Irish Court of Appeal

Judgment

Title:	Ogieriakhi -v- Minister for Justice and Equality & ors
Neutral Citation:	[2016] IECA 46
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Court:	Court of Appeal
Composition of Court:	Ryan P., Peart J., Irvine J.
Judgment by:	Ryan P.
Status:	Approved
Result:	Allow and set aside

THE COURT OF APPEAL

[2015 No. 51]

High Court [2012 15 SP]

The President
Peart J.
Irvine J.

BETWEEN

EWAEN FRED OGIERIAKHI

PLAINTIFF/RESPONDENT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND,

THE ATTORNEY GENERAL AND AN POST

DEFENDANT/APPELLANTS

JUDGMENT of the Court delivered by the President on 26th February 2016

Introduction

1. This appeal is the latest step in a marathon of litigation in which the parties have been before three High Court judges, the Supreme Court, the European Court of Justice and now this Court over a period of more than ten years. The defendants seek to overturn the decision of the High Court of 22nd December 2014, awarding damages to the plaintiff for breach of European Union law and of his constitutional rights, arising from his dismissal from employment with the second defendant, An Post, in October, 2007.

2. Mr. Ogieriakhi has represented himself in all the courts, in addition to the Employment Appeals Tribunal. During the time that has elapsed since his dismissal, he has engaged successfully in legal studies and he is a candidate for a Doctorate-in-Law. His presentation of his case reflected great ability, legal ingenuity and no lack of advocate's passion.

3. In certain circumstances, an individual is entitled to recover damages against a Member State of the European Union for failure to implement a Directive, or for not implementing it properly if the person has suffered loss as a result and can establish that the failure represented a serious breach of Union law. The first issue that arises on this appeal is whether the plaintiff's claim fulfils the conditions necessary to recover damages. In fact, as will be seen, the central question is whether the admitted failure of the State to implement the relevant Directive fully according to the meaning definitively established by the Court of Justice constituted a serious breach of EU law. Secondly, the court has to consider whether the trial judge erred in awarding Mr. Ogieriakhi damages for breach of constitutional rights.

4. The plaintiff did not file notice of cross-appeal, but he argued in written submissions and oral argument that he was entitled to an award of damages that was many times greater than the High Court allowed.

Facts and Chronology

5. The best way of examining the case is to begin with the story of the events from Mr. Ogieriakhi's arrival in the State.

• 24th July 1998: The plaintiff, a Nigerian national, arrived in the State and sought asylum.

• 18th May 1999: The plaintiff married Ms. Leatitia George, a French national working in the State thereby exercising EU Treaty rights. Ms. George was employed in the State between 1999 and 2004, except for relatively short intervals (see para. 3 of High Court judgment). The plaintiff then withdrew his asylum application.

• 12th October 1999: The plaintiff was granted leave to remain in the State for an initial period of one year as spouse of EU national, under Regulation 1612/68; he was later granted permission to remain until 11th October 2004 because of marriage to Ms. George.

• 12th November 2001: The plaintiff began to work for An Post.

• December 2003: A daughter was born to plaintiff and Ms. Madden.

• 11th September 2004: The plaintiff applied to renew residency on the basis of marriage. The marriage had broken down in 2001 and plaintiff was now living with a new partner, Ms. Catherine Madden, and their Irish born (December 2003) child.

• 3rd November 2004: The Minister refused Mr. Ogieriakhi's application by reference to the provisions of Article 10 of the 1968 Regulation concerning a tenancy agreement and a current contract of employment of Ms. George. The plaintiff continued to work with An Post, but without a valid permit, which the employer did not know about. The plaintiff challenged the refusal of residency in judicial review proceedings.

• 11th March 2005: The High Court (MacMenamin J.) quashed the Minister's decision because of failure to take into account information that subsequently became available concerning Ms. George's employment.

• 13th April 2005: The Minister made a further decision rejecting the plaintiff's claim for residency on the ground that Article 10 of the 1968 Regulation required that Ms. George was currently exercising her EU Treaty rights by working or residing in the State and she had last worked in Ireland in December 2004.

• 30th April 2006: Directive 2004/38/EC was transposed into Irish law - by S.I. 656/2006; Article 16 of 2004/38/EC: General rule for Union Citizens and their Family Members: Article 16 of 2004/38/EC: General rule for Union Citizens and their Family Members:

> "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 apply also 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.
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> 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."

• 30th April 2006: This is the date when the plaintiff became entitled to permanent residency rights pursuant to Directive 2004/38/EC as it was subsequently held by the ECJ.

• 11th March 2007: Plaintiff applied for permanent residence under Directive 2004/38/EC which was implemented into the Irish law by S.I. 656/2006; this was based on his 5-year residency from 1999 to 2004.

• 9th May 2007: The High Court (MacMenamin J.) delivered a further judgment in which he rejected a claim for damages for breach of EU law in respect of the decision of 3rd November 2004 based on the *Francovich* case, holding that the court had simply

decided that the determination was *ultra vires*; there was no manifest or grave disregarding of the limits of the exercise of discretionary State power; there was no finding of bad faith, malice or spite:

> "There is no evidence either that the State engaged in breach of Community law in which it persisted despite the existence of a judgment establishing the infringement or by way of preliminary ruling or settled case law."
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> The court also rejected a claim for damages for breach of domestic law, holding that there was no evidence of commission of a recognised tort, relying on the authority of *Glencar Explorations plc v. Mayo County Council (No.2)* [2002] 1 I.R. 84.

