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Judgment

Title: Singh -v- TheMinister for Justice and Equality

Neutral Citation: [2016] IEHC 202

High Court Record Number: 2013 83JR

Date of Delivery: 08/04/2016

Court: High Court

Judgment by: Mac Eochaidh J.

Status: Approved

Neutral Citation: [2016] IEHC 202

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2013/83/JR

Between:-

KULDIP SINGH

Applicant

- and -

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

Record No. 2012/873/JR

Between:-

DENZEL NJUME

Applicant

- and -

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

Record No. 2012/984/JR

Between:-

KHALED ALY

Applicant

- and -

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

Judgment of Mr. Justice Mac Eochaidh delivered on the 8th day of April, 2016

1. This a judgement on applications for costs in three cases and for substantive orders in the first two cases named in the title of the proceedings above. The applicants seek their costs in the cases. In the *Aly* case, no formal orders of any sort are sought save an order as to costs. In the *Singh* and *Njume* case, the applicants seek orders and costs but effectively concede that it is not appropriate to make orders of certiorari but it is said that the Court should, in view of the decision of the Court of Justice on the reference, make certain declarations in relation to matters affecting or of interest to the applicants in those cases.

2. The respondent is looking for the costs of the proceedings including the reference to the E.C.J. in respect of the *Singh* and *Njume* case and they seek their costs in respect of the *Aly* case save those costs in respect of the reference where they seek no order as to costs.

3. The text of the Art. 267 Reference sent by this Court to the E.C.J. sets out all relevant matters in relation to these proceedings and I therefore incorporate it in this ruling as follows:-

“The Text of the Article 267 Reference

A. INTRODUCTION

1. Three cases before the High Court in Ireland involve questions of EU law where non EU citizens married non Irish EU citizens in Ireland. In each case the EU citizen departed Ireland and obtained a divorce in another EU Member State.

2. The questions concern the interpretation of Council Directive 2004/38/EC and in particular whether the Minister was entitled deny the non-EU citizens permissions to continue to reside in Ireland on the basis that the EU citizens (former spouses) ceased to exercise their EU Treaty rights in Ireland on the date of the various divorces. Related questions arise as to the correct interpretation of Article 7(1)(b) of the Directive concerning the EU citizen spouse's right of residence, and whether 'sufficient resources' may take into account the resources of a non-EU citizen spouse and whether non-EU citizens may have a right to work in a host Member State in order to provide 'sufficient resources'.

B. RELEVANT PROVISIONS OF EU LAW

3. The relevant provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States are as follows.

Recital (5):

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

Recital (15):

Family members should be legally safeguarded in the event of the death of the Union citizen,

divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures

should therefore be taken to ensure that in such circumstances family members already

residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

Article 1 under the subheading 'Subject' states:

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement

and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public

security or public health.

Article 2 defines "family members" for the purpose of the Directive -

2) "Family member" means:

(a) the spouse;

(b) ...;

(c) the direct descendants who are under the age of 21 or are dependants and those of the

spouse or partner as defined in point (b);

(d).....;

3) "Host Member State" means the Member State to which a Union citizen moves in order to

exercise his/her right of free movement and residence.

Article 3 defines the beneficiaries for the purposes of the Directive:

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

Article 7:

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or

administrative practice, for the principal purpose of following a course of study, including vocational training; and

- have comprehensive sickness insurance cover in the host Member State and assure the

relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions

referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

Article 8(4) defines "sufficient resources":

4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

Article 11:

Validity of the residence card

1. The residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years.

2. The validity of the residence card shall not be affected by temporary absences not exceeding 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.

Article 12

Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right

of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13

Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or

termination of the registered

partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has

lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of

domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

Article 14:

Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

C. RELEVANT DOMESTIC LEGISLATION

4. The Directive is implemented in Ireland by the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. 656 of 2006) and 2008 (S.I. 310 of 2008) ("the Regulations"). The Regulations are set out in the annex hereto.

D. STATEMENT OF FACTS

First Case - Kuldip Singh

5. Mr. Singh is an Indian national who was born on 25th March 1983. He arrived in Ireland on 6th February 2002 on a student visa, and thereafter resided lawfully in Ireland, save for a number of months in 2004.

6. Mr. Singh married Nadezda Mitrofanova, a Latvian national and EU citizen, who was working and lawfully residing in Ireland, on the 11th November, 2005. Their son Justin was born on 3rd December, 2007, and he is an EU citizen (Latvian).

7. Following the decision of the CJEU in *Metock and Others v. Ireland* (Case C-127/08) and pursuant to the Directive, Mr. Singh was granted a five year permission to reside in Ireland as the spouse of an EU citizen who was residing and exercising rights established by the Treaty on the Functioning of the European Union in the State.

8. Mr. Singh's wife was continuously in employment in various jobs from 2004 until June 2009, apart from a period of maternity leave in 2007.

9. In 2009 Mr. Singh set up and operated a pizza restaurant in Ireland under a Franchise Agreement dated 29th May, 2009 for an initial term of 10 years, with a business partner. Thereafter Mr. Singh supported his wife and son financially and she stayed at home and cared for their son

10. Mr. Singh and his wife experienced difficulties in their marriage in December, 2009. His wife left the family home and departed Ireland on or about 16th February, 2010. His evidence is that while initially he hoped for a reconciliation this did not prove possible. By agreement he paid €300 per month to his wife for the maintenance of Justin. His wife then instituted divorce proceedings in Latvia on or about 24th September, 2010 **(1)**. A preliminary judgment was delivered by the Latvian court in March, 2011, and the divorce became legally effective as and from 12th May, 2011. The Divorce certificate was not issued until 12th October, 2011. **(2)**

11. On 14th December, 2011 Mr. Singh's solicitors applied to the Minister for retention of permission to remain post-divorce and for permanent residency in Ireland pursuant to the Directive and domestic implementing measures, based on his marriage to a Union citizen and as father of Justin Singh and satisfaction of the legislative conditions (that the marriage had lasted at least 3 years, including one year in Ireland). Mr. Singh was self-employed/in employment at the time.

