THE HIGH COURT

[2015 No. 67 J.R.]

BETWEEN

A. R. Q.

AND E. C.

APPLICANTS

AND

MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 11th day of March, 2016

1. The first named applicant is a Pakistani national who is married to the second named applicant, a national of the United Kingdom. The applicants entered into an Islamic marriage on 4th September, 2013 and a civil marriage on 16th January, 2014.

2. Having arrived in the State sometime in 2012, the second named applicant took up employment on 11th September 2013 and it is not disputed that she worked for Supermacs Ltd. until she became involuntarily unemployed on 16th February 2014.

3. On 4th November, 2013 an application was made for a residence card by way of Form EU1 for the first named applicant based on his status as a family member of an EU citizen who was working in the State. In support of the application, the first named applicant furnished the applicants' passports, an Islamic marriage certificate which documented that the applicants underwent an Islamic ceremony of marriage in Dublin on 4th September, 2013, a letter from the Civil Registration Office dated 11th September, 2013 which documented the receipt of an application for an intended civil marriage on 16th January, 2014 letters from ESB Networks and Permanent TSB evidencing the applicants' residence in the State and a letter from Supermacs Ireland Ltd. of 24th September 2013 together with a Tax Certificate in respect of the second named applicant, evidencing her employment in the State.

4. On 27th November 2013, the respondent requested the applicants' civil marriage certificate, when available, and as "evidence of the current activities of the EU citizen in the State" a "signed contract of employment" and "two recent payslips" in respect of the second named applicant's employment, together with documentary evidence of how the applicants' accommodation needs in the State were being met.

5. The first named applicant was advised that any change of circumstances, including a change in the activities of the EU citizen, were to be advised to the respondent. The due date given by the respondent for a decision on the application was 3rd May, 2014.

6. By separate letter of the same date, the respondent granted the first named applicant temporary permission to reside in the State pending the determination of his application. It is common case that no further information was provided by the applicants by the time the refusal of the application issued on 29th April, 2014 save that, according to the refusal decision, the respondent through contact with the second named applicant's previous employer became aware that her employment ceased in February, 2014.

7. The basis of the refusal decision which issued on 19th April, 2014 was essentially that the first named applicant had not submitted satisfactory evidence that he was a family member of an EU citizen in accordance with Regulation 2 (1) of the 2006 Regulations, that he did not submit the documentation which had been requested on 27th November, 2013 and that based on the information which the respondent had obtained from the second named applicant's erstwhile employer (information which had not been advised to the respondent by the applicants), the respondent was not satisfied that the second named applicant was exercising her EU Treaty rights through employment, self-employment, the pursuit of a course of study, involuntary unemployment or the possession of sufficient resources in accordance with the requirements of Regulation 6 (2) (a).

8. The first named applicant exercised his entitlement to seek a review of the decision and on 9th May, 2014 submitted an application by way of Form EU4. Included with this application were details of the first named applicant's new address together with a signed tenancy agreement. Form EU4 designated the second named applicant as someone in "involuntary unemployment" and that she was registered with FÁS as a job seeker. Details of the second named applicant's PAYE/USC balancing statement (P21) for the tax year 2013 were submitted together with her P60 for the year ended 2013. The application also included a P45 in respect of the first named applicant.

9. By letter of 19th May, 2014, the respondent sought the applicant's original marriage certificate and with regard to the second named applicant's involuntary unemployment a current letter from the Department of Social Protection detailing claims made to-date, a letter from the Employment Services Office acknowledging registration as a job seeker, a letter from the second named applicant's previous employer outlining the circumstances of the cessation of employment (namely that the EU citizen was made involuntarily unemployed) and "evidence of employment in the State covering a period in excess of 12 months". The first named applicant was advised to note that "in circumstances where an EU citizen's employment records in the State cover less than 12 months, applicant's right to reside in the State ceases 6 months after the date of involuntary cessation of EU citizen's last employment". In respect of the applicants' place of residence in the State, they were requested to provide letters of registration of tenancy from the PRTB (when available) and utility bills. The first named applicant was reminded that any change of circumstances, including a change in the circumstances of the second named applicant, was to be advised to the respondent.

10. By separate letter of 19th May, 2014 the first named applicant was granted temporary residence pending the outcome of the review application. On 17th September 2014, the respondent sent a follow up letter reminding the first named applicant that the

information sought on 19th May, 2014 remained outstanding and again advising that any change of circumstances, including those of the second named applicant, should be advised to the respondent.

11. On 3rd November, 2014, the first named applicant's solicitor resubmitted the second named applicant's P60 for the year ended 2013 and furnished the applicants' original civil marriage certificate and correspondence dated 23rd May, 2013 from "Intreo" and the Department of Social Protection respectively which detailed that the second named applicant was a job seeker and in receipt of a job seekers' allowance. The letter from the applicants' solicitors also advised:-

"We are instructed that [the second named applicant] is currently 6 months pregnant. We are further instructed that she is currently experiencing mental health issues and is attending a psychiatrist. We intend to submit further evidence of this shortly."

12. This correspondence was acknowledged by letter from the respondent dated 7th November, 2014. This letter again advised of any further documentation which the first named applicant wished the respondent to consider was to be submitted within 10 days of the respondent's letter and in this regard the applicant was referred to the "document lists" in previous correspondence and advised that "no further requests for documentation will issue from this office."

13. No further correspondence issued from the applicants prior to the issue of the refusal decision which is the subject of the within proceedings.