• 19th September 2007: The Department informed the plaintiff that his application for residency was incomplete and could not be considered. The Department interpreted the Directive as granting a right of permanent residence on the basis of a continuous 5-year period up to and including 30th April 2006, but not for the 5-year period that had expired before 30th April 2006. This meant that the plaintiff was not able to qualify under this interpretation.

• Date in late 2007: Plaintiff was featured in a newspaper article as being at risk of deportation and he was asked by An Post to produce his work permit which he was unable to do.

• 26th September 2007: Plaintiff instituted judicial review proceedings for a declaration that he was entitled to remain in the State under Directive 2004/38/EC and an order directing the Minister to grant him a residence permit.

• 24th October 2007: Plaintiff was dismissed from his position with An Post; the dismissal letter said that if he got a permit in future the company would re-employ him.

• 25th January 2008: High Court (Charleton J.) refused leave. The judge analysed the application of S.I. 656/2006 and Directive 2004/38/EEC and held that the new regulations did not confer a right to permanent residence on the plaintiff because the right began on 30th April 2006 and did not apply to events that happened back in 1999. The entitlement did not apply to residence in 2005 or 2006 unless it was a continuous period of five years. Because Ms. George was not in the State on 30th April 2006, the plaintiff did not qualify for permanent residence under the terms of the new Directive and Regulations. This judgment was not challenged until 2011 after the decision of the ECJ in *Secretary of State for Work and Pensions v. Lassal C* - 162/09 delivered on 7th October 2010.

• 4th April 2008: EAT Day 1 of 2. Plaintiff received a message by phone from the Department that he had been given Stamp 4 status. The Tribunal adjourned to obtain confirmation.

• 8th April 2008: Minister confirmed by letter that the plaintiff was granted leave to remain in the State for period of three years - Stamp 4 permission gave the plaintiff the right to reside in the State and to set up a business; it was based, *inter alia*, on the fact that the plaintiff was the father of an Irish citizen child and was in a stable relationship with the mother and had been in the State for a substantial time. This permission was renewed in April 2011 for a further period of three years.

• 27th June 2008: At the EAT, An Post offered the plaintiff his job back. He refused the

offer because he was pursuing other interests. He told the Tribunal that he was no longer interested in the offer because he had just established a company of his own.

• 14th July 2008: EAT upheld the validity of the dismissal of the plaintiff, holding that it must judge matters as of the date of dismissal and since the plaintiff had not established a legal entitlement to work at that point the dismissal was lawful.

• January 2009: Plaintiff and Ms. George divorced.

• June 2009: Plaintiff and Ms. Madden married.

• 7th October 2010: *Secretary of State for Work and Pensions v. Lassal C* - 162/09: ECJ judgment:

> "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 in that connection 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 17 thereof.
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> 36 It must be stated that such a result is contrary to the purpose of Directive 2004/38, set out in paragraphs 30 to 32 of this judgment, and would deprive it of its effectiveness.
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> 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.
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> 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.
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> 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).

40 Consequently, for the purposes of the acquisition of the right of permanent residence provided for in Article 16 of Directive 2004/38, continuous periods of five years' residence completed before the date of transposition of that directive, namely 30 April 2006, in accordance with the earlier EU law instruments, must be taken into account."

• 18th February 2011: The Supreme Court refused an extension of time to appeal the 25th January 2008 High Court decision.

• 23rd February 2011: The plaintiff applied to Minister for a review of the decision of September 2007 refusing him permanent residency, in light of ECJ decision in *Lassal*.

• April 2011: Plaintiff's Stamp 4 permission was renewed for another period of three years.

• 4th November 2011: Department obtained legal opinion in respect of plaintiff's entitlement to permanent residence based on ECJ judgment in Lassal.

• 7th November 2011: Plaintiff was granted permanent residency.

• 12th January 2012: Plaintiff instituted these proceedings by way of special summons.

• 5th March 2013: The High Court (Hogan J.) delivered judgment in which it decided to make a reference to the Court Justice for a preliminary ruling under Article 267 TFEU which provides:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

In this case, the court considered that a Court of Justice decision on three questions was necessary to enable it to give judgment:

'(1) Can it be said that the spouse of an EU national who was not at the

time himself a national of a Member State has "legally resided with the Union citizen in the host Member State for a continuous period of five years" for the purposes of Article 16(2) of Directive 2004/38 …, in circumstances where the couple had married in May 1999, where a right of residency was granted in October 1999 and where by early 2002 at the absolute latest the parties had agreed to live apart and where both spouses had commenced residing with entirely different partners by late 2002?

(2) If the answer to Question 1 is in the affirmative and bearing in mind that the third-country national claiming a right to permanent residence pursuant to Article 16(2) [of Directive 2004/38] based on five years continuous residence prior to 2006 must also show that his or her residency was in compliance with, inter alia, the requirements of Article 10(3) of Regulation … No 1612/68, does the fact that during the currency of that putative five-year period the EU national left the family home and the third-country national then commenced to reside with another individual in a new family home which was not supplied or provided for by the (erstwhile) EU national spouse mean that the requirements of Article 10(3) of Regulation 1612/68 are not thereby satisfied?