12. By letter dated 30th April, 2012 the Minister refused the applications

stating, inter alia,

"...as Ms. Mitrofanova left the State in 2010 she is no longer deemed to be exercising her EU Treaty Rights in the State in accordance with the provisions of Regulation 6(2)(a) of the Regulations she no longer enjoys the Right of residence in the State under Regulation 6. Accordingly it is not therefore possible for you Kuldip Singh to derive a right of residence from Ms. Mitrofanova under the provisions of Regulation 6(2)(b)."

13. Mr. Singh sought a review of this decision (as provided for in Article 31 transposed by Regulation 21), asserting that he had a personal entitlement to residence under Regulation 10, transposing Article 13 of the Directive, and that the claim was not a derivative one arising under Regulation 6. Before the review was determined the Minister was furnished with a copy of the Deed executed by the parties governing custody and access of Justin Singh.

14. By letter dated 12th November, 2012 the Minister's Review Unit informed Mr. Singh that his Review was unsuccessful citing the following reasons:

"Your former EU Citizen spouse, Ms. Nadezda Mitrofanova, left the State in February 2010 at which time she ceased to exercise her EU Treaty Rights in the State and as such you cease to hold any derived right to reside in the State from her on an EU Treaty Rights basis. You were requested to provide evidence at the initial stage of your application to show that Ms. Mitrofanova was absent from the State for any of the reasons outlined in Regulation 8 of the Regulations and you provided no such evidence. You were also requested at both initial and review stages to provide evidence of her continuing to exercise her EU Treaty Rights in the State up until her departure from the State but the evidence you have provided only shows such exercise of rights up until Mid 2009."

15. This letter further informed Mr. Singh that "in the circumstances particular to your case, it has been decided to grant you a permission to remain in the State for a period of one year as an exceptional measure", which permission allowed Mr. Singh to reside and work without the need for a work permit and to engage in business in the State pursuant to the provisions of national law. The said permission may be renewed.

Second case - Denzel Njume

16. Mr. Njume claims to be a national of Cameroon, born on 13th August, 1979. On the 6th January, 2004 he applied for asylum in Germany under the name Ebongalame Stanley Njumbe, born on the 13th August, 1982.

17. Mr. Njume claims he met and commenced a relationship with Manuela Ziefle, a German citizen, in January 2005, and that thereafter they lived together in Eslohe, near Dortmund, for some eighteen months.

18. Mr. Njume illegally entered Ireland and applied for asylum in Ireland on the 4th September, 2006. A positive Eurodac hit was subsequently made in respect of his prior application in Germany, and under Council Regulation (EC) No. 343/2003 Germany agreed to be responsible for the asylum application, and Mr. Njume was issued with a Transfer Order dated 6th November, 2006 transferring the application to Germany. Mr.

Njume did not present to the Irish authorities as he was required to do in order to effect the transfer and was classified as an absconder.

19. On 4th January, 2007 Mr. Njume married Manuela Ziefle at Cork Registry Office, Ireland.

20. Following the decision of the CJEU in *Metock and Others v. Ireland* (Case C-127/08) and pursuant to the Directive, Mr. Njume was granted a five year permission to reside in Ireland as the spouse of an EU citizen who was residing and exercising rights established by the Treaty on the Functioning of the European Union in the State, by letter dated the 3rd December, 2008. The said permission was backdated to the 11th October, 2007, and was evidenced by the issue of a residence card.

21. Thereafter Mr. Njume sought and obtained employment. He claims that he and his wife lived together in Ireland throughout the period of late 2006 to January 2011, apart from three temporary visits to the UK of ten days each to allow her to seek employment there as a qualified social scientist. He claims to have supported her from his earnings between 2008 and 2011.

22. By letter dated the 25th February, 2011, sent on behalf of Mr. Njume, the Minister was informed that Mr. Njume's wife had left the State in early 2011 and returned home to Germany. By letter dated the 25th March, 2011, it was claimed that he was entitled to retain his right of residence pursuant to Regulation 9 of the 2006 Regulations in the event of departure from the State of the Union citizen.

23. By letter dated the 12th July, 2011, Mr. Njume's representatives were informed that Regulation 9 did not apply to him in the circumstances of his case. In response, by letter dated the 22nd July, 2011, Mr. Njume's representatives informed the Minister that his wife had initiated divorce proceedings in the United Kingdom.

24. A Decree Nisi issued from the High Court of Justice Principal Registry of the Family Division, dated the 21st December, 2012, which stated that on that date District Justice Reid had found that the Applicant and his spouse had "*lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.*" The Applicant's spouse had initiated divorce proceedings on the 14th June, 2011 in the United Kingdom. A Decree Absolute issued on the 28th March, 2012.

25. By letter dated the 23rd March, 2012, Mr. Njume's representatives furnished the Minister with a copy of the *Decree Nisi*. A copy of the Decree Absolute was forwarded by letter dated the 2nd March, 2012. Thereafter Mr. Njume sought retention of his residency permission on the basis of Regulation 10 of the Regulations (implementing Article 13(2) of the Directive).

