

THE HIGH COURT

2018 No. 994 JR

Between:

HANY HEMIDA

Applicant

– and –

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 22nd May, 2019.

1. Mr Hemida, an Egyptian national, lives and works in Ireland. He is separated from his EU-national wife (Ms C) who lives here, appears last to have worked here in 2013 and receives welfare payments, including a 'jobseeker's allowance'. By review decision of 05.10.2018, the respondent revoked Mr Hemida's residence card on the basis that Ms C is not exercising EU Treaty rights consistent with the EC (Free Movement of Persons) Regulations 2015. (It appears that any present right of Ms C to be here is under reg.6(3)(c) of same).

2. Under the Social Welfare Consolidation Act 2005, persons with a right to reside in Ireland – and under that Act (see ss.141, 246) one must be habitually and lawfully here to receive jobseeker's allowance – include a person with "*the right under the...*[2015] *Regulations...to enter and reside in the State or...deemed* [thereunder]...*to be lawfully resident*". It is not suggested that Ms C has been so deemed. So the Department of Social Protection (DSP) must consider that Ms C has the right to be here under reg.6(3)(c); by contrast, the respondent considers that Ms C is not so entitled. The respondent may in principle reach this contrary conclusion. But to do so properly, he must reason through (and has not reasoned through) how Mr Hemida does not enjoy a *derivative* right of residence under the Regulations, in circumstances where the DSP has apparently concluded that Ms C (with whom it will have liaised directly) enjoys a *primary* right of residence thereunder. The respondent cannot side-step, ignore, or close his eyes to, the 'elephant in the room' that is presented by the DSP's stance; he must confront it head-on. In failing to do so, the respondent's review decision appears unreasonable, even irrational.

3. As to the respondent's statement in the review decision that "*Although you maintain that your wife is exercising her EU Treaty Rights in the State through involuntary unemployment, you have not provided any documentation to support this assertion*", the court respectfully does not see what further documentation Mr Hemida could provide: he is separated from Ms C, appears to have little contact with her and, if he contacted the DSP, would undoubtedly (and rightly) be told that the DSP will not discuss Ms C's social welfare provision with him. Though an applicant must make the best application that he can, he cannot properly be expected to do the impracticable.

4. *Abouheikal v. MJE* [2019] IEHC 124 is not on point. There, (i) benefits were not claimed at the date of the review decision, and (ii) the DSP was perceived by the court to have acted erroneously. Here (a) the benefits continued to be claimed, and (b) the court is not in a position to adjudge whether or not the DSP has acted correctly. (Nor, in passing, is there any presumption in favour of the reasoning of the Minister versus that of the DSP, or *vice versa*).

5. Given the foregoing, an order of *certiorari* will issue.