# Irish Court of Appeal



**Judgment**

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| **Title:** | Tarola -v- Minister for Social Protection |
| **Neutral Citation:** | [2017] IECA 208 |
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| **Status:** | Approved |
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**THE COURT OF APPEAL**
Neutral Citation Number: [2017] IECA 208

**No. 2016/207**

**Peart J.**
**Irvine J.**
**Hogan J.**

**BETWEEN/**

**NECULAI TAROLA**

**APPLICANT /**

**APPELLANT**

**- AND -**

**MINISTER FOR SOCIAL PROTECTION**

**RESPONDENT /**

**RESPONDENT**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 19th day of July 2017**

1. This appeal from the judgment of White J. raises difficult questions concerning the proper interpretation of Article 7(3)(c) of Directive 2004/38/EC ("the Citizenship Directive"), as transposed into our domestic law by Article 6(2)(c)(iii) of the European Communities (Free Movement of Persons) Regulations (No.2) 2006 (S.I. No. 656 of 2006)("the 2006 Regulations"). Both Article 7 of the Citizenship Directive and the 2006 Regulations set out the conditions under which a EU-national exercising free movement rights is entitled to stay in a host country beyond an initial three month period and to be treated as a worker for all purposes (including social security payments) by that host State.

2. In the present case the fundamental question is whether a two week period of employment during a particular period entitled the applicant to extend his residence qua worker in Ireland for at least a further six months such as would entitle him to claim social security payments. In his judgment in the High Court White J. essentially concluded that the applicant's employment in the State as a casual labourer for that particular two week period was not sufficient to bring him within the terms of Article 7(3)(c) of the Citizenship Directive such that he would have an entitlement to stay here for at least a further six months and, accordingly, to claim job seeker's benefit once that period of employment ended: see *Tarola v. Minister for Social Protection* [2016] IEHC 206.

**The background to the present appeal**

3. The background to the present appeal is as follows. The applicant, Mr. Neculai Tarola, is a fifty six year Romanian citizen who first arrived in Ireland in May 2007. Following his arrival in the State he was employed from 5th July 2007 to 30th July 2007, and again from 15th August 2007 to 14th September 2007. He appears to have subsequently left the State in December 2007 by reason of the fact that he had become unemployed. He later returned in May 2013. He was subsequently employed here from 22nd July 2013 to 24th September 2013 and, critically, from 8th July 2014 to 22nd July 2014 with Marren Brothers Ltd. It is perhaps worth noting that Mr. Tarola earned just over €1,309 in respect of his employment with Marren Brothers. He also worked as a self-employed subcontractor from 17th November 2014 to December 5th 2014.

4. Mr. Tarola had previously applied for job seekers allowance on 21st September 2013, which was refused on the ground that he was not habitually resident in the State. He failed to produce evidence of residency or means of support from 15th September 2007 - 22nd July 2013. Mr. Tarola then applied for supplementary welfare allowance on 26th November 2013, which was refused because he could not produce supporting documentation to demonstrate how he supported himself and paid rent from September 2013 to 14th April 2014.

5. On 6th November 2014, Mr. Tarola sought job seeker's allowance for the second

time, and this application was refused on 26th November 2014. The respondent Minister concluded that since coming to Ireland, the applicant had not worked for more than a year and the evidence produced was insufficient to establish Ireland as his habitual residence.

6. The applicant sought a statutory review of the decision of 26th November 2014 pursuant to the provisions of the Social Welfare (Consolidation) Act 2005. The respondent replied by pointing out that the only difference between the applicant's circumstances between September 2013 and November 2014 was that he had worked for two weeks in July 2014. The respondent stated that this short period of employment was not sufficient to revise the decision of 26th November 2014 that the applicant was not habitually resident in the State. For completeness, it may be observed that it is accepted that the applicant registered as a job seeker with the relevant employment office.

7. On 10th March 2015, the applicant asked the respondent to review the decision of 26th November 2014 for the second time after having obtained new legal representation. On this occasion the applicant argued that he had a right to reside as a worker for the period of six months after his employment in July 2014 for the purposes of Article 7(3)(c) of the Citizenship Directive. (As will shortly be seen, this is the critical issue so far as this appeal is concerned.) The Minister rejected this application on 31st March 2015 saying that:

> "Since Mr. Tarola came to Ireland he has not worked for more than a year and he did not have sufficient independent resources to support himself. Should Mr. Tarola's circumstances change, he may apply for Job Seekers' Allowance."