14. The refusal decision of 3rd December 2014 which issued to the first named applicant reads as follows:

> "I am directed by the Minister for Justice and Equality to refer to your request for a review of the decision dated 29/04/2014 refusing your application for a residence card received under the provisions of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 (the "Regulations") and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the "Directive").
>
> Your application has been reviewed in accordance with the provisions of the Directive and Regulation 21 (sic) the Regulations.
>
> I am to inform you the review of your application has not been successful, as you do not fulfil the relevant conditions set out in the Regulations and the Directive. The decision to refuse your application dated 29/04/2014 is affirmed for the following reasons:
>
> You have stated on your EU 4 Review Application Form that your EU citizen spouse…is exercising her right of free movement in the State in accordance with Regulation 6 (2) of the Regulations through involuntary unemployment following the cessation of her employment with Supermacs Ltd. It is noted however that you have not provided a letter from her former employer indicating the circumstances under which her employment ceased. It is also noted that from the information provided by you that [the second named applicant] has been in employment in the State for less than one year.
>
> Regulation 6 (2) (c) (iii) of the Regulations provide for circumstances in which an EU citizen in which an EU citizen is involuntarily unemployed after completing a fixed term contract of less than a year after working in the State for less than a year. However, this is subject to the provisions of Regulation 6 (2) (d) of the Regulations which states the right to remain in the State referred to in regulation 6 (2) (c) (iii) of the Regulations on the basis of involuntary unemployment expires six months after the cessation of the EU citizen's employment unless the EU citizen enters employment within that period. As [the second named applicant] has worked in the State for less than one year and has not re-entered employment within six months after the cessation of her previous employment she does not retain the status of a worker in accordance with the provisions of Regulation 6 (2) (c) (iii) and 6 (2)(d) of the Regulations.
>
> You have not provided documentary evidence to indicate that [the second named applicant] is exercising her right of free movement in this State in accordance with Regulation 6 (2) of the Regulations through employment, involuntary unemployment, self employment, residing with sufficient resources, or the pursuit of a course of study. Therefore, you are not entitled to a residence card under Regulation 6 (2) (b) of the Regulations.
>
> The decision to refuse you a residence card for a family member of a Union citizen does not interfere with any rights which he may have under the Constitution or Article 8 of the European Convention on Human Rights. In any subsequent proposed decision where such interference may arise, please note that full and proper consideration will be given to these rights.
>
> The review of your EU Treaty Rights application is now closed. The residence permission granted to you pending consideration of your review application will expire on 11/01/2015 and will not be renewed. Your file will then be forwarded to the Removals Unit for consideration under Regulation 20 of the Regulations…"

15. The consideration of file noted, *inter alia*, that the applicants had established a sufficient family relationship and that the second named applicant was no longer in employment at the time the original decision was made. It was noted that the employment was stated to have commenced on 11th September, 2013 and that according to contact made by the respondent with Supermacs on 28th April, 2014 the employment ceased on 16th February, 2014. The file recorded that the applicant "did not notify the Minister of this change in circumstance and no further evidence of exercise of rights was submitted prior to a decision being made." The documents submitted for the purposes of the review application were noted together with the first named applicant's submission that the second named applicant was exercising her rights of free movement in the State by way of involuntary unemployment. The consideration of file also noted :

> "The most recent correspondence from the applicant's legal representatives indicates that [the second named applicant] is 6 months pregnant and also that she is currently experiencing mental health issues although no documentation has been submitted in respect of either circumstance. The applicant was advised by letter from this office dated 07/11/2014 to submit any further documentation which he wishes this office to consider within 10 working days of the date of that letter however nothing further has been received from him."

16. It went on to state:

> "I am not satisfied that [the second named applicant] can be said to be exercising her EU Treaty Rights in the State and this case falls to be considered in accordance with Regulations 6 (2) (c) (iii) and 6 (2) (d) as [the second named applicant] has worked for less than one year in the State and has not re-entered employment within 6 months after the cessation of her previous employment. No evidence has been tendered of exercise of rights by any other means in accordance with Regulations 6 (2) of the Regulations therefore the applicant is not entitled to reside in the State under EU Treaty Rights."

17. Leave was granted to challenge the decision by order of MacEochaidh J. on 23rd February, 2015.

18. The primary reliefs sought by the applicant are:

> "1. Certiorari by way of an application for judicial review to quash the decision of the respondent dated the 3rd of December 2014 to refuse the first applicant's review application for a Residence Card pursuant to the European Communities (Free Movement of Persons) Regulations 2006 and 2008 and/or Council Directive 2004/38/EC.
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> 2. (A) A Declaration that the first applicant retains her status as a worker for a reasonable period following the birth of the applicants' child and the second applicant is entitled to reside and work for as long as she retains the status as a worker; and/or (B) a Declaration that the first applicant is entitled to reside and work in the State until such time as the respondent lawfully refuses to issue him with a residence card.
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> 3. A Declaration by way of an application for judicial review that Regulation 6 (2) (d) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 is incompatible with Article 7 of Council Directive 2004/38/EC and/or Article 45 of the Treaty on the functioning of the European Union."

19. The grounds upon which *certiorari* is sought are:

> "(i). By failing to have any, or any adequate, regard to the fact that the second applicant was 7 months pregnant at the time of the decision refusing the said application, the respondent was disproportionately interfered with the second applicant's right of residence in the State contrary to Regulation 6 (2) of the Regulations, Article 7 of the Directive and/or Article 45 TFEU.
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> (ii). In the alternative, by refusing the residence card without first permitting the second applicant a reasonable period of time to take up employment following the birth of her child, the respondent has disproportionately interfered with the second applicant's right of residence in the State and/or has acted irrationally and/or disproportionately and/or in breach of Regulation 6 (2) of the Regulations, Article 7 of the Directive and/or Article 45 TFEU.
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> (iii). By imposing an obligation on the second applicant to return to work during her pregnancy in order to retain her status as a worker under European Union law, the respondent has acted irrationally and/or disproportionately and/or in breach of Regulation 6 (2) of the Regulations, Article 7 of the Directive and/or Article 45 TFEU.
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> (iv). By failing to consider the individual circumstances of the second applicant in determining whether she retained her status as a worker under EU law and, in particular, the fact that she was 7 months pregnant at the time of the said refusal, the respondent has acted irrationally and/or disproportionately and/or in breach of Regulation 6 (2) of the Regulations, Article 7 of the Directive and/or Article 45 TFEU.
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> (v). By failing to consider representations made in support of the review application and, in particular, the pregnancy of the second applicant, and/or to provide reasons as to why those representations were rejected the respondent has acted in breach of the principle of effectiveness of EU law and/or contrary to the principles of Fair Procedures and Constitutional and Natural Justice."

20. The declaratory relief sought at para. D.2 (A) and (B) is grounded as follows:

> "(vi). In the premises, the first applicant retains her (sic) right of residence pursuant to Article 45 TFEU and Article 7 of the Directive. Further, or in the alternative, the first applicant is a person who had submitted a valid Form EU1 application which the respondent has not yet lawfully refused. By reason of the foregoing, the first applicant enjoys a right to reside and take up employment in the state pursuant to Article 7 of the Directive and Regulation 6 of the Regulations."

