered by reference to the criteria set out in *Brasserie du Pêcheur* and *Factortame.* It is clear that, by reference to those criteria, it is not sufficient for an aggrieved person to establish as a fact that the State misunderstood or misapplied a provision of EU law and that he or she suffered loss as a result. On the other hand, it does not suffice for a successful defence to a claim of this nature that officials acted honestly on foot of a misapprehension that was not "bizarre or eccentric". Having regard to paragraph 2 of the conclusions in *Brasserie du Pêcheur* those considerations cannot be all that is required to establish excusability, and in my view the decision of the Court of Appeal lays too great an emphasis on them. Good faith is certainly relevant to the extent that a finding of improper motivation would probably be decisive as against the State, as counsel for the State parties accepts. However, good faith and honest misapprehension cannot be sufficient to excuse the State from liability in an appropriate case. Similarly, a mistake as to the true meaning of a legal measure might be shared with the authorities of one or more other Member States, and yet, objectively, be clearly wrong.

102. In the circumstances of this case, it seems to me that the appellant's application to the Minister in March, 2007 raised two significant problems that can be summarised as follows:

> (i) The appellant's wife had left the State in December, 2004. Under the then-current regime the appellant had no further right of residence, and he was refused an extension of leave to reside in 2005. That gave rise to a question whether it was possible for him, as a person whose presence was not authorised at the time, to acquire rights on the coming into force of the new Directive and domestic regulations in 2006.
>
> (ii) The appellant and his wife had, as a matter of fact, separated and were not living together before she left. That raised the question whether he could be said, as a matter of law, to have been legally residing with her either before or after her departure.

103. The Minister's answer, as set out in the decision of the 19th September, 2007, was that the appellant's right to residence depended on the ongoing exercise of EU rights by his wife. Was this manifestly wrong?

104. In my view both of these issues gave rise to complex considerations that were not expressly covered by the terms of the Directive. While the rulings of the Court of Justice in *Lassal* and in this case are clearly determinative of the issues it cannot, in my opinion, be said that the answers to the questions were obvious, or that the Directive was so clear and precise as to render the error on the part of the State authorities "grave and manifest" or "inexcusable". It is relevant to note that the Commission, in its correspondence and its communication to the Parliament, appears to have taken the position at least at some stage that, if the facts of the case were as they ultimately turned out to be, the appellant did not have a valid claim.

105. In my view, therefore, the criteria for liability for *Francovich* damages were not satisfied and the learned High Court judge was incorrect in this respect.

106. The sum of €107,905 for loss of earnings was awarded as being in respect of the breach of the appellant's rights under EU law. The Court of Appeal was right to hold that this award could not stand. I would simply add that even if the criteria for *Francovich* damages had been met, I do not believe that the award could have been upheld. The appellant was offered his job back at the Employment Appeals Tribunal hearing and the trial judge found that if he

accepted the offer he would have been back in employment within one year of his dismissal. That should therefore have been the limit on any damages in any event. As it happened, he refused the offer because, he said, he intended to engage in a business venture. The argument that the offer of re-engagement was not in writing may or may not have been something of an afterthought, but certainly was not communicated at the time. In my view the date of that refusal was the cut-off point for the assessment of loss - to rule otherwise was, in effect, to hold the State liable for the financial failure of the business, since it is inconceivable that a court could have awarded six years loss of earnings if in fact he had earned a larger income during that time.

Is there a separate remedy under domestic law?

107. The appellant has, in addition to the claim under *Francovich* criteria, sought damages for breach of his constitutional rights. The High Court judge found that a dismissal from employment that was brought about by operation of law (as opposed to a decision by an employer) engaged the protection of property rights afforded by Article 40.3.2 of the Constitution. He considered that the award of *Francovich* damages provided an effective and adequate protection of the property rights associated with the appellant's employment. However, he then went on to find that the ordinary law did not afford the appellant an effective remedy, such that no "injustice" was done for the purposes of Article 40.3.2, in respect of damage done to the appellant's reputation by the dismissal. This was because neither the law of contract nor the tort of defamation would afford such a remedy. The learned judge did refer to the possibility that this situation might have been capable of being remedied by means of proceedings under the Unfair Dismissals Acts 1977 to 2007:

> "*but, as we have seen, the Employment Appeals Tribunal rejected the claim that the dismissal was unfair."*

108. It was therefore necessary, in his view, to award damages for the breach of the constitutional right to a good name.

109. I consider that the Court of Appeal was correct in overturning this finding. In the first instance, I agree with that Court that there was as a matter of fact no defamatory aspect and no damage to the appellant's reputation involved in his dismissal. He lost his job because from the employer's point of view he did not, at the time the issue arose, have permission to work. The dismissal was effected by a letter that made it clear that he could have his job back if the situation changed. It is simply not the case that a dismissal brought about because of a statutory bar on continued employment necessarily affects the employee's reputation and I do not see that it did so in this case.

110. The appellant has argued that, even if the conditions for *Francovich* liability are not met, he can rely on domestic law for the purpose of giving full effect to the Directive. That is, in itself, an uncontroversial statement in that the right to invoke the jurisdiction of the national courts to ensure enforcement of EU law does not depend on the same criteria as those establishing a right to damages for a breach of that law. The question here, however, is whether domestic law can grant the remedy of damages for a loss brought about by a breach of EU law on the part of the State. The issue arises because part of the reasoning of the Court of Appeal in relation to the High Court award of damages for injury to reputation was that no such award could be made where the cause of action arose purely in the context of EU law.

111. I agree with the conclusion of the Court of Appeal, although I consider that it is possible, depending on the facts of a given case, that a breach of EU law could as a matter of fact be accompanied by features giving rise to independent claims under Irish law. There would arguably be no objection to an award in this case if, for instance, the employer had in fact dismissed the appellant in a manner that wrongfully damaged his reputation. In those circumstances, the reason for the dismissal would still have fallen to be considered by reference to

EU law, since both the right to employment claimed by the appellant and the sole reason for its denial were rooted in EU legal instruments. However, behaviour by an employer that was unrelated to EU law could conceivably have created an independent cause of action under Irish law.

112. As already stated, the sole reason for the loss of the appellant's employment was the incorrect interpretation of EU law by the Minister. Domestic law undoubtedly gives an individual in this position a right to apply to the courts for enforcement of the correct interpretation of that law. The national courts also have jurisdiction to determine whether, as a matter of EU law, damages can be awarded under EU law criteria. What cannot be done is to find a free-standing right to damages under national law where the *Francovich* criteria are not satisfied, if the wrong done is a wrong under EU law. The latter is a separate legal order, with autonomous concepts that must be applied uniformly throughout the Union (see *Dias* and *Ziolkowski*, referred to above, on the question whether rights of residence conferred by national law could confer rights under EU law). In the circumstances of this case it was the sole source of the rights claimed by the appellant. It does not give rise to separate rights under domestic law.

Conclusion

113. In summary, the appellant has undoubtedly been injured by the mistaken interpretation of the relevant EU law on the part of the Minister. He lost his employment and was threatened with deportation. Both of these events are likely to have caused him distress. However, the right to damages as a remedy for breach of European Union law requires him to demonstrate, not just that an error of law caused his loss, but that the error of law concerned was inexcusable. In the circumstances of this case I consider that it was not, and that no right of his under the national legal order has been infringed such as to give rise to a right to damages. I would dismiss the appeal.