26. By letter dated 21st September, 2012 the Minister declined permission to Mr. Njume to remain in Ireland under Regulation 10(2) giving the following reason:

"It isnoted that you are now divorced from Ms. Ziefle and that Ms. Ziefle has not been resident and exercising EU Treaty Rights in the State since 2008. Please note that the grounds under which you were granted

permission to remain no longer apply as your derived right under the European Communities (Free Movement of Persons) Regulations 2006 and 2008 was no longer valid once your EU national spouse ceased exercising EU treaty Rights in the State. Regulation 10(2) refers to retention of a right of residence on an individual and personal basis in the event of divorce, however given that your right of residence was not subsisting at the time of Divorce, there is no entitlement to retention."

The Minister accordingly revoked the residency permit, and by further letter bearing the same date gave notice of a proposal to deport Mr. Njume.

27. By letter dated the 12th September, 2013, Mr. Njume was granted permission under Irish National Law in respect of his request to remain in the State based on his parentage of an Irish citizen child, on a stamp 4 basis, for three years until the 12th September, 2016, which may be renewed.

Third Case - Khaled Aly

28. Mr. Aly is a citizen of Egypt. He entered the State on 14th March 2007 on a visitor's visa with permission to remain until 14th June 2007. Mr. Aly married a citizen of Lithuania, Ms. Sonta Palsyte, in Ireland on 12th July 2007. He was issued with a residence card pursuant to the Regulations on 21st August 2008, which was backdated to 3rd February 2008, and was valid for five years until 2nd February 2013.

29. Mr. Aly's EU citizen spouse worked in Ireland from 1st May, 2004, (the date of accession to the Union by Lithuania) until January 2009 when she lost her job due to the economic downturn. She received unemployment benefit until June 2009. At this time, she had to return to Lithuania to care for her mother who was ill for about 3 months. When she returned to Ireland, she applied for social welfare but was refused. She and her husband lived on his earnings, remaining self-sufficient, whilst she continued to look for employment. In March, 2011, she went to the United Kingdom to take up a job for a short period.

30. By letter dated 14th August 2012, Mr. Aly informed the Irish Naturalisation and Immigration Service ('INIS') that in the six months after his wife moved to London to work the relationship broke down. She wished to remain in London and he did not wish to move to London.

31. By letter dated 3rd October 2012, the INIS replied and stated that it was proposing to revoke Mr. Aly's permission to reside in the State, and invited representations from him. The letter stated, inter alia:

"By letter dated 14/08/12 from your legal representative you have informed this office that the EU citizen, Sonta Palsyte, is no longer residing in the State exercising EU Treaty Rights. In light of the above, I am to inform you that it is proposed to revoke your permission to remain, as you do not qualify for residence under the provisions of The European Communities (Free Movement of Persons) (No. 2) Regulations, 2006 as amended."

"You are now invited to make written representations to this office within 10 working days of the date of this letter setting out the reasons why your

permission to remain in this State should not be revoked.”

32. By letter dated 15th October, 2012, Mr. Aly’s solicitor replied and informed the INIS that divorce proceedings had commenced in Lithuania and that a decree of divorce would issue shortly, and submitted that Mr. Aly was entitled to remain in the State pursuant to Article 13 of Directive 2004/38/EC. A Certificate was submitted which had issued on 8th October 2012, confirming that the required documents had been submitted to a specialised legal services company on 15th September, 2012 and the application for divorce had commenced. Therein it was stated that the applicant’s wife had *“decided to dissolve the marriage to Khaled A. Md. Aly at the end of April, 2011”*.

33. By decision dated 12th November 2012, (‘the contested decision’), INIS revoked Mr. Aly’s permission to reside in the State. The contested decision stated, inter alia:

“It is further noted that Ms. Palsyte has left the State and has not exercised EU Treaty Rights in the State in compliance with Regulation 6(2) for a considerable period of time. As such, please note that the grounds under which you were granted permission to remain no longer apply as your derived right under the provisions of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 was no longer valid once your EU national spouse ceased exercising EU Treaty Rights in the State. Regulation 10(2) refers to retention of a right of residence on an individual and personal basis in the event of divorce, however, given that you are not divorced and your right of residence ceased to be valid when Ms. Palsyte ceased exercising EU Treaty Rights in the State, there is no entitlement to retention.”

34. Following the contested decision, Mr. Aly reported to the immigration authorities as required, and unlike the cases of Mr. Singh and Mr. Njume, an officer destroyed the applicant’s residence card, cutting it in half in front of him, and marked the residence stamp in his passport as ‘cancelled’. The officer also contacted Mr. Aly’s employer in order to prevent Mr. Aly from working.

35. An Application/Request was made to the Vilnius city 2nd District Court on 19th November 2012, to cancel the marriage by common agreement.

36. Mr. Aly was granted leave to apply for judicial review in respect of the contested decision by Mr. Justice McDermott in the High Court on 10th December 2012.

37. On foot of those proceedings, by letter dated 17th December 2012, Mr. Aly was granted a temporary stamp 4 permission to work and remain in the State.

38. A Certificate of Divorce was issued in Lithuania on the 12th March 2013, to the parties.

E. Reasons for Article 267 Reference

39. The following is a statement of the reasons prompting the High Court

to refer questions pursuant to Article 267 TFEU.

40. In the first two cases (Njume and Singh) a divorce was obtained following the separation of the parties and the departure from the host Member State by the EU national spouse following which the Respondent refused the applications for retention of residence rights. In the third case (Aly) the Respondent revoked the residence card granted to the Applicant following the separation of the couple and the departure by the EU national from the host Member State. At the time the application for retention of residence rights was refused the couple in the Aly case were separated but not divorced. A divorce was subsequently obtained.