(3) If the answer to Question 1 is in the affirmative and the answer to Question 2 is in the negative, then for the purposes of assessing whether a Member State has wrongfully transposed or otherwise failed properly to apply the requirements of Article 16(2) of the 2004 Directive, is the fact that the national court hearing an action for damages for breach of EU law has found it necessary to make a reference on the substantive question of the plaintiff's entitlement to permanent residence itself a factor to which that court can have regard in determining whether the breach of EU law was an obvious one?'."

• 10th July 2014: The Court of Justice delivered its judgment (C-244/13), answering the questions as follows:

"47 In the light of all the foregoing considerations, the answer to Questions 1 and 2 is that Article 16(2) of Directive 2004/38 must be interpreted as meaning that a third-country national who, during a continuous period of five years before the transposition date for that directive, has resided in a Member State as the spouse of a Union citizen working in that Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with Union citizenship.

55 In the light of the foregoing considerations, the answer to Question 3 is that the fact that, in relation to a claim for damages for infringement of EU law, a national court has found it necessary to seek a preliminary ruling on a question concerning the EU law at issue in the proceedings on the substance must not be considered a decisive factor in determining whether there was an obvious infringement of that law on the part of the Member State."

• 22nd December 2014: The High Court (Hogan J.) delivered judgment, holding, first, that the dismissal of the plaintiff from his position in An Post in 2007 resulted directly from the wrongful failure of the State to apply Article 16 (2) of the 2004 Directive properly; second, such wrongful failure constituted a serious breach of EU law within the

meaning of the Francovich principles as elaborated in subsequent decisions; third, that the plaintiff was entitled to damages in the amount of €107,905 and fourth, awarding the plaintiff €20,000 for breach of his constitutional right to a good name.

The Appeal

6. From this judgment, the defendants appeal on the following grounds.

First, that the trial judge was mistaken in finding:

(a) A serious breach of EU law;

(b) that Directive 2004/38/EC Article 16 (2) was clear and precise and

(c) that the State's errors were not objectively excusable.

Secondly, that the trial judge erred in awarding damages (€20,000) for breach of constitutional right for loss of reputation because:

(a) There is no precedent for such an award;

(b) it is not justified in law;

(c) there was no specific evidence before the court of damage to reputation or good name;

(d) there was no evidence of mala fides and the award violated the principles in the Supreme Court decisions in Pine Valley and Glencar and

(e) the rights that the plaintiff asserted are EU rights so the remedy for any breach lies in EU law only.

7. Thirdly, the trial judge erred in fact and detail in awarding damages for loss of employment after June 2008 when the court had held that the plaintiff refused an offer of reinstatement at that time.

8. Although, as stated above, Mr. Ogieriekhi did not file a notice of cross-appeal, he did make detailed submissions in response to the defendants' case. His arguments went first to rebutting the appeal submissions and then to support his own case for a large award of damages, far in excess of the amount fixed by the High Court. The essence of his argument was that Regulation 1612/68 afforded him an entitlement to all the earnings that he would have had if he continued in employment with An Post. The commencement date for such payments was on his dismissal but the terminus had not yet been reached; that would only come when An Post changed its allegedly discriminatory contract term so as to be in compliance with Article 7 of Regulation 1612/68. The plaintiff's case is therefore a rejection of the applicability of *Francovich* and *Brasserie du Pêcheur*, which is the foundation of the judgment. I do not think that Mr Ogieriekhi's argument is sound or meritorious and I will give my reasons in due course for rejecting the Regulation 1612/68 points but it is not logical or convenient to address that case before considering the appeal by the defendants against the judgment and orders made by the High Court.

9. The questions on this appeal are:

(i) Was Mr. Ogieriekhi entitled to *Francovich*-principle damages? More specifically, was the second element of the *Brasserie du Pêcheur* test satisfied?

(ii) Was the High Court correct in finding a breach of Irish law and fashioning a novel constitutional remedy to award compensation for it?

(iii) Was Mr. Ogieriakhi entitled to succeed in his complaints about the award?

The Law

10. *Francovich C-6/90 and 9/90* says:

> "39 Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.
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> 40 The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State' s obligation and the loss and damage suffered by the injured parties.
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> 41 Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law."

11. *Brasserie du Pêcheur EU C: 1996:79* develops the principle"

> "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.
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> 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.
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> 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."