8. It is this particular decision that has given rise to the present application for judicial review. In his judgment White J. concluded that as the applicant did not satisfy the conditions of Article 6(2)(c)(iii) of the 2006 Regulations, this application must be refused. Article 6(2)(c)(iii) provides that:

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

9. This provision transposes into Article 7(3) of the Citizenship Directive which states:

> "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."

10. It is next necessary to draw attention to the importance of Article 7(1)(a) of the

Citizenship Directive. Article 6 of the Directive provides that all European Union citizens have the right to be present for a period "of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport". Article 7(1)(a) provides, however, that all EU citizens shall have the right of residence "on the territory of another Member State for a period of longer than three months" if they:

> "…are workers or self-employed persons in the host Member State…."

11. Article 7(3)(c) of the 2004 Directive then provides:

> "For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self -employed person shall retain the status of worker or self-employed person in the following circumstances:
>
> ….
>
> (c) he/she is in duly recoded 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."

12. Having set out these provisions in his judgment White J. held that the applicant did not qualify as a "worker" and thus habitually resident for the purposes of claiming social assistance in this sense. He held that these provisions of the 2006 Regulations dealt with the position of persons who have been on fixed term contracts of employment. He reasoned that the portion of the wording "or after having become involuntary employed during the first year" referred to completing a "fixed term employment contract of less than a year." As he put it:

> "I am satisfied that the applicant's reliance on Article 6(2)(c)(iii) [of the 2006 Regulations] would not qualify him as a worker and thus habitually resident for the purposes of claiming social assistance as that particular section deals with persons who have been on fixed term contracts of employment and that portion of the wording in the section "or after having become involuntary unemployed during the first year" is not a stand alone phrase or sentence but is qualified and refers back to "completing a fixed term employment contract of less than a year."

13. White J. also held that the applicant's infrequent work pattern was such that the period of work from 8th July 2014 - 22nd July 2014 could not be regarded as a "fixed term contract of employment" in this sense. The applicant's entitlement to job seeker's allowance was thus governed by Article 6(2)(c)(ii) of the 2006 Regulations which states:

> "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."

14. It followed in turn that as the applicant had not been able to establish continuous employment of more than one year prior to applying for assistance, the decision of the respondent Minister to refuse to make such payments to the applicant was accordingly upheld.

**The interpretation of Article 7(3)(c) of the Citizenship Directive**

15. As I have already observed, the question of whether an individual who has worked for less than twelve months retains his or her status as a "worker" for the purposes of Article 7(3)(c) of the Citizenship Directive and, by extension, Article 6(2)(c)(iii) of the 2006 Regulations lies at the heart of the present appeal. At the outset it should be stressed, of course, that the Citizenship Directive represents a careful balance of a variety of social, economic and legal consequences. While the Directive expands upon rights given by earlier Directives, Treaty provisions and jurisprudence from the Court of Justice, it does not, of course, give EU nationals unconditional rights of residence in

other Member States.

16. The basic premise of EU free movement law remains that persons who depend on social security payments should be cared for in their home Member State. As Recital 10 to the Citizenship Directive states:

> "Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions."

17. Part of this balance is reflected in the conditions specified in Article 7(3)(c) itself and these conditions are designed to ensure that free movers do not unreasonably burden the social assistance systems of the home Member State.

18. It should, of course, also be observed that Article 7 of the Citizenship Directive gives effect to Article 45 TFEU dealing with the free movement of workers throughout the Union, so that the general case-law of the Court of Justice on the meaning of the term "worker" can be applied equally to the interpretation and application of Article 7: see generally, Guild, Peers, Tomkin, *The EU Citizenship Directive* (Oxford, 2014) at 125.

19. In that regard it should be pointed that the Court of Justice has consistently taken a broad view of what constitutes a "worker". In Case 53/81 Levin [1982] ECR 1035, a United Kingdom national, sought a residence permit from the Dutch authorities on the basis that she was a "worker" for the purposes of Community law. This was refused by the Dutch authorities on the basis that she was employed for only 30 hours a week as a chambermaid and earned less than the minimum wage under Dutch law.