41. The Applicants argue in the first two cases (Njume and Singh) that the clear terms of Article 13(2) of Directive 2004/38/EC establish an entitlement to retention of residence in a personal capacity by a third country national spouse of an EU citizen residing in the State whose marriage has ended in divorce, provided the marriage lasted at least three years including one year in the host Member State. The Applicants in the first two cases argue that Articles 13(2) and 14(2) of Directive 2004/38/EC (in contrast to Article 13(1)) contain no provision stipulating that in order to qualify for retention of permission following divorce, the EU spouse must remain in the host Member State. It is argued that the retention of residence in a personal capacity expressly stated to be such in Article 13(2) of the Directive is intended to vindicate the private life rights of the third country national spouse in the host Member State and is not dependent on the continued presence of the EU spouse in that State post-divorce. Reliance is placed in this regard on Article 7 of the Charter of Fundamental Rights. The Applicants further argue that the Respondent's interpretation of Article 13(2) of the Directive would deprive it of its effectiveness. It is furthermore argued that a teleological or purposive interpretation has been repeatedly endorsed by the Court of Justice and in this respect regard must be had to the terms of Recital 15 to protect family and private life rights of third country national spouses in the host Member State in the event of marital breakdown. The Applicants also argue that if the Respondent's interpretation were to be correct then Article 13(2) would discriminate against third country nationals who, with their EU national spouses, settle in a Member State such as Ireland with national laws that stipulate longer periods of separation or residence in order to qualify for divorce than in other Member States.

42. In the third case (Aly) the Applicant also relies on Article 13(2) of Directive 2004/38 and the interpretation advanced in the first two cases (Njume and Singh) as outlined above. It is argued by the Applicant (Aly) that Article 13 does not require that the divorce should happen in the host Member State and that if the non-Union citizen's "personal right of residence" is to be affected, that spouse must be permitted to continue his residence in the host Member State whilst the divorce is being obtained. Reliance is placed on the fact that in most cases where a marriage breaks down there will be a period of separation prior to divorce proceedings actually being instituted. It is again argued that a purposive interpretation ought to be given to Article 13(2)(a) of the Directive in order to render effective the right provided for therein by the EU legislature. Significant reliance is placed by this Applicant on the judgment of the High Court in Lahyani which is referred to at paragraph 46 below.

43. The Respondent in all three cases argues that the purpose of Directive

2004/38/EC is to facilitate the free movement of Union citizens throughout the Member States by permitting their family members, including non-EU nationals, to accompany or join them in the host Member State. The right of those family members to reside in the host Member State is tied to the legal presence of the EU spouse. If the EU spouse departs, then subject to defined exceptions the non-EU spouse has no right to remain. It is argued by the Respondent that Article 12 of the Directive contains limited categories of third country national family members who derive a right to remain where the EU spouse has departed the host Member State. Furthermore and crucially, according to the Respondent, it is argued that Article 13 does not confer a retained right of residence in a personal capacity for a third country national spouse where at the relevant time the EU national had departed the host Member State and had ceased any qualifying economic activities under Article 7 of the Directive. In this regard the Respondent argues that the rights obtaining under Article 13 of the Directive are inextricably linked with and predicated upon the requirement for the Union citizen to engage in a qualifying economic activity contained in Article 7 of Directive 2004/38/EC at all material times.

44. In the third case (*Aly*) the Respondent argues that the matter is governed by Article 7 as well as Article 12 of the Directive. The Respondent submits that the limited categories wherein a right of residence is retained by a third country national spouse upon the departure of the EU national spouse under Article 12 is not one which applies to this Applicant having regard to the express terms of Article 12. It is furthermore argued that at the relevant time the EU national spouse was not exercising any economic activity in compliance with Article 7 of the Directive, although the applicant contends that by 1st May, 2011, his wife had acquired permanent residence in the State in accordance with Chapter IV of the Directive and enjoyed the rights thereunder. The Respondent's position is that this latter argument evolved in these proceedings and was not reflected in the application process.

45. It appears to this Court that the scope of the entitlement to retention of residence by a non-EU citizen following divorce from an EU citizen pursuant to Article 13(2) of Directive 2004/38/EC does not appear to have been the subject of any consideration by the Court of Justice of the European Union (CJEU) to date.

46. It is to be noted however that in *Lahyani v. Minister for Justice* [2013] IEHC 176 the High Court of Ireland (Clark J.) considered this issue. In that case Clark J. stated:

"Article 13 must be interpreted expansively to provide for the occasions where marriages and civil partnerships do not work out and where the Union worker simply deserts and quits the host state before matrimonial proceedings are contemplated".

Clark J. also stated:

"Once the divorce is finalised, working or self-sufficient non-EU spouses gain a personal right of residence under Article 13(2), irrespective of whether the Union citizen continues to reside and exercise free movement rights in the host state, in the same way that death and departure provisions apply to family members of the EU worker previously living and

working in the host state. Article 13 is a new departure in free movement rights which, when read with recital 15 to the Directive, is clearly intended to protect non-EU spouses from being obliged to leave the host state because their legal status in the host state has been altered by the dissolution of their marriages. The Article is clear - divorce obtained while the Union citizen is exercising free movement rights in the host state does not adversely affect the right of the non-EU spouse to reside in the host state, provided that the marriage has lasted for at least three years with at least one of those years in the host state before the divorce proceedings were commenced and provided that the non-EU spouse is not a burden on the state”.

47. However in the earlier case of *Shyllon v. Minister for Justice* [2010] IEHC 153 the High Court of Ireland (Herbert J.) stated in relation to this issue:

“The applicant has not pointed to any express provision in either Domestic Law or European Law enabling the separated non-national spouse of a Union Citizen, which Union Citizen no longer resides in and is employed or is self employed in the host Member State, to retain a right to reside in that host Member State until such time as a Decree of Divorce or a Nullity may be obtained”.