Discussion

12. It is clear that the question the High Court had to answer was whether Ireland had manifestly and gravely disregarded the limits on its discretion in the manner in which it implemented the Directive. At para. 47 of the judgment, the judge sets out the relevant and important paragraphs from *Brasserie du Pêcheur* which are quoted elsewhere in this judgment. He also referred to the helpful summary appearing in the judgment of the

Court of Justice on the instant reference:

> "49 First of all, it should be borne in mind that the principle of State liability for loss and damage caused to individuals as a result of infringements of EU law for which the State can be held responsible is inherent in the system of the Treaty (*Francovich* and Others, EU:C:1991:428, paragraph 35; *Brasserie du Pêcheur* and *Factortame*, C 46/93 and C 48/93, EU:C:1996:79, paragraph 31; and *British Telecommunications*, C 392/93, EU:C:1996:131, paragraph 38).
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> 50 Similarly, it should be recalled that the Court has also held that EU law confers a right to reparation where 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 resting on the State and the damage sustained by the injured parties (*Brasserie du Pêcheur* and *Factortame, EU:C:1996:79*, paragraph 51).
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> 51 As regards the second condition, after stating that the decisive test for finding that an infringement of EU law is sufficiently serious is whether the Member State concerned manifestly and gravely disregarded the limits of its discretion, the Court indicated the criteria that national courts — which have sole jurisdiction to find the facts in the main proceedings and to decide how to characterise the infringements of EU law at issue — may take into account, such as the degree of clarity and precision of the rule infringed (*Brasserie du Pêcheur* and *Factortame*, EU:C:1996:79, paragraphs 55, 56 and 58)."

13. The High Court held that the requirement in the Directive was clear and precise, that it was not objectively excusable and that the Minister "adopted an interpretation of Article 16 (2) which was always inherently unlikely to prevail". This was so because of the terms of the recitals to the Directive. The court also declared that the breach of the Directive was objectively a very serious one and that was also a basis for imposing liability, on which point the judge found authority in an Irish case of *Maxwell v. Minister for Agriculture* [1999] 2 I.R. 474.

14. In my view, these were erroneous findings because the High Court misapplied the Court of Justice jurisprudence. The Court considered only a small number of the relevant criteria, the factual basis of the consideration did not have a sound foundation and the Irish case on which the court relied is not an authority that supersedes the jurisprudence of the Court of Justice. It is first convenient to look briefly at *Maxwell's* case before analysing the authoritative European case law.

15. A scheme authorised by a Council Regulation to assist beef producers facing acute problems as a result of the BSE crisis differentiated between producers in a manner that the High Court held was discriminatory and contrary to Article 40(3) of the Treaty of Rome. The Court invoked *Brasserie du Pêcheur* and *Factortame* (Cases C-46/93 & C-48/93) [1996] E.C.R. I-1029, holding that the breach of Community law was of a sufficiently grave nature to confer a right to damages on the applicant, particularly in light of the fact that the Regulation in question was operating retrospectively so that the injured party had no opportunity to take steps to mitigate his loss. The degree of seriousness of a breach of Community law was to be viewed objectively. The court observed that no authority had been cited as to what constituted a sufficiently serious breach of Community law. This comment is a little difficult to understand when the very authority that the court cited announced what it called the decisive test for finding that a breach of Community law was sufficiently serious. The court determined seriousness by the amount of the applicant's loss. The court did not examine the question in the particular sense or meaning in which it is considered in the Court of Justice authority

cited. It seems, therefore, that this case does not establish a general rule, and still less one that governs the disposition of the case now under appeal. And if that were to be suggested, the proposition would actually contradict the very authority on which it is supposedly based. Although the High Court referred to this case, the judgment did not suggest that there was anything in *Maxwell* that qualified the application of the principle underlying the Court of Justice judgments.

16. Let me break down the *Brasserie du Pêcheur* rule into its component parts. First, the decisive test for liability is manifest and grave disregard by the Member State of the limits on its discretion. Secondly, if the State persists in its refusal to implement the Directive, notwithstanding a specific ruling of the Court of Justice that the State's conduct is an infringement, that is sufficient. Similarly, if the court's established case law is clear on the infringement but the State fails to comply, the court may take into consideration:

> (a) The clarity and precision of the rule breached;
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> (b) the measure of discretion left by that rule to the national authorities;
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> (c) whether the infringement and the damage caused was intentional or involuntary;
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> (d) whether any error of law was excusable or inexcusable;
>
> (e) the fact that the position taken by a Community institution may have contributed towards the omission, and
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> (f) the adoption or retention of national measures or practices contrary to Community law.

17. To address these issues in turn, beginning with the criteria of clarity and precision, the respondents submit that there was substantial uncertainty until the Court of Justice disposed of the matter in its decision in *Lassal*. The detailed reasoning in that judgment, with its analysis of previous decisions and of the overall purpose of the Directive, demonstrates the complexity of the matter. It is also relevant that Ireland was not alone in its interpretation of the Directive among Member States that were genuinely endeavouring to bring the new regime into domestic law. 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. If two interpretations of the Directive are legitimate and the Court of Justice declares one meaning to be the operative one, that is the end of the debate, but does that mean that the other interpretation is necessarily wrong? It is unnecessary to debate this point and we may proceed on the assumption that the Irish State made an error in its implementation measure. It is apparent that this is the preferable approach in the interest of certainty.

18. 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.

19. The measure of discretion is not a particularly relevant consideration in this case. Member States were not free to adopt very different means of implementation. The

question was not so much the range of options available but what precisely was required to achieve the requirement of the Directive.

20. The infringement was wholly unintentional. The trial judge accepted the evidence that all the decision-makers acted honestly by reference to their understanding at the time of the requirements of the Directive. The State had no ulterior motive to avoid its obligations under Union law. The officials genuinely believed that their national measures faithfully reflected the regime contained in the Directive.