21. The declaratory relief at D.3 is grounded as follows:

> "(vii). By providing that a Union citizen automatically loses their status as a worker under EU law if they fail to enter into employment within six months of the cessation of their employment, Regulation 6 (2) (c) (iii) of the Regulations is incompatible with Article 7 of the Directive and/or Article 5 TFEU."

22. In the affidavit of Aengus Casey sworn on 8th May 2015 verifying the statement of opposition filed on behalf of the respondent, it is averred, *inter alia*, as follows:

> "As appears from paragraph 9 of the affidavit sworn herein by the first named applicant, the Minister refused the review and so notified the first named applicant by letter dated 3rd December 2014. The basis for the refusal was set out in the said letter. The Minister found that the first named applicant did not fulfil the conditions of Council Directive 2004/28/EC and the European Communities (Free Movement of Persons) Regulations 2006 and 2008, that he had failed to provide evidence that the second named applicant was exercising her right of free movement in accordance with Regulation 6 (2) of the Regulations or of the circumstances in the second named applicant had ceased working. On the basis of the information provided to the Minister, it was evident that the second named applicant had been working within the State for a period of less than one year and that she had not re-entered employment within six months of the date on which she ceased her previous employment."

The relevant law

23. It is apposite at this juncture to set out the relevant legal framework under which the issues which are before this court arise:

Regulation 6 (Residence in the State) of the European Communities (Free Movement of Persons (No.2) Regulations 2006 provides:

6. (1) Subject to Regulation 20, a person to whom these Regulations apply may reside in the State for up to 3 months on condition that he or she –

(a) (i) where the person is a Union citizen, holds a valid national identity card or passport,

(ii) where the person is not a Union citizen, holds a valid passport, and

(b) does not become an unreasonable burden on the social welfare system of the State.

(2) (a) Subject to Regulation 20, a Union citizen may reside in the State for a period longer than 3 months if he or she –

(i) is in employment or is self-employed in the State,

(ii) has sufficient resources to support himself or herself, his or her spouse and any accompanying dependants, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants,

(iii) is enrolled in an educational establishment in the State for the principal purpose of following a course of study there, including a vocational training course, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants, or

(iv) subject to paragraph (3), is a family member accompanying or joining a Union citizen who satisfies one or more of the conditions referred to in clause (i), (ii) or (iii).

(b) Subject to paragraph (3), a family member of a Union citizen who is not a national of a Member State shall be entitled to reside in the State for more than 3 months where the Minister is satisfied that the Union citizen concerned satisfies one or more of the conditions referred to in subparagraph (a)(i), (ii) or (iii).

(c) Subject to Regulation 20, a person to whom subparagraph (a)(i) applies may remain in the State on cessation of the activity referred to in that subparagraph if –

(i) he or she is temporarily unable to work as the result of an illness or accident,

(ii) he or she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with a relevant office of the Department of Social and Family Affairs and FÁS,

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

(iv) except where he or she is involuntarily unemployed, he or she takes up vocational training related to the previous employment.

(d) In a case to which subparagraph (c)(iii) applies, the right to remain referred to in paragraph (c) shall expire 6 months after the cessation of the activity concerned unless the person concerned enters into employment within that period.

(3) (a) Paragraph (2)(a)(iv) and (2)(b) shall operate to allow only a qualifying family member of a Union citizen to whom paragraph (2)(a)(iii) applies to remain in the State.

(b) Without prejudice to subparagraph (a), the Minister may, following an extensive examination of the personal circumstances of the person concerned, permit a permitted family member of a Union citizen to remain in the State.

(c) Where the Minister does not permit a person to remain in the State pursuant to subparagraph (b), he or she shall notify the person of the reasons for the decision."

24. Regulation 6 gives effect to Article 7 of the Directive 2004/38/EC. Article 7 provides:

"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).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

The submissions advanced on behalf of the applicants

25. It is submitted that the right of free movement guaranteed by Articles 20 and 21 TFEU is a fundamental right in respect of which the ECJ has said that it must not be interpreted restrictively. Furthermore, the right must be effective and unnecessary administrative obstacles which are not justified cannot frustrate the exercise of the right. The grant of a residency card is declaratory in nature, as set out by the ECJ; it is a recognition of the right by the Member State and not the conferring of a right. In this regard, counsel relies on the decision of Cooke J. in *Lamasz v. Minister for Justice* [2011] IEHC 50 and *Desci v. Minister for Justice* [2010] IEHC 342.

26. Article 45 TFEU governs the freedom of movement of workers within the EU. Council Directive 2004/38/EC ("The Directive") consolidates and strengthens the right of free movement. Pursuant to the Directive, an EU citizen may move to a Member State and remain there for three months without restriction. For a stay longer than three months up to five years, the Directive provides conditions for residency namely that an EU citizen must be a worker or self-employed, a student or have sufficient resources to provide for themselves. Moreover, if a person who exercises their right of free movement is a worker and becomes involuntarily unemployed, they retain the status of worker provided that the person was employed for more than one year and has signed on for work.

27. If an EU citizen becomes involuntarily unemployed and has worked for less than one year, their status as worker is retained for at least a minimum of six months. This is an important issue in the present case. It is submitted the six months period is the minimum safeguard under the Directive and that the status of worker can be retained for longer than six months even if an EU citizen has worked less than a year and becomes involuntarily unemployed and is looking for work. This is the position of the second named applicant.

28. Article 7 of the Directive is a minimum safeguard and not exhaustive. However the manner in which Article 7 of the Directive has been transposed into Irish law, namely by Regulation 6 of the 2006 Regulations (as amended) is incorrect and thus this is an important legal issue to be determined in these proceedings.

29. With regard to Regulation 6 (2) (a), the manner of the transposition of the Directive means that the second named applicant has to satisfy either Regulation 6 (2) (a) (i) or Regulation 6 (2) (a) (ii) or Regulation 6 (2) (a) (iii) and if one or other of those provisions is satisfied, the first named applicant, as a non-national family member is entitled to a residence card pursuant to Regulation 6 (2) (b).