20. The Court of Justice nevertheless held that the expression "worker" was a concept governed by Community law and must accordingly be given an autonomous interpretation. A person might be a "worker" even if he or she worked for less than the minimum wage and even if he or she works only part-time. The motives of the person for working in the particular Member State were irrelevant. The Court stressed, however, that the services which were provided must be real and not marginal or subsidiary, provided that the claimant "pursues an activity as an employed person which is effective and genuine."

21. In one of the other leading cases on this topic, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, the Court of Justice held that a trainee teacher was, throughout the period of her training placement, under the direction and control of the institution to which she was attached. She had to carry out instructions and comply with regulations throughout a substantial period of his teaching placement. She had to teach pupils, thus supplying services with an economic value. The payment he received could be treated as remuneration in respect of those services and obligations. The Court held that the criteria required to establish a work relationship were established.

22. These principles were applied by the Court of Appeal for England and Wales in *Barry v. Southwark LBC* [2008] EWCA Civ 1440, [2009] PTSR 952. Here the question was whether an employee who had been employed as a security guard for two weeks during the course of the Wimbledon Lawn Tennis Championships was a "worker" in this sense. Arden L.J. answered this question in the affirmative, saying ([2009] PTSR 952, 962):

> "We find in this case that Mr Barry was employed by a security agency and that he had a number of employments of short duration. I do not, therefore, consider that the fact that his employment with the Wimbledon championships was of short duration deprived it of its ability to render Mr

> Barry a worker. He was only a steward but that may be explicable because he was no longer able to work as a security guard since he was unable to comply with new regulations which required him to have a licence. The work which Mr Barry performed was in any event of economic value since, if he had not performed that service, the Wimbledon championships would have to have employed someone else to fulfil his duties. It was not ancillary to any other relationship between Mr Barry and the Wimbledon championships. It was not marginal because it was a role for which the Wimbledon championships was prepared to pay a not insignificant sum as remuneration. The Wimbledon championships made deductions from his pay on the same basis as if he were any other employee."

23. It is true that these comments were made in the context of whether the applicant was a "worker" for the purposes of UK Housing Regulations, but as this judgment makes clear, that issue in turn also depended on whether Mr. Barry, a Dutch national, was to be regarded as a "worker" for the purposes of general principles of EU law. Contrary to what White J. may have suggested, I think that *Barry* clearly indicates that a person employed for a two week period and who is genuinely remunerated for that work is still a "worker" for the purposes of EU law generally and that the case cannot be realistically distinguished on the grounds that it also concerned the eligibility requirements for public housing under UK law. This analysis is, in any event, also supported by the decisions of the Court of Justice in key cases such as *Levin* and *Lawrie-Blum*.

24. This brings us immediately to the critical issue of interpretation of Article 7(3)(c) of the Citizenship Directive. The question effectively here is whether Mr. Tarola has retained his status as a worker for the purposes for the purposes of Article 7(3)(c) of the Citizenship Directive by virtue of the fact that he worked for this two week period in July 2014. If the answer to this is in the affirmative, then was he was entitled to retain his status as a "worker" for at least the next six months (as per Article 7(1)(a) and Article 7(3)(c) of the Directive) so that he would in principle have been entitled to receive job seeker's allowance for this purpose as he had been rendered involuntarily unemployed and had registered as such with the relevant employment office.

25. The first part of Article 7(3)(c) refers to involuntary unemployment following the completion of a fixed-term employment contract of less than a year. Whatever may have been the position at an earlier stage in the proceedings, counsel for the applicant, Mr. Shortall, has not pressed the suggestion that Mr. Tarola was employed pursuant to a fixed term contract. Before this Court the emphasis was rather on what Mr. Shortall submitted was the disjunctive character of the wording of the second limb of Article 7(3)(c) ("…or after having become involuntarily unemployed during the first twelve months…") which he contended was wholly distinct and separate from that of the cessation of part-time employment. It is true that in his judgment White J. in the High Court considered that the corresponding words contained in Article 6(2)(c)(ii) of the 2006 Regulations could not be divorced from the preceding references to the cessation of the fixed-term employment contract. For my part, however, I am not convinced that this interpretation is necessarily correct because, first, the opening words of the first part of Article 7(3)(c) ("…is in duly recorded involuntary unemployment after completing a fixed-term contract of less than a year…") already seem to deal with the position of fixed-term employees who become unemployed and, in this context at least, the word "or" would seem necessarily disjunctive and to contemplate a different state of affairs from that which preceded it.