21. In the circumstances, the error in the local measure was excusable. The position that the State adopted was not a bizarre or eccentric understanding of what was required. It was indeed subsequently declared to be incorrect, but that does not invalidate or disqualify the credibility of the motivation for the legitimacy of the understanding. The Court of Justice has the function of resolving issues of Union law, which is just what it did in this case. The fact that a number of Member States understood the Directive to mean something different has to be considered as excusable in the absence of any basis for considering that their view was untenable.

22. It cannot be said that a Community institution contributed to the failure to implement the Directive fully in the first instance in accordance with the judgment of the Court of Justice in *Lassal*. The respondents point to the fact that the Commission, in its supervisory role, had occasion to look at the Irish implementation measure and did not make any adverse comment thereon and did not apparently appreciate the insufficiency of the Irish rules in achieving the intended purpose of the Directive. That is not to blame the Commission; the fact is that the Irish State's understanding was subsequently held to be incorrect. However, it is of some significance and perhaps is more directly material to some of the other considerations, such as the obviousness of the omission or whether it was intentional or excusable. The point is in the same category as the fact that other Member States were of similar understanding.

23. The last of the suggested considerations is whether the State adopted or retained national measures or practices contrary to Community law. This test also cannot assist the applicant. The State adopted a measure that was expressly intended to carry Union law into effect in the national scheme and did not seek to retain it after the ruling of the Court of Justice declared its understanding to be incorrect. The State duly proceeded to abide by the judgment by changing its rules.

24. It is apparent from this summary review of the circumstances of the adoption of the Directive by Ireland that the State is not to be found liable under any of the criteria that the Court of Justice has held to be relevant in considering the seriousness of the particular breach of Union law. It is not that some of them are applicable and others not. The point is that there is not a single one under which the State is to be condemned. Not only that, when the decisive test is considered in its clarity and simplicity, there is no basis for declaring that Ireland manifestly or gravely disregarded the limits of its discretion in regard to the Directive.

25. There is simply no comparison between the situation that arose in regard to this Directive and the facts of *Francovich, Factortame* or *Brasserie du Pêcheur*.

26. It follows, therefore, that the trial judge in this case identified the precise test for determining the liability of the State, but then, unfortunately, failed to apply it in the manner helpfully and clearly laid out in *Brasserie du Pêcheur*.

27. One cannot ignore the fact that the judge himself found it necessary in order to decide the case to have the assistance of the Court of Justice under Article 267. Obviously, as that Court pointed out in its answer to Question 3, as posed by the High

Court, such a reference was not decisive on the point but it seems to me to be self-evidently relevant on the question of obviousness. It is worth noting the manner in which the European Court diplomatically recast the question and declined the invitation of the judge to exclude this very argument. 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.

28. In regard to the facts of the case, the High Court, following *Maxwell v. Minister for Agriculture*, held that the breach of the Directive in the manner of its implementation was objectively a very serious one with grave consequences for the plaintiff. We have to examine the basis of that conclusion which the judge appears to have thought was practically irresistible. Again, I fear I must differ.

29. There is no evidence or suggestion in this case that there was anything expressly defamatory in the manner of the dismissal of Mr. Ogieriakhi. He did not have a work permit - the employer would have been a happy to keep him on if he had one or could get one. The employer was reluctant to dismiss him, doing so only after getting legal advice. It was made clear that An Post would be happy to re-employ him if they could do so. The reason why the Employment Appeals Tribunal held that the dismissal was not unfair was because it was solely based on the absence of a work permit. The trial judge accepted expressly that An Post sought to minimise the loss and disruption which he suffered and that they did not act in an arbitrary or high-handed fashion. It is obvious that the plaintiff would have been upset and unhappy and angry about being dismissed. But those emotions could not have been attributed to the manner of his dismissal as opposed to that fact that it happened. It may be recalled that the plaintiff did not actually turn up on the day when he was dismissed, but it had been made clear to him a couple of days earlier what would happen if he was unable to produce the necessary document.

30. My conclusion, accordingly, is that the High Court judgment on the breach of Union law cannot stand. The principle expressed by the ECJ in Brasserie and the earlier and later cases is clear and it goes back to *Francovich* where it was first expounded. The court has held that the objectives of the treaties require that there should be a jurisdiction of this kind. The principle of liability is not that an inadvertent error in transposition of a Directive gives rise to a right of action for a person affected. But that is the test that the trial judge in effect applied. Although the judge identified and cited the correct rules as laid down by the ECJ, he actually applied an entirely different criterion.

The Award for Breach of Constitutional Rights

31. The judge accepted the evidence of the plaintiff and his wife that his dismissal from employment had serious financial and reputational consequences for him and his family. That, however, is not the basis for this claim. The judgment proceeds to isolate this claim as an independent one:

> "This appears to be the first case in which this Court has been required to determine whether a person who has been dismissed in this or similar fashion can sue for breach of his constitutional right to a good name by reason of the injury to his reputation resulting in that dismissal."