30. Effectively, the respondent concluded that as the second named applicant worked for less than a year and became involuntarily unemployed she had only a six month period under the Regulations to find employment, pursuant to Reg.6(2)(c)(iii) and Reg.6(2)(d). The respondent's position is that as she failed to re-enter employment within these six months she did not therefore qualify under the Regulations and accordingly the first named applicant did not qualify for a residence card.

31. It is submitted that the respondent the applied a restrictive interpretation of the Directive in making the six months window provided for in the Directive a finite one. The respondent failed to have regard to or consider that the second named applicant retained the status of worker during and after her pregnancy.

32. Article 7 (3) (c) provides that the status of worker shall be retained for "no less than six months". When compared to Article 7 (3) (c), Regulation 6 (2) (d) of the 2006 Regulations is restrictive in that it states that the right "shall expire" six months after the cessation of work unless a person becomes employed again within that period. Yet, under Article 7 (3) (c) the reference to six months is not exhaustive or finite.

33. It would appear that the framing of Regulation 6 (2) (d) binds the respondent so that she cannot consider the possibility that the second named applicant retained the status of worker longer than six months. Accordingly, counsel submits that there has been an incorrect transposition of Article 7 (3) (c) into Irish law.

34. Thus, insofar as the respondent, in the refusal decision of 3rd December, 2012, relies on Regulation 6 (2) (c) (iii) as a basis for the refusal of the residence card for the first named applicant, that decision is erroneous as Regulation 6 (2) (d) is in conflict with Article 7 (3) (c) of the Directive. It is submitted that although having become involuntarily unemployed in circumstances where she

worked for less than a year, the second named applicant retained the status of worker due to her pregnancy, once she was looking for work and thus her circumstances fell within the ambit of Art.7(3)(c) of the Directive, if not the 2006 Regulations.

35. In support of the submission that there has been an incorrect transposition of Art.7(3)(c) into Irish law counsel relies on the decision of the ECJ in *Jobcenter Berlin v. Alimanovic* [2015] ECR and placed particular reliance on what the ECJ stated at paras. 56 – 57 of the decision, as follows:

> "56. As regards the question whether a right of residence under Directive 2004/38 might be established on the basis of Article 14(4)(b) thereof for Union citizens in the situation of Ms Alimanovic and her daughter Sonita, that provision stipulates that Union citizens who have entered the territory of the host Member State in order to seek employment may not be expelled for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.
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> 57 Although, according to the referring court, Ms Alimanovic and her daughter Sonita may rely on that provision to establish a right of residence even after the expiry of the period referred to in Article 7(3)(c) of Directive 2004/38, for a period, covered by Article 14(4)(b) thereof, which entitles them to equal treatment with the nationals of the host Member State so far as access to social assistance is concerned, it must nevertheless be observed that, in such a case, the host Member State may rely on the derogation in Article 24(2) of that directive in order not to grant that citizen the social assistance sought."

While the factual matrix and relevant considerations in *Alimanovic* is not on all fours with the present case, it is submitted that the ruling made by the ECJ in that case is to the effect that the six months provision in Article 7 (3) (c) of the Directive may well be extended if an EU citizen continues to look for work.

36. The respondent was advised of the second named applicant's pregnancy on 3rd November, 2014. The first issue that arises is that further to that information there was no request from the respondent for further details in relation thereto. It was however incumbent on the respondent to determine the application for a residence card in light of the second named applicant's pregnancy.

The second aspect is the issue of the pregnancy itself and the second named applicant's status during her pregnancy and during the postnatal period.

37. In the refusal decision there was no consideration of or account taken of the second named applicant's pregnancy or the impact of this on her status as a worker. As with the letter of refusal which issued to the first named applicant on 3rd December, 2012 it was noteworthy that the decision of the Review Officer of the same date did not advert to the second named applicant's pregnancy. It could not be said that the applicants had failed to respond to a request for further information in relation to the second named applicant's pregnancy as further to the respondent having been advised of the pregnancy on 3rd November, 2014 the respondent did not seek any further details in relation thereto. While it was noted in the examination of file dated 26th of November, 2014 that the second named applicant was pregnant and experiencing mental health issues and that no further documentation was submitted in respect of either circumstance that was in the context where the respondent did not seek any further details in relation to either circumstance. This failure has to be contrasted to the requests which the respondent made of the applicants in relation to a myriad of other matters. In the absence of any similar request for further details regarding the pregnancy, the applicants had no reason to believe that further documentation was required in this regard.

38. Thus, it would appear that the second named applicant's pregnancy was not considered because there was no documentary evidence in respect of it before the respondent. If that is the case it is fundamentally unfair given that no documentation was sought by the respondent in circumstances where documentation regarding other matters was sought. This unfairness has to be viewed in the context where the onus is on the respondent to seek such documentation. That being said, it is however difficult to conceive whether the second named applicant's pregnancy would have been considered in any event given the restrictive manner in which Article 7 (3) (c) has been transposed into Irish law.

39. Furthermore, insofar as the examination of file made reference to the second named applicant not having tendered evidence of the exercise of her rights "by any other means in accordance with Regulation 6 (2)", that was not the case as the respondent had knowledge of the second named applicant's pregnancy.

40. In support of the submission the respondent failed to properly assess the application and that the respondent should have taken steps to examine the pregnancy issue, counsel relies on the decision of Cooke J. in *Lamasz v. Minister for Justice* [2011] IEHC 50. There an application for a residence card was refused because the respondent was unable to contact an employer. This was found by Cooke J. not to be a valid reason for a refusal. Reliance is placed on the following:

> *"19. The reason given for the refusal decision in this case relates only to the issue as to whether the Union citizen, the first named applicant, is in employment and thus whether the condition stipulated in Regulation 6(2) (b) by reference to paragraph (2)(a) (i) of that paragraph is satisfied. It is not suggested that the applicants are not married, or that a marriage took place but was a sham or that any of the payslips, revenue forms or other documents are false. All that is said is that the office was "unable to verify" that the first named applicant was exercising EU Treaty rights, namely, that she was in employment. According to the internal memorandum this was based exclusively upon a number of unspecified attempts to make contact "with employers" although the form of the contact attempted is not described.*
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> *20. In the judgment of the Court this is an inadequate ground upon which to refuse an application which is otherwise accepted as validly made under the Regulations. Where is it not questioned that a couple are married; nor that one of them is an EU citizen and that they both have the necessary three month period of established residence, the onus passes to the Minister to state clearly which condition of the application remains unsatisfied; which documentary proof is missing or questioned and to state plainly why this is so."*

41. Counsel submits that *Lamasz* is authority for the proposition that once an applicant for a residence card establishes that one of them is an EU citizen, that they are married and that they both have the necessary three months of established residency, the onus is on the respondent to state why the application should not succeed.