In *Shyllon* Herbert J. also stated:

“The purported rights contended for by the applicant, which would have the effect of transforming a consequential right into a personal right and, would involve a very material interference with the sovereign right of this Member State to control its own borders, could only, in my judgment be created by a clear and express legislative provisions, and could not arise by way of inference or by implication.”

48. In *Amos v. Secretary of State for the Home Department* [2011] 1 WLR 2952 the Court of Appeal of England and Wales found that the Directive meant that the EU national spouse must have been a worker or self employed (or otherwise satisfy the requirements of Article 7(1) of the Directive) at all times while residing in the United Kingdom until the divorce to satisfy the requirements of Article 13 of the Directive. Although that case related to the relevant conditions to be established for persons claiming to be entitled to permanent residence under the UK implementing legislation in respect of the Directive, it appears that the Court of Appeal’s judgment in *Amos* has since been interpreted and applied in England and Wales as a binding authority on the particular requirements for coming within the provisions of Article 13(2) of the Directive. Accordingly, to date at least, the Courts of England and Wales have declined to make an Article 267 reference to the Court of Justice of the European Union on the point arising, e.g., *Ahmed v. Secretary of State for the Home Department* [2013] UKUT 89.

49. In the submission of the Immigrant Council of Ireland, intervening as *amicus curiae*, the core common question for determination in these proceedings is how the provisions of Article 13(2) of the Directive are to be interpreted in the specific context of a departure by an EU citizen spouse or partner from the host country leading to divorce. If the position in England and Wales as in *Amos* and *Ahmed* is adopted, the Immigrant Council has submitted that, potentially in many cases, where the

separating EU national spouse returns to his or her own country, or departs for elsewhere, and the third country spouse is left behind, the 'safety net' of Article 13(2) may be frustrated by the free will of the departing spouse. It is contended that this level of personal dominion, resulting from the automatic ending, as from the moment of departure, of the protection extended by Article 13(2), appears inconsistent with the human dignity that the provision was designed to protect, as well as with its *sui generis* character as a particular safeguard, in cases of departure not otherwise governed by Article 12, for third country spouses and partners in circumstances of separation and divorce.

50. In so submitting, the Immigrant Council accepted that the entitlement could not be entirely open-ended. In that regard, this Court notes that the final provisions of Article 13(2) themselves provide for the conditions for the continuing enjoyment of the derivative and personal right. Notwithstanding that constraint, a potentially difficult question arises as to how, if the position in England and Wales is not correct, the Court might identify the temporal and/or other conditions necessary for the triggering of the Article 13(2) entitlement in the first instance.

51. At all events, the matter has led to divergent judgments of the High Court in Ireland in relation to the issue. That difficulty, coupled with the fact that the Court of Justice of the European Union has not pronounced on this issue, has prompted the High Court to refer certain questions pursuant to Article 267 TFEU.

52. The Applicants in the first two cases also make certain arguments with regard to the necessity for sufficient resources contained in Article 7(1)(b) of the Directive and argue that the requirement in this regard need not be limited to those resources that an EU citizen possesses but should also encompass the resources of their spouse (the family income/assets) so as to include EU citizens and their family members where the EU citizen chooses, as in the present case, to stay at home and rear a child.

53. The Respondent argues that the clear import and context of the requirement for sufficient resources contained in Article 7(1)(b) refers to the Union citizen's own resources and that this cannot have been intended to refer to situations where the Union citizen does not work and relies on the income of the third country national spouse. The Respondent in this regard further argues that the interpretation urged upon the Court in this regard would lead to abusive situations where Union citizens could simply work for a very limited period of time so as to confer a right to work on their third country national spouse.

54. The Respondent also argues in the proceedings that there is an implied obligation pursuant to the terms of the Directive for the Applicants to have communicated their material change of circumstances to the Respondent once the EU national spouse ceased economic activities and once the EU national spouse departed the host Member State. Whilst this obligation is not expressed in the Directive it is however stated in the Regulations (see Regulation 11(4)). The Applicants in Singh and Njume argue that this requirement is not provided for by the Directive. The Applicant in Aly points out that nowhere in the contested decision in his case was this issue referred to, and contends that it has no relevance to the issues to be determined in his case.

F. THE QUESTIONS REFERRED

Accordingly, pursuant to Article 267 TFEU the following questions are referred by the High Court of Ireland to the Court of Justice for its preliminary ruling:

(i) Where marriage involving EU and non-EU citizens ends in divorce obtained following departure of the EU citizen from a host Member State where EU rights were exercised by the EU citizen, and where Articles 7 and 13(2)(a) of Council Directive 2004/38/EC apply, does the non-EU citizen retain a right of residence in the host Member State thereafter? If the answer is 'no', does the non-EU citizen have a right of residence in the host Member State during the period before divorce following departure of the EU citizen from the host Member State?

(ii) Are the requirements of Article 7(1)(b) of Directive 2004/38/EC met where an EU citizen spouse claims to have sufficient resources within the meaning of Article 8(4) of the Directive partly on the basis of the resources of the non-EU citizen spouse?

(iii) If the answer to the second question is 'no', do persons such as the applicants have rights under EU law (apart from the Directive) to work in the host Member State in order to provide or contribute to 'sufficient resources' for the purposes of Article 7 of the Directive?"

4. As can be seen, the three cases sought to quash decisions denying retention of permission to remain in the State by non-E.U. nationals who had married E.U. nationals from other Member States and who had lived together in Ireland.

5. In each of the cases, the female non-national E.U. spouse ceased employment during the course of being present in the State. In each of the cases, there was marital breakdown. In each of the cases, the Union spouse departed the State and in each of the cases, there followed divorces obtained in other Member States of the Union.