32. Then the judge held that the ordinary law did not afford the plaintiff an effective remedy to protect his good name under Article 40.3.2, although it did so in respect of his property rights. In what way was the plaintiff's good name damaged? The judge explains, at para. 99 of the judgment, that it is the "act of dismissal which often sends the signal to future employers that the employee is not fit to be re-hired. The gist of the damage to the plaintiff's good name was the immediate and unlawful termination of his

contract of employment with An Post". He was summarily dismissed over his protests that he had a legal entitlement to work here "in circumstances that must have been personally humiliating and undignified. To make matters worse, his dismissal was totally unrelated to his work performance or the necessity for the company to re-structure its business. The summary nature of the dismissal created the impression that he was not lawfully entitled to work and perhaps worse" (see para. 101).

33. As to the availability of an effective remedy, the high court judge concluded that the common law was deficient, as was statute law. Defamation was not available and would not generally be so, first, because defamatory words might not be used, as is the situation in this case, and second, because qualified privilege would apply. Contract law would not be available because of the decision in *Addis v. Gramophone Co. Ltd.* [1909] AC 488, on which the judge engages in a detailed critique, but acknowledges that it was applied in this jurisdiction in *Garvey (No. 2)* [1979] ILRM 266. Nevertheless, that case may be distinguished on the judge's analysis. In respect of statutory remedies, the Employment Appeals Tribunal rejected the plaintiff's claim.

34. I cannot agree with this approach. It is not a deficiency of the law that it fails to provide a remedy for defamation where nothing defamatory was said or done. There is no evidence or suggestion in this case that there was anything defamatory in the manner of the dismissal. The plaintiff did not have a work permit; the employer would have been a happy to keep him on if he had one or could get one. It was reluctant to dismiss him, doing so only after getting legal advice. It was made clear that An Post would be happy to re-employ him if they could do so. The reason why the EAT held that the dismissal was not unfair was because it was solely based on the absence of a work permit.

35. As noticed above, the employer behaved in a reasonable and considerate manner in the circumstances and only because it felt compelled as a matter of law to proceed as it did.

36. It follows that if this plaintiff is entitled to claim damages for breach of constitutional rights on dismissal, such a cause of action is available to everybody who is dismissed unlawfully. The circumstances in which it happened in this case are so far from being denigratory or humiliating that if this award stands, it will be a basis for recovery in almost every circumstance imaginable.

37. The constitutional protection afforded by Article 40.3.2 is provided by the law of tort and contract and in statute. 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. In *McDonell v. Ireland* [1998] 1 I.R. 134 at 147-148, Barrington J. said:

> "Constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules. If the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different course of action. Thus the Constitution guarantees the citizen's right to his or her good name but the cause of action to defend his or her good name is the action for defamation. The injured party, it appears to me, has to accept the action for defamation with all its incidents including the time limit within which the action must be commenced."

38. The respondents also relied on *Glencar Explorations plc v. Mayo County Council (No.2)* [2002] 1 I.R. 84.

39. The plaintiff was dismissed because of the law; the employer was not responsible for that. Everything that happened - indeed the only thing that happened - to the plaintiff was that he was dismissed because of the law. Obviously, the dismissal was distressing, but the trauma should not be overstated. The circumstances of dismissal were the opposite of humiliating or demeaning or disrespectful. A new constitutional tort cannot be invented to provide damages for a person who is dismissed in accordance with law and who is not defamed or otherwise legally wronged. The issue arose because of the implementation of the Directive and only because of it. Any injury or loss suffered by plaintiff was not because of domestic law, but European law. And it was not by reason of deficient rights protection in the Irish legal system. It follows as a matter of legal logic that if a plaintiff does not have any entitlement to damages under European law, he cannot claim under domestic law. The wrong is under European law and any claim arises thereunder. Otherwise one would have the anomalous situation whereby a plaintiff recovered on foot of a newly-minted Irish constitutional tort under the Francovich principle when the same rule actually denied recovery.

40. A constitutional tort arises where there is not a common law or statutory remedy for a breach of constitutional rights. In normal circumstances, the person who claims to have suffered a civil wrong proceeds under the regime of the law of torts, whether that is common law or statutory. If there is a rule of statute law or of the common law that is incompatible with the Constitution, the courts are empowered to strike it down or to adapt it or interpret it in a constitutionally harmonious or compatible manner as necessary. The constitutional obligation to vindicate personal rights is observed and performed by the State in its law of tort. If there was some deficiency of the common law rule in *Addis v. Gramophone Company [1909]*, the question would be whether and to what extent it had been imported into our law by the Constitution because it is a decision of 1909. In fact, however, Addis was expressly approved and applied in this jurisdiction by the High Court (McWilliam J.) in *Garvey v. Ireland (No. 2)*.

41. The law does not sanction the course taken by the High Court judge here. Having declared the inadequacy of the legal regime comprised in the law of defamation and of unfair dismissals and of the principle in *Addis v. Gramophone Company*, the judge reached for the Constitution to find a remedy in order to compensate the plaintiff, but what was the compensation for? The points that the judge made as to this case arise in every dismissal case, so the consequence is, if this finding were to stand, that there would be created a new - the judge acknowledges the novelty expressly - parallel constitutional right to damages in every case of unfair and of wrongful dismissal. In case it might be thought that this is an exaggeration, the reality is that most cases of dismissal are based on factual circumstances that are far more disturbing for the person involved and more affecting than this one. The plaintiff was dismissed, it is true, but that happened in non-humiliating circumstances. Actually, An Post was reluctant to dismiss the plaintiff and got legal advice before doing so. Not only that, they told Mr. Ogieriakhi that they would be happy to have him back if he got a work permit and if they had a vacancy. As it happened, when the situation arose at the EAT that he was to get the necessary permits, An Post offered him his job back but he did not want it.