42. It is also submitted that in *Lamasz*, Cooke J. was troubled by the respondent's modus operandi in circumstances where enquiries were made by the respondent of the employer without notice to the applicants. In the present case, the enquiry which was made should have been made of the applicants.

43. Furthermore, in *Decsi v. Minister for Justice* [2010] IEHC 342, Cooke J. emphasised the declaratory nature of the rights sought to be asserted by the applicants in the present case and that decision is authority for the proposition that non compliance with administrative formalities cannot defeat such rights.

44. Furthermore, if it was the case that the pregnancy was not considered because the respondent had no proof of same that represents a fundamental unfairness given that the second named applicant was not asked any information in circumstances where the onus rested with the respondent. Thus, the respondent could have sought proof of the second named applicant's pregnancy.

45. It is submitted that of particular importance to the within proceedings is the decision of the ECJ in *Saint Prix v. Secretary of State for Work and Pensions* (Case C-507/12).

46. The key finding by the ECJ in *Saint Prix* was that Article 7 (3) (c) does not list exhaustively the circumstances in which a migrant worker who is no longer in employment may nevertheless continue to benefit from the status of worker. It is submitted that the ruling of the ECJ makes the transposition by this State into law of Article 7 of the Directive even more flawed, given the restrictive manner in which the six months time limit is framed in Regulation 6 of the 2006 Regulations. The question which fell to be determined by the ECJ centred on Ms. Saint Prix having to temporarily give up work as she could not continue in her then job because due to her pregnancy the physical demands of the job were too strenuous for her and her non-success in finding work more suitable to her pregnancy. The issue was not one of Ms. Saint Prix being incapable of working during her pregnancy.

47. The further importance of the judgment in *Saint Prix* is that the ECJ considered inability to work arising from pregnancy as a generic matter and the Court did not frame the retention of status of worker by reference to a particular incapacity to work because of pregnancy.

48. In the applicant's case, the respondent conducted no assessment as to whether at the time the review application was refused the second named applicant retained her status because of her pregnancy.

49. In Ireland, national rules on the duration of maternity leave, in accordance with Article 8 of Council Directive 92/85/EEC are contained in the Maternity Protection Acts 1994 and 2004. Under s. 8 thereof, the minimum period of maternity leave is 26 consecutive weeks. Pursuant to s. 14, an employee is entitled, if she so wishes, to further leave from her employment, known as "additional maternity leave", for a maximum period of 16 consecutive weeks commencing immediately after the end of her maternity leave. Therefore, it is submitted that the reasonable period of time (as contemplated by the ECJ in *Saint Prix*) during which a woman attains her status as a worker after childbirth must be a minimum of 42 weeks, consonant with s. 14 of the relevant legislation. In the present case, this would permit the second named applicant to have retained her status as a worker until January 2016.

The respondent's submissions

50. It is submitted that Article 7 (3) (c) of the Directive, by virtue of the phrase "no less than six months" confers on Member States a discretion as to how much longer than six months they are prepared to continue the status of worker to a person in employment for less than a year. What the Directive provides is that this period could not be shorter than six months. Thus if the second named applicant could show that she retained the status of worker under Article 7 (3) she would have a right of residence under Article 7 (1) and that would extend to the first named applicant, pursuant to Article 7 (2).

51. Article 14 (1) of the Directive provides:

> "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."

52. Article 14 (2) states:

> "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."

53. In reliance on Article 14 (2), counsel submits that as of the date of the refusal decision the second named applicant had not met the condition set out in Article 14 (2).

54. Insofar as reliance is placed by counsel for the applicants on the decision of the ECJ in *Alimanovic* in support of the argument that there has been a restrictive transposition of Art.7(3) into Irish law , it is submitted in the first instance that the German law under review by the ECJ in *Alimanovic* was equivalent to the Irish law as set out in Regulation 6 of the 2006 Regulations save the proviso in the 2006 Regulations that a person has to be registered as a job seeker. It is clear that like this State, German law provides for the retention of the status of worker for a period of six months in circumstances where an EU citizen who has less than one year's employment becomes involuntarily unemployed. The issue in *Alimanovic* related to social welfare benefits and the question before the ECJ was whether notwithstanding that the *Alomanovics* had lost the status of worker they could establish a right of residence on the basis of Art.14(4)(b) of the Directive. In the present case, the applicants are not relying on a right of residence under Article 14 (4) (b).

55. In *Alimanovic*, the ECJ made no criticism of the six months time limit put on the retention of the status of worker by the German law.

56. Insofar as the applicants rely on the decision of the ECJ in *Saint Prix*, while that judgment is very significant, it is not an authority for the proposition that a pregnant woman can effectively retain the status of worker by virtue of her pregnancy, which is in effect the argument being made by counsel for the applicants. It is very clear that *Saint Prix* says that where physical constraints require a pregnant woman to give up work temporarily she retains her status of worker if she returns to work within a reasonable time after childbirth.

57. There are fundamental difficulties with the applicants' counsel's reliance on *Saint Prix*. Firstly, it was never asserted that the second named applicant either gave up work or gave up looking for work because of her pregnancy. That case was not made to the respondent at any stage. Secondly, the applicants' solicitor's correspondence of 3rd November, 2011 raised the issue of her pregnancy but did no more than that. The review application was made on the basis of the second named applicant's involuntary

unemployment and on the basis that she was a job seeker. In aid of that, on 3rd November, 2014 the applicants' solicitor submitted a P60 and other documentation which stated that the second named applicant was in receipt of Job Seeker's Allowance and produced a letter from the Department of Social Protection stating that she qualified for Job Seeker's Allowance. It was not suggested in the letter of 3rd November, 2014 that the second named applicant had a right to reside in the State by virtue of her pregnancy or that she was not looking for work at the time due to her pregnancy or that she was unavailable for work due to her pregnancy. All that was referred to in the letter was the fact of her pregnancy and that she was experiencing mental health problems and attending a psychiatrist.