26. Second, if, moreover, the first limb refers to fixed-term employment contracts "of less than a year" (my emphasis), it would seem odd if the second limb with its reference to "…during the first twelve months…" also referred to the same thing. The first reference appears to be to contracts of *less* than a year whereas the second reference appears to be to an employment contract of greater than a year, but where the Union citizen becomes unemployed within the first twelve months of that contract.

Furthermore, the first limb refers to fixed term contracts whereas the second limb does not.

27. All of this is further underscored by the very fact that the first limb of Article 7(3)(c) refers to "duly recorded" cases of fixed term contract workers who have become unemployed. If the second limb of this provision was also referring to former fixed term employees who had become unemployed "during the first twelve months", the requirement contained towards the end of this provision that such persons register as a job-seeker with the relevant employment office would seem like a unnecessary duplication of that already stated in the first limb of Article 7(3)(c). (I would, however, observe that the obvious force of this point is weakened when one considers, however, that a similar duplication is plainly evident in Article 7(3)(b)).

28. It must also be admitted, however, that the alternative interpretations of Article 7(3)(c) for which the applicant contends are not themselves without their own difficulties. As counsel for the Minister, Ms. Barrington S.C., was anxious to stress, if the applicant's argument is correct, then wording of the second limb of the sub-paragraph seems incomplete. If the second limb does not refer to fixed-term contracts, one must ask to what the words "during the first twelve months" actually refer? Is it following arrival in the host State? Or does the reference to twelve months refer to the date upon which the applicant commenced employment?

29. In this regard, one must also have regard to the provisions of Article 7(3)(b) which refers to the position of an applicant who:

> "…is in duly recorded involuntary unemployment after having been employed for more than one year and has registered with the relevant employment office."

30. This seems to parallel the second limb of Article 7(3)(c), save that it presupposes that the applicant has become unemployed after having worked for at least twelve months. In the case of Article 7(3)(b) the Union citizen in questions would seem to retain the status of "worker" indefinitely, whereas in the case of the second limb of Article 7(3)(c) then, if the applicant's contention is correct, the applicant retains that status as a "worker" for the purposes of Article 7(1)(a) "for no less than six months." If this interpretation is correct, then one might nonetheless ask why these words are juxtaposed with the first limb of Article 7(3)(c) and the reference to fixed-term contract workers.

31. This interpretation of Article 7(3)(c) also sits uneasily with one of the underlying objectives of the Citizenship Directive of striking a fair balance between safeguarding the free movement of workers on the one hand and ensuring that the social security systems of the host Member State should not be placed under unreasonable burdens. This objective might well be compromised and undermined if very short periods of employment on the part of the free mover were sufficient to found an entitlement to be treated as a "worker" for the purposes of Article 7(1)(a) and Article 7(3)(c) during subsequent periods of involuntary unemployment and thus to trigger an entitlement to social security payments during such periods of unemployment for at least a further six months.

**Conclusions**

32. Given this variety of possible interpretations of Article 7(3)(c) of the Citizenship Directive, the acknowledged absence of any definitive ruling on what must be a very important aspect of the general law of free movement of workers, and the fact that there is no apparently easy or straight forward answer to the questions raised in the course of this appeal, the case for a reference to the Court of Justice of the European

Union pursuant to Article 267 TFEU is obvious.

33. I would accordingly propose that this appeal should stand adjourned pending the outcome of a ruling from the Court of Justice on the following draft question:

> "Where a citizen of another EU member state arrives in the host state and works for a two week period for which he is genuinely remunerated and thereafter becomes involuntarily unemployed, does that citizen thereby retain the status of a worker for no less than a further six months for the purposes of Article 7(3)(c) and Article 7(1)(a) of Directive 2004/38/EC such as would entitle him to receive social security benefits on the same basis as if he were a resident citizen of the host State?

34. I would invite the parties to address the Court on the wording of the proposed draft questions and any further issues which would now seem to arise following this Article 267 reference.