42. It must be remembered that on the main and general issue that happened here was that the State took a position honestly and conscientiously, as the judge properly found on the evidence, that was later declared to be incorrect by the Court of Justice, but it was not an eccentric or capricious interpretation. Indeed, it could be said to be an understandable one; after all, two other member states also held it to be the correct view. So, the circumstance of Mr. Ogieriakhi's dismissal came about because of a proper, honest endeavour to implement the Directive into Irish law, but which was later held to be an incorrect interpretation of the Directive.

43. The High Court was wrong to invent a constitutional tort or remedy in the

circumstances of this case. The judge's conclusion that the common law was inadequate is unsound in law and on the facts. Moreover, the claim or the award on foot of breach of constitutional rights i.e. the award of €20,000 cannot survive the failure of the *Francovich* claim.

44. Specifically, the common law was not inadequate. Mr. Ogieriakhi was entitled to bring proceedings for wrongful dismissal, but not at the same time as Employment Appeals Tribunal proceedings. A person has a choice of proceeding at common law for wrongful dismissal or under the Unfair Dismissals Act for redress as specified. He chose to proceed to the EAT and those proceedings were determined. The Tribunal decided that his dismissal was not unfair and was not unlawful. The plaintiff did not appeal that decision. It is difficult to quarrel with the finding in the circumstances of the time. The plaintiff did not have a work permit so the employer dismissed him. The fact that there is a common law rule relating to what may be joined or included in a common law action arising out of his dismissal - as in *Addis v. Gramophone* - is not something that actually arises in this case because his claim is not a wrongful dismissals action. Having said that, even if it had been a wrongful dismissal case and if *Addis v. Gramophone* was stated to be relevant, it is hard to see how the circumstances of the plaintiff's dismissal could have given rise to any auxiliary claim that might have been barred by the common law rule in that case.

45. The claim brought by the plaintiff arises out of a breach of European law. It is not a matter of domestic law, and still less is it a case of an established right being interfered with by action of the State, otherwise than in respect of its obligations under European law. Neither can I see how this right of action or claim could exist independently of the Francovich claim. To envisage that possibility would give rise to a wholly anomalous situation where he would be entitled to nothing under his principal claim, but have a free-standing right to an award anyway. That award would arise out of a dismissal that was held to be valid in the sense of not being unlawful or unfair under the relevant legislative code, and that was so because of the State's implementation of the Directive. It would simply be illogical and even irrational to have a claim that could arise in those circumstances and it would necessarily give rise to a parallel jurisprudence for anybody who suffered dismissal from his job and I do not think that that is warranted by the Constitution or by any of the cases that have been invoked.

Quantum of Francovich Damages

46. Although this issue does not arise in view of my conclusions that the plaintiff is not entitled to damages, I think I should indicate my disagreement with the approach adopted by the trial judge to the assessment of damages. The plaintiff was dismissed from his position with An Post on 24th October 2007, and they offered his job back on 27th June 2008. The trial judge awarded damages based on loss of earnings for a period of six years because that was the maximum permitted by the Statute of Limitations, subject to an obligation on the plaintiff's part to mitigate his loss. The judge held that Mr. Ogieriakhi's damages fell to be reduced by 50%. In the result, the court awarded €107,905 under this head.

47. In my view, if the plaintiff was entitled to damages they should have been calculated on the basis of his net loss of earnings between 24th October 2007 and 27th June 2008. Any additional claim would have to be brought within the principles of the law of contract. If the court made an award for more than the net loss of earnings, that would require to be justified by reference to the law on damages for breach of contract. I do not see how such a claim could have arisen in the circumstances. The employer had made clear to the plaintiff that the only reason for his dismissal was that he did not have a work permit and that if he acquired one he would be re-employed if possible. That is just what happened. If Mr. Ogieriakhi chose to reject the offer to take him back, there is no basis on which he can claim to be entitled to damages for six years. An Post

is not responsible for what happened to the plaintiff after he rejected the offer of re-employment. Neither are the other defendants.

The Claim by Mr. Ogieriakhi

48. The plaintiff did not cross-appeal against the award of damages made by the High Court. He did, however, make the case in his response to the notice of appeal and that he was entitled to a much more substantial amount by reason of the application to the case of Article 7 of Regulation 1612/68. This provision is contained in Title II of the Regulation under the heading: 'Employment and Equality of Treatment' and is as follows:

> "Article 7
>
> 1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;
>
> 2. He shall enjoy the same social and tax advantages as national workers.
>
> 3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.
>
> 4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States."

49. Mr. Ogierakhi submitted that the Court of Justice of the European Union has decided that he was treated differently from other national workers and other EU nationals An Post is now obliged to reinstate him in his position and pay all his accrued remuneration from 24th October 2007 to date and continuing until the company fully complies with Article 7.1.4. The reason for this obligation is the provision and 7.1.4 declaring that discriminatory conditions are null and void. It follows, on the plaintiff's analysis, that the condition under which he was dismissed was a discriminatory one, and so it was null and void. He must therefore be considered to be still in his employment and paid accordingly. The decision that was made to refuse him the right of permanent residence has been decided to be discriminatory.