58. Even today there is no indication whatsoever that the second named applicant's pregnancy was such that had she been in employment she would have given up work because of her pregnancy. What the applicants are effectively asking this court is to equate a pregnant woman at whatever stage of pregnancy with a worker status. That is the essence of the argument being made.

59. While the ECJ has said in *Saint Prix* that a "worker" has to be broadly construed, it did not go so far as to say that any woman who becomes pregnant is a worker in circumstances where the six months' time period in the Regulations has expired, assuming this court finds that the respondent was entitled under the 2006 Regulations to set a six months' time limit.

60. The second named applicant became involuntarily unemployed on 16th February 2014. Thus, pursuant to Regulation 6 (2) (d), the six months' period in which she retained the status of worker expired on 16th August, 2014. By that time the second named applicant was two and a half months pregnant. For the second named applicant to retain her status of worker by virtue of her pregnancy she would have had to have the status of "worker". But by 17th August, 2014 the second named applicant lost that status because she had been unemployed for six months by that time and had not re-entered the work force.

61. Furthermore, as set out in the refusal decision of 3rd December, 2014, the applicants did not provide documentary evidence of the fact that the second named applicant was in involuntary unemployment, as had been requested. This failing on behalf of the applicants appears to be ignored by the applicants' counsel yet this was also the basis for the refusal decision.

62. It was made clear both from the correspondence which issued from the respondent on foot of the original application and the later review application that if there was a change in status of the EU citizen the respondent had to be informed of such change. The applicants' counsel agrees that this was not done by the applicants when the second named applicant went from being an employed person to being in involuntary unemployment. While she was undoubtedly entitled as of 14th February, 2014 to rely on her status as a worker once she was a job seeker, the fact is that the circumstances which ended her employment were not brought to the respondent's attention by the applicants.

63. By virtue of their review application on 9th May, 2014, the applicants remained bound to bring to the attention of the respondent any change in the second named applicant's status. However, it is not accepted that a letter of the ilk of the 3rd November 2014 can be construed as having brought to the respondent's attention any change in the second named applicant's status as a job seeker on foot of involuntary unemployment.

64. The protection given by the ECJ in *Saint Prix* to a pregnant worker does not arise the very minute a woman becomes pregnant. Insofar as the ECJ extended the terms of Article 7 (3) (c) to include women such as Ms. Saint Prix, it did not go so far as to extend the rules to any pregnant woman. In this regard, the ECJ states:

> *"16 On 22 January 2008, hoping to find work in secondary schools, Ms Saint Prix registered with an employment agency and, on 1 February 2008, she withdrew from the course that she had been attending at the University of London. As no secondary school work was available, she took agency positions working in nursery schools. On 12 March 2008, when she was nearly six months pregnant, Ms Saint Prix stopped that work, however, on the grounds that the demands of caring for nursery school children had become too strenuous for her. She looked for a few days, without success, for work that was more suited to her pregnancy."*

65. This, counsel submits, is very significant as it demonstrates the mere fact of pregnancy is not sufficient. The premise upon which the UK court made a reference to the ECJ was that it was sought to be ascertained whether Article 7 (3) could be interpreted as not precluding the recognition of further persons who remain workers other than the categories provided for therein and the essence of the UK Supreme Court's referral was that if Article 7 was capable of such an interpretation did it extend to a woman who reasonably gives up work or seeking work because of the physical constraints of the late stages of pregnancy (and the aftermath of childbirth)?

66. Thus, the entire premise on which the case was referred to the ECJ was that Ms. Saint Prix needed to give up work due to the physical constraints on her in the workplace due to the late stages of her pregnancy. It is submitted that such constraints do not arise in all pregnancies, whether at an early or late stage. It may well be the case that pregnant women in certain categories of employment may have to give up work in the early stages of pregnancy; this will depend on the nature of their employment. However, for most jobs, pregnant workers work up to maternity leave.

67. As far as the present case is concerned, at the time the impugned decision was made (3rd December, 2014), the extent of the information provided to the respondent was that the second named applicant was six months pregnant.

68. It is abundantly clear from the judgment in *Saint Prix* that it was the inability to work due to pregnancy and not the mere fact of pregnancy which entitled the applicant to retain her status as a worker. Thus, what the ECJ set out at paragraph 47 of *Saint Prix* constitutes the parameters of its ruling that Article 7 (3) (c) of the Directive is not exhaustive.

69. If the respondent is correct in arguing that the 2006 Regulations properly transposed Article 7 of the Directive, the second named applicant lost her status as a worker in August, 2014. There was no evidence put before the respondent that in August, 2014, or prior, the second named applicant was unable to work or look for work as a result of her pregnancy. Thus, if the second named applicant had lost her status of worker by 17th August 2014 and thereafter became ill or incapable of working due to the physical constraints of her pregnancy she could not thereby retain the status that she had lost in August, 2014.

70. Had the second named applicant returned to work at any stage after 17th August, 2014, she would have become a worker again; however she would not be in the situation where she was "retaining" the status of worker.

71. It is submitted that any further widening of Article 7 (3) (c) must, as in *Saint Prix*, be consistent with the Directive.

72. In the circumstances in which the second named applicant found herself simply equating her pregnancy as giving rise to a retention of worker status is not in conformity with the Directive or the ECJ's ruling in *Saint Prix*. What the applicants contend for here

is not known to the law.

73. Contrary to the applicants' counsel's contention, the onus which is on the respondent, as referred to by Cooke J. in *Lamasz*, is not an onus which requires the respondent to go on enquiry with regard to the potential rights a person may assert. *Lamasz* is not authority for the proposition that there is an onus on the respondent to carry out her own research or request documents for a claim regarding the second named applicant's pregnancy that was not advanced by the applicants in the letter of 3rd November, 2014.