6. In the *Aly* case, an application was made for retention of a right to remain following departure of the E.U. citizen spouse but prior to divorce but during the period of separation. That is the significant point of difference between the *Aly* case and the first two cases.

7. In each of the cases, decisions were given by the State that there was no right to retain a right of residence on the part of the non-E.U. national spouse in the circumstances of the cases. It is clear from the decisions that the Minister was of the view that the cessation of the exercise of E.U. treaty rights as evidenced by the departure of the E.U. citizen spouse triggered an end to the derivative rights of the non-E.U. spouse.

8. There is a suggestion in the decision making process that the Minister was of the view that the evidence of the non-exercise of E.U. treaty rights was available not just from the departure of the E.U. citizen from Ireland, but also from the cessation of work. The applicants say that officials expressed the view that cessation of work by the E.U. nationals indicated a cessation of exercise or entitlement to exercise E.U. treaty rights. The respondent submits that the evidence does not indicate any such mindset but that officials were entitled to conclude that E.U. treaty rights were not being exercised by the E.U. nationals where the only information supplied about the circumstances of the E.U. national was as to the fact that the E.U. national had ceased working in Ireland and had, thereafter, left Ireland and had then divorced/separated from the non-E.U. national remaining in Ireland.

9. There is a significant lack of clarity, even at this late stage, as to what the true

position of the State was with respect to that point. I think it is fair to say that the applicants in these proceedings did not come to court to litigate a complaint about an alleged view of the respondent that the exercise of E.U. treaty rights automatically ceased when the E.U. citizen ceased work. However, I do accept the suggestion advanced by the applicants that one could find an expression of that view, either reading between the lines or taking the lines together in the decision making process, as evidenced by the decision letters in the three cases. The Minister could not lawfully conclude that mere cessation of employment by an E.U. national establishes non-exercise of E.U. treaty rights and disentitles the E.U. national and her immediate family from being lawfully in the State.

10. It is important to consider that the order for reference in this case came about in circumstances where the parties agreed that such an order would be made. And the Court, which normally has the responsibility and the function of drafting the order for reference, requested the parties themselves to agree a draft in accordance with the rules of procedure of the Court of Justice. The parties presented versions of the reference which were largely similar. The Court made some adjustments to the draft and the parties agreed the text finally signed by this Court on 25th February, 2014.

11. The Rules of the Procedure of the E.C.J. require the reference to set out the reasons questions are referred to Luxembourg. Those reasons are set out in section E of the reference. The competing arguments of the parties as to the meaning, in particular, of art. 13(2)(a) of the Citizens Directive (Directive 2004/38/EC) is set out as the principal dispute between the parties.

12. As part of the reason for the order for reference, the Court refers to conflicting judgments of the Irish High Court on the question of the nature and extent of the retention of rights of non-E.U. citizen spouses following departure of Union citizen spouses and two cases are referred to. One is the case of *Lahyani v. Minister for Justice* [2013] IEHC 176. That is a decision dated 18th April, 2013, which would appear to strongly favour the view of the law as observed by the applicants. But it is also to be noted that the judgment dated 18th April, 2013 post-dates the institution of the proceedings being referred to in this decision.

13. The *Singh* proceedings were commenced on 11th February, 2013, the *Njume* proceedings were commenced on 18th October, 2012, and the *Aly* proceedings were commenced on 10th December, 2012. When the applications for retention of permission were made, they were not based on the authority of the High Court in support of the position sought to be advanced by the applicants. Indeed, the opposite might be said because as pointed out in the order for reference there is an earlier decision of the Irish High Court called *Shyllon v. Minister for Justice* [2010] IEHC 153, where Herbert J. said that:-

"The applicant has not pointed to any express provision in either Domestic Law or European Law enabling the separated non-national spouse of a Union Citizen, which Union Citizen no longer resides in and is employed or is self employed in the host Member State, to retain a right to reside in that host Member State until such time as a Decree of Divorce or a Nullity may be obtained."

14. Therefore, it would appear that the position adopted by the State when it refused the applications for the retention of right of residence was in accordance with the jurisprudence of the High Court at that time. In any event, by the time these three matters came through the list there were conflicting Irish decisions on the point of law.

15. There are three particular paragraphs of the reference which are of relevance to the

costs application. Paragraph 51 as set out says that:-

“At all events, the matter has led to divergent judgments of the High Court in Ireland in relation to the issue. That difficulty, coupled with the fact that the Court of Justice of the European Union has not pronounced on this issue, has prompted the High Court to refer certain questions pursuant to Article 267 TFEU.”

16. Paragraph 52 requires that the applicants in the first two cases make certain arguments with respect to the meaning of art. 7(1)(b) as follows:-

“The Applicants in the first two cases also make certain arguments with regard to the necessity for sufficient resources contained in Article 7(1)(b) of the Directive and argue that the requirement in this regard need not be limited to those resources that an EU citizen possesses but should also encompass the resources of their spouse (the family income/assets) so as to include EU citizens and their family members where the EU citizen chooses, as in the present case, to stay at home and rear a child.”

17. Paragraph 53 of the order for reference sets out what the respondent regarded as the proper meaning of art. 7(1)(b) of the Citizens Directive and the entitlement of a Union citizen to rely upon the resources and income of a non-Union citizen for the purposes of being art. 7 compliant and lawfully in the State:-

“The Respondent argues that the clear import and context of the requirement for sufficient resources contained in Article 7(1)(b) refers to the Union citizen’s own resources and that this cannot have been intended to refer to situations where the Union citizen does not work and relies on the income of the third country national spouse. The Respondent in this regard further argues that the interpretation urged upon the Court in this regard would lead to abusive situations where Union citizens could simply work for a very limited period of time so as to confer a right to work on their third country national spouse.”

18. It has been strongly suggested that the State has changed its view in respect of that matter not just in the course of the proceedings but also from the date upon which it took decisions in relation to these cases. In any event, Mr. Conlan Smyth (S.C.) for the State concedes that the issue of the proper meaning of art. 7 was referred to the Court of Justice on the State’s initiative and I think that is correct. Any proper look back over these three cases would indicate that the applicants were mainly or exclusively concerned with the meaning of art. 13 of the Directive.

19. The applicants drew attention to the fact that the case was decided by a Grand Chamber of the Court of Justice of the European Union.

20. I note that in the second paragraph of her opinion the Advocate General says:-

“The question of how those provisions are to be applied in circumstances such as those of the main proceedings is still unresolved in the Court’s case-law.”

21. Therefore, the background to the consideration by the E.C.J. of the questions referred by the Court in Ireland is that:-

1. There were conflicting Irish judgments as to the proper meaning of art. 13 of the Citizens Directive.

2. There was no decision by the Court of Justice on the meaning of art. 13 and the circumstances in which art. 13 applied, according to the Advocate General, were unresolved.

22. This Court is aware that there are circumstances in which the Court of Justice is entitled to send questions back to a referring court with a curt decision saying; “please

see decision 'X' for your answer." In other words, where a court sends a question the answer to which is perfectly clear the Court can refuse to answer the question and simply refer to decided principles, provisions of regulations or directives, or case law. That of course is not what happened in this case. There was full consideration by the Court of Justice of the questions referred.

23. In its decision the E.C.J. notes that observations were submitted to it by the Immigrant Council of Ireland. This Court permitted the Immigrant Council to participate in the proceedings and in the reference on an *amicus curiae* basis; that being a fairly unusual step which the Court allows in circumstances where it believes there are important questions which go beyond the narrow interests of parties litigating matters.

24. The E.C.J. also notes that it received submissions from the Danish Government, the Greek Government, the Spanish Government, the Polish Government, the Government of the United Kingdom and of course by the European Commission. It is not in every case that the European Commission will make observations although that of course is common. The Court considered the various questions and at paras. 58, 61, 62 and 66 of that judgment the Court gives an interpretation of art. 13 of the Directive which was the first time it had pronounced on the precise meaning of art. 13 in the circumstances which applied in these cases and answered the first referred question contrary to the interests of the applicants. The ratio of the case is that the non-E.U. nationals' rights are limited and contingent on the exercise of E.U. treaty rights in the host State by the E.U. citizen and that much is clarified by the decision:-

"58 It follows that, where a Union citizen in a situation such as that of the spouses of the applicants in the main proceedings leaves the host Member State and settles in another Member State or in a third country, the spouse of that Union citizen who is a third-country national no longer meets the conditions for enjoying a right of residence in the host Member State under Article 7(2) of Directive 2004/38. It must, however, be examined whether, and under what conditions, that spouse can claim a right of residence on the basis of Article 13(2)(a) of Directive 2004/38 where the departure of the Union citizen is followed by a divorce.

61 The reference in that provision to, first, 'the host Member State', which is defined in Article 2(3) of Directive 2004/38 only by reference to the exercise of the Union citizen's right of free movement and residence, and, secondly, 'initiation of the divorce ... proceedings' necessarily implies that the right of residence of the Union citizen's spouse who is a third-country national can be retained on the basis of Article 13(2)(a) of Directive 2004/38 only if the Member State in which that national resides is the 'host Member State' within the meaning of Article 2(3) of Directive 2004/38 on the date of commencement of the divorce proceedings.

62 That is not the case, however, if, before the commencement of those proceedings, the Union citizen leaves the Member State in which his spouse resides for the purpose of settling in another Member State or a third country. In that event the third-country national's derived right of residence based on Article 7(2) of Directive 2004/38 has come to an end with the departure of the Union citizen and can therefore no longer be retained on the basis of Article 13(2)(a) of that directive.....

66 Consequently, it is clear that the spouse who is a Union citizen of a third-country national must reside in the host Member State, in accordance with Article 7(1) of Directive 2004/38, up to the date of commencement of the divorce proceedings for that third-country national to be able to claim the retention of his right of residence in that Member

State on the basis of Article 13(2) of the directive.”

25. The second question as to whether a non-E.U. national can contribute to the resources of the E.U. citizen for the purposes of complying with art. 7 conditions permitting the presence of the E.U. national in the host State was answered. As indicated above there appears to be a difference in the position as to the meaning of art. 7(1)(b) adopted by the State as between the moment it agreed the order for reference and the time it made submissions to the Court of Justice.

26. Following the decision of the Court of Justice the matter has come back before this Court. In respect of the first two cases where substantive orders are sought, I am compelled by the answer given by the E.C.J. to question one to refuse orders of *certiorari*. Based on the answer given to the second question referred which accorded with the consistent position of the applicants, I invited the applicants (in the first two cases) to suggest an order which the Court might make relating to their rights and to the decisions which were taken. I was not satisfied that the draft orders presented to the Court in any way assisted the applicants in those cases or related in any way to the real dispute which they brought to the Court when leave was granted in those cases. So I am refusing to make any substantive orders in respect of the first two cases. I note that in the third case, the *Aly* case, no positive orders of any sort were requested by Mr. Lynn (S.C.) on behalf of the applicant.

27. The question which now arises relates to the costs of the cases. Order 99 of the Rules of the Superior Courts provides that costs follow the event. According to the well known decision of Clarke J. in *Veolia Water UK Plc & ors v. Fingal County Council* [2006] IEHC 240 the Court is entitled to make different types of cost orders as the circumstances and the justice of the case merits, and in certain cases the Court may identify more than one event if that is appropriate. It seems to me that in relation to what I refer to as the domestic element of the proceedings, that is the application for leave to seek judicial review and anything connected with the proceedings in the Irish High Court to quash the decisions in suit, the applicants have fundamentally failed at every stage and could not be entitled to any order as to costs in relation to the purely domestic nature of the proceedings.

28. I have come to the view that separate considerations apply in respect of the part of the proceedings connected with the reference of questions to the Court in Luxembourg. There is no doubt that there was a lack of clarity as to the precise meaning of art. 13 of the Directive. In the words of the Advocate General, the proper meaning or application of the Directive in the circumstances of these cases was unresolved. Secondly, there was a confusion or a difficulty caused by the existence of conflicting judgments of the Irish High Court as to what art. 13(2) meant and it is clear that the executive arm of the State and the judicial arm of the State took different views as to the proper meaning of art. 13 of the Directive. It is also clear that the State itself adjusted its understanding of the meaning of art. 7 of the Directive during the course of these proceedings.

29. The Court has to decide whether there are special circumstances in the case which justify departing from the default rule that costs follow the event. I have indicated that the Court is entitled to say that there is more than one event in the cases. The decision I take on these applications for costs is that I am satisfied that it is appropriate to regard the outcome of the order for reference to the Court in Luxembourg as an event which is discrete and separate from the purely domestic aspect of the proceedings. But in a sense that does not resolve the question as to costs because even if I am satisfied that it is a discrete event, for the most part the applicants were unsuccessful in that event. But it must be emphasised that they did enjoy considerable success which respect to the manner in which they dealt with the second question referred by this Court and though ultimately the State adopted the same position as the applicants, it is

a position which was arrived at after some shifting of the sands.

30. The rules in respect of the entitlement of parties who are unsuccessful to costs have been comprehensively set out in a divisional decision of the High Court called *Collins v. Minister for Finance* [2014] IEHC 79. Amongst the principles which it is appropriate to take account of is whether or not issues touched upon sensitive aspects of the human condition. I do not regard that the right of retention of residence is such an issue. Although it is a personal and important matter, it is not one of the sort of issues that is contemplated under the sensitive aspects of the human condition rubric.

31. The second category of cases which might attract positive orders notwithstanding a negative result involves cases of conspicuous novelty where the issues touched upon aspects of the separation of powers, for example. On a careful review of the issues in this case, I do not regard the issues as being of that order such as the issues concerning foreign and defence policy pursued in *Horgan v. Ireland* [2003] IEHC 64 or the issue of the rules surrounding impeachment of judges in *Curtain v. Dáil Éireann* [2006] I.E.S.C. 27. That level of novelty is not achieved by the dispute as to the meaning of art. 13(2) in these cases.

32. Another rubric under which a negative outcome might induce a positive costs result is cases where the issue was one of far reaching importance in an area of law with general application. And another one is cases where the decision has clarified an otherwise obscure unexplored area of the law.

33. It seems to me that those two headings avail the applicants here. I believe that the decision of the Court of Justice in respect of the true meaning of art. 13(2) has far reaching importance. I believe that the importance of the legal issue in the cases is underlined by the fact that a Grand Chamber of the E.C.J. was empanelled and that so many countries decided to intervene. I note that Mr. Conlon Smyth (S.C.) said that not too many cases in Ireland are queuing up waiting to be determined by this issue (apparently only twelve such cases). But there can be no doubt but that the nature and extent of free movement rights is a hot legal and political issue which in the neighbouring jurisdictions is causing very wide debate and on one interpretation has led to the referendum proposed to be had in a few months time as to whether Britain should leave the Union. One of the most controversial issues in the Union is the nature and extent of free movement rights acquired by non-E.U. citizens - who acquires them, how long they last, grandfathering aspects of them, who can you bring with you and such matters. The issues are of far reaching importance and touch upon the nature of the Union itself.

34. I am satisfied that the decision of the E.C.J. has clarified an unexplored area of law. The Court of Justice itself had not addressed it; Irish courts had addressed it giving conflicting decisions. So in all of those circumstances, my view is that notwithstanding the lack of success of the applicants on the main issue referred, it seems appropriate that I should award the applicants the costs of the reference only, to include the costs of preparing the order for reference and I will invite the parties to address me on the exact nature of that because it might need some clarification given that three applicants cooperated to produce one single reference and I am not sure that each party could be entitled to the full cost of drafting as if they had drafted one separate reference each.

35. So, therefore, I am refusing the applicants any costs in relation to any purely domestic element of these proceedings. I am granting the applicants all of the costs in relation to the order for reference. And I am declining the respondent's application for costs. I refuse the respondent costs to which she would normally be entitled in view of her success both in the E.C.J. and in Ireland because to do so would unwind the effect of

the costs order I have made in respect of the reference to the E.C.J..

(1) In Latvia divorce can be obtained if the spouses have been living separately for at least three years, but it may be dissolved if they have been living together for less than three years, inter alia, when both spouses claim for divorce or one spouse agrees with the other's claim for divorce. See information on EC website on the conditions for grant of divorce in the various member states:

http://ec.europa.eu/civiljustice/divorce/divorce_gen_en.htm

(2) It should be noted that under Article 41.3.2 of the Constitution of Ireland, and section 5 of the implementing legislation, the Family Law (Divorce) Act, 1996, divorce cannot be decreed by an Irish court unless it is satisfied, inter alia, that the spouses have lived separated and apart from one another for a period of, or periods amounting to, at least four years during the previous five years. Accordingly the spouses in this case would not have been able to seek a decree of divorce from an Irish court until February, 2014 at the earliest.

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