50. Mr. Ogierakhi submitted that the provision of Article 7.1.4 of Regulation (EU) No. 492/2011 is directly applicable, unconditional and binding on this court. He argued that *Francovich* and *Brasserie du Pêcheur* do not apply and the appellants are precluded from raising matters dealt with by the CJEU and the remedies for the re-employment and the remunerations of the plaintiff become due under the terms of the Regulation. Since the Regulation provides that insofar as the condition for the termination of the plaintiff's employment authorises a discriminatory condition (the plaintiff having been treated differently to national workers by virtue of his nationality and other EU nationals) the court should declare the entirety of the consequences arising as null and void ab initio in light of Case C-244/13 Ogierakhi.

51. The provision of Article 7 of Regulation 1612/68 and its entire subparagraphs have already been the subject to the adjudication and judgment of the ECJ in Cristini and Walrave and the right of family members to rely on and invoke the provisions of Article

7 has been upheld in those cases. It was submitted, therefore, that the appellants cannot re-litigate the subject matter of EU jurisprudence in circumstances where Article 7 of Regulation 1612/68 has been held to be directly applicable and applies independently of any EU rules or principles.

52. Mr. Ogierakhi also submitted that in Lassal the CJEU has unequivocally decided on the question of the retroactive effect and application of Article 16 of Directive 2004/38/EC and the appellants cannot re-litigate this judgment. Despite the Lassal judgment the appellants have continued to fail to take the necessary steps to adopt independent legislative measures to correct its transposition under Regulation 12 of S.I. 656 of 2006.

53. Counsel for the defendants submitted that Regulation 1612/68 was not applicable. Nothing that happened to the plaintiff arose by reason of discrimination within the meaning of Article 7. In 2011, the Minister recognised his EU residency rights under directive 2004. He is asserting that he was discriminated against in relation to Regulation 1612 by virtue of having to live under the same roof as his French wife. That appears to be the discrimination he relies on.

54. The plaintiff's claim was that even though the grant of residence had been made, he still had to prove for the purposes of damages under Francovich that he was entitled to it. So, that aside from the Lassal point and when the five years had to run from, he had to establish he qualified under Regulation 1612 as a family member residing with an EU citizen. That argument was advanced in 2013, and led to the reference to the Court of Justice. That reference gave rise to the comments Mr. Ogieriakhi relied upon to say that he was discriminated against.

55. However, the plaintiff was never discriminated against on any basis that could be related to Article 7 of the Regulation. The reason he was refused in 2007 was because the Directive was incorrectly transposed as regards the five year period. When that question was resolved in Lassal and the matter was considered, it was decided, irrespective of Regulation 1612, to grant him his EU right of residency. In the result, he was never forced to live with his French wife.

56. Therefore, insofar as Mr. Ogieriakhi says he was discriminated against in any sense of the word, whether it might be under Article 7 or otherwise, it never actually happened. That is without prejudice to the fundamental point that this measure simply has no application to the case whatsoever. Even if there was discrimination on some basis, which the defendants do not accept, it was not discrimination within the meaning of Article 7. There was no discrimination. And the plaintiff clarified in his submission that in actuality he was invoking Article 7 of 1612 of 68 against An Post, not against the Minister. So even if there is some way of saying the Minister discriminated against him by the way in which the Minister applied the Article, it could not have been his employer, An Post. The only thing that An Post said was: "we cannot legally employ you". They did not discriminate against him in any meaning of the word.

57. The plaintiff's argument, based on Article 7 of Regulation 1612/68, seems to me to be entirely misconceived. This is a provision prohibiting discrimination in the employment in one Member State against a national of another EU Member State. As such, it does not arise in this case. It is true to say that in the course of the consideration by the Court of Justice of the reference by the High Court, there was argument based on the concept of discrimination as between married persons who were nationals of the home Member State and those who were not in respect of a requirement to live together. However, that arose in consideration of the plaintiff's rights under the Directive whose implementation was in issue. The question in consideration was this State's compliance, and in the interpretation of the provisions, it

was relevant to discuss whether one application would be discriminatory as compared with another. It does not follow that the judgment of the Court of Justice represented a finding of discrimination against the plaintiff that gave him an automatic entitlement to damages. Still less did it represent a declaration under Article 7 of the Regulation.

58. There is, I am afraid, no basis on which the plaintiff could be entitled to claim damages in the manner that he has put forward. I think that the submissions made by the defendants are correct and that Mr. Ogieriakhi's arguments must be rejected as being wholly erroneous.

59. My conclusions in summary are:

• Firstly, that the plaintiff's claim for damages under the *Francovich* principle fails.

• Secondly, he is not entitled to claim damages for breach of constitutional rights and that came also fails.

• Thirdly, if he were entitled to recover damages, the High Court erred in its mode of assessment.

• Fourthly, Mr. Ogieriakhi's claim under Regulation 1612/68 is misconceived.

60. I would, accordingly, allow the appeal and set aside the orders of the High Court.