74. The applicants in the present case are not in the category of applicants to which Cooke J. referred in *Lamasz*. In that case, Cooke J. found that all appropriate documentary proofs had been submitted. Here, the applicants never furnished information to the respondent as to the reason for the cessation of the second named applicant's employment. This was only ascertained by the respondent by way of a telephone call to the employer concerned. If the conditions for the recognition of rights are not met, the applicants are not entitled to exercise the EU Treaty rights. Cooke J. noted, in *Lamasz* that it had not been disputed by the Minister that the applicant had made a valid application on Form EU1 and that the appropriate documentary proofs as required by the Regulations and requested by the EU Treaty Rights Section had been submitted. In *Lamasz*, the Minister had made unsuccessful attempts to contact the employer of the EU citizen with a view to confirming the contents of the documentary evidence submitted. It was held that the Minister was not entitled to reject the application on the basis that it was not possible to verify that the applicant was employed. In the instant case, the applicants failed to provide the Minister with evidence from the employer setting out the circumstances in which the second named applicant had ceased employment. The issue which gave rise to an infirmity in the decision in *Lamasz* was that the Minister opted to confirm whether the information provided in the letters from the employer was correct and decided that the employment had not been verified by reason of a number of unanswered telephone calls, thereby not placing weight on the correspondence from the employer which had been provided to the Minister. In the instant case, the applicants were informed clearly what documents were required in order to support the application being made for a residence card on the ground of the second named applicant's involuntary unemployment and her registration as a job seeker. The applicants were so informed by letters dated 19th May, 2014 and 17th September, 2014 and were again reminded on 7th November, 2014 to provide any supporting material within 10 working days of that letter and they were again referred to the documentary list with which they were previously furnished. The applicants failed to supply information regarding the cessation of employment and thus their situation is distinguishable from the situation which pertained in *Lamasz* where a valid application complete with all necessary documents had been made. Insofar as Cooke J. emphasised there was an onus on the respondent to state clearly in the decision what information was missing, that was done as the respondent clearly referred to the documentary proof that was missing, namely a letter from the second named applicant's employers as to the reasons for the cessation of employment.

75. Thus, in all of the circumstances, the applicant's position is not comparable to that which presented in *Lamasz*. This is highlighted by what Cooke J. stated:

> *"In the circumstances of this case, however, where the initial refusal was not based upon any alleged inadequacy or defect in the application or its supporting documentation but merely on the Department's own (and largely unexplained,) ability to carry out inquiries it thought appropriate, it is clear to the Court that this refusal decision ought not to have been made and, unless or until the respondent can adduce some valid reason for its refusal, the applicants ought not to be put to the delay of an administrative review."*

76. In the present case, the refusal decision was based on an inadequacy and defect in the review application. Furthermore, if the applicants wished to assert that the second named applicant retained the status of worker which is not for a reason recorded in the Directive and/or the 2006 Regulations that should have been put to the respondent, but this was not done. Accordingly, for all of the foregoing reasons, it is submitted on behalf of the respondent that the refusal decision was validly made.

77. As far as the second named applicant's pregnancy is concerned, there is no evidence from which it could be inferred that the respondent doubted the pregnancy; it was simply a matter of no relevance as the applicants had not indicated that it had any relevance. Therefore, there was no onus on the respondent to seek further information on the issue.

78. The applicants in their written submissions seek to place reliance on the decision of the ECJ in *Caves Krier Frères Sàrl v. Directeur de l'Administration de l'empoi Case C-379/11* [2012] ECR and the principle set out therein, namely that "a person who is genuinely seeking work must also be classified as a worker".

79. The applicant's case is effectively that by reason of the pregnancy of the second named applicant she was a worker for the duration of her pregnancy and remains so for a period thereafter. While it is accepted that the definition of worker has specific community meaning and must not be interpreted narrowly it is submitted that the case law does not support equating pregnancy *per se* with worker status. Unless it is established, as in the *Saint Prix* case, that a person is unable to work due to her pregnancy, the principle in *Caves Krier Frères Sàrl* that "a person who is genuinely seeking work must also be classified as a worker" requires a pregnant woman to seek work unless she is unable to do so by reason of her pregnancy. If a woman who becomes involuntarily unemployed becomes pregnant she does not become exempt from the requirement to seek work by reason of the mere fact of her pregnancy – a woman who is in employment who becomes pregnant and who is not incapable of working due to her pregnancy would not be protected, by European or national law, if she chose not to work. Furthermore, insofar as the applicants cite the decision of the ECJ in *Mayr* Case C-506 [2008] ECR, it is accepted that EU law and the jurisprudence of the ECJ affords substantial protection to pregnant women. That notwithstanding, the protections afforded by Directive 92/85/EC are not absolute as can be seen from the provisions of Article 10 of that Directive. In any event, there was no question in the present case of the second named applicant's employment having been terminated because of pregnancy.

80. The present case, in effect, concerns whether or not the fact the second named applicant's pregnancy conferred a benefit on her. Counsel submits that this is not the law, as evidenced by the decision of the ECJ in *Saint Prix*.

Considerations

81. Arising from the submissions advanced on behalf of the applicants, the matters which arise for determination in the context of these judicial review proceedings are:

1. The manner of the transposition of Article 7 of the Directive into Irish law;

2. Whether it was incumbent upon the respondent to determine the first named applicant's application for a residence card having regard to the second named applicant's pregnancy;

3. The status of the second named applicant during the course of her pregnancy and thereafter; and

4. Whether there was undue reliance by the respondent on administrative formalities.

82. Be it pursuant to Art. 7 of the Directive or Regulation 6 of the 2006 Regulations, as amended, the basis upon which the first named applicant sought a residence card was in accordance with the recognition which is afforded to him as the non-national spouse of an EU citizen who has exercised her EU Treaty rights. This is the starting point for the within proceedings.

83. For the purposes of the decision which the respondent was required to make in the present case I accept the applicants' counsel's general submission that the rights in issue are such that the respondent recognises such rights as opposed to conferring them on qualifying applicants. In *Desci v. Minister for Justice,* Cooke J. put it thus:

> *"… a Union citizen has a right of residence in another Member State for a period longer than three months where one of the conditions stipulated in Article 7.1 of the Directive is met and it is that right of residence of the Union citizen which "extends to family members who are not nationals of a Member State" in accordance with paragraph 2 of Article 7. Accordingly, the entitlement to residence which accrues to the family member of a Union citizen is based upon the same Treaty-derived right of the Union citizen and that is why Article 10.1 of the Directive when prescribing the issue of residence cards to family members speaks of their right of residence being "evidenced by the issuing of a document called 'residence card of a family member of a Union citizen'". (Emphasis added) The residence card does not confer the right to reside but is merely evidence of the exercise of the right.*
>
> *……*
>
> *[T]he entitlement of the family member to join or accompany the Union citizen is an intrinsic facet of the Treaty right exercised by the Union citizen and cannot therefore be defeated or obstructed by obstacles based on administrative formalities provided the substantive conditions can be proved to be fulfilled by other means."*

84. In the present case, the issue is whether the respondent acted within jurisdiction in refusing to recognise the applicants' rights.

85. The decision of 3rd December, 2014 which affirmed the refusal of a residence card for the first named applicant sets out essentially the rationale for the refusal, namely that as the second named applicant had worked in the state for less than a year and had not re-entered the work place within six months after the cessation of her previous employment she did not retain the status of worker in accordance with the provisions of Regulation 6 (2) (c) (iii) and Regulation 6 (2) (d). It was also noted that the first named applicant had not provided the requested letter from the second named applicant's employer indicating the circumstances in which her employment ceased.

86. It is clear form the provisions of Article 45 (3) TFEU, in particular Article 45 (3) (d), that the right of an EU citizen worker in employment less than a year to remain in a Member State after the period of employment has ceased is subject to conditions. In the case of the applicants, the relevant provision is Art. 7(3)(c) of the Directive.

87. Counsel for the applicants submits that Article 7 (3) (c), as framed, demonstrates that an EU citizen who becomes involuntarily unemployed during the first 12 months of employment and who has registered as a job seeker will retain *at a minimum* the status of worker for a period of six months. Counsel argues that the right of an EU citizen to remain in this State as provided for in Art. 7(3)(c) and Regulation 6 (2) (c) (iii) is unduly restricted by the terms of Regulation 6 (2) (d) which provides that the right to remain provided for in Regulation 6 (2) (c) (iii) "shall expire 6 months after the cessation of the activity concerned unless the person concerned enters into employment within that period".

88. I do not accept the argument that Regulation 6 (2) (d) on its face is in conflict with Article 7 (3) (c) of the Directive given that Regulation 6 (2) (d) does not trespass upon the minimum period fixed by the Directive for the retention of status of worker in circumstances to which Regulation 6 (2) (c) (iii) pertains. While the Directive clearly envisages the six month period as a minimum period leaving it open to Member States to adopt a longer period, the fact that this State chose to adopt the minimum period cannot be said to be in conflict with the Directive. I agree with the respondent's submissions that Article 7 (3) of the Directive does not require a period longer than six months in which the status of worker is to be retained for an EU citizen whose circumstances equate to those envisaged by Regulation 6 (2) (c) (iii) of the 2006 Regulations or indeed as envisaged by Regulation 7 (3) (c) of the Directive. In support of his argument, counsel for the applicants cited the decision of the ECJ in Alimonavic. However, I am not persuaded that that decision is authority for the proposition canvassed by the applicants in this case.

89. The factual matrix in that case was as follows:

90. Ms. Alimanovic (born in Bosnia) and her three children (born in Germany) were all Swedish nationals. They left Germany in 1999 for Sweden and returned to Germany in June 2010 where Ms. Alimanovic and her daughter worked between June 2010 and May 2011 in temporary jobs for less than a year. Between December 2011 and May 2012 she and her daughter were paid subsistence allowances for the long term unemployed and she received social allowances for her other children. Following a change in the law, these benefits were subsequently withdrawn. The Social Court in Berlin held that the family were entitled to the benefits. In its appeal to the Federal Social Court (the referring court) Jobcenter Berlin argued that since the benefits constituted "social assistance" within the meaning of Art.24(4) of the Directive job seekers could be refused such benefits.

91. The issue raised by the referring court were set out by the ECJ as follows:

> *"41 By its second and third questions, the referring court asks the Court as to, in essence, the compatibility, first, with Article 24(2) of Directive 2004/38 and, secondly, with Articles 18 TFEU and 45(2) TFEU, of national legislation which excludes from entitlement to certain benefits nationals of other Member States who have the status of job-seekers, whereas those benefits are guaranteed to nationals of the Member States concerned who are in the same situation."*

92. In the course of its consideration of the questions referred it went on to state:

> *"52 Only two provisions of Directive 2004/38 may confer on job-seekers in the situation of Ms Alimanovic and her daughter Sonita a right of residence in the host Member State under that directive, namely Article 7(3)(c) and Article 14(4)(b) thereof.*
>
> *53 In this connection, Article 7(3)(c) of Directive 2004/38 provides that if the worker is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a jobseeker with the relevant employment*

office, he retains the status of worker for no less than six months. During that period, the Union citizen concerned retains his right of residence in the host Member State under Article 7 of Directive 2004/38 and may, consequently, rely on the principle of equal treatment, laid down in Article 24(1) of that directive.

54 The Court thus held, in the judgment in Vatsouras and Koupatantze (C 22/08 and C 23/08, EU:C:2009:344, paragraph 32), that Union citizens who have retained the status of workers on the basis of Article 7(3)(c) of Directive 2004/38 have the right to social assistance, such as the benefits at issue, during that period of at least six months.

55 However, as the Advocate General observes in point 41 of his Opinion, it is not disputed that Ms Alimanovic and her daughter Sonita, who retained the status of workers for at least six months after their last employment had ended, no longer enjoyed that status when they were refused entitlement to the benefits at issue.

56 As regards the question whether a right of residence under Directive 2004/38 might be established on the basis of Article 14(4)(b) thereof for Union citizens in the situation of Ms Alimanovic and her daughter Sonita, that provision stipulates that Union citizens who have entered the territory of the host Member State in order to seek employment may not be expelled for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

57 Although, according to the referring court, Ms Alimanovic and her daughter Sonita may rely on that provision to establish a right of residence even after the expiry of the period referred to in Article 7(3)(c) of Directive 2004/38, for a period, covered by Article 14(4)(b) thereof, which entitles them to equal treatment with the nationals of the host Member State so far as access to social assistance is concerned, it must nevertheless be observed that, in such a case, the host Member State may rely on the derogation in Article 24(2) of that directive in order not to grant that citizen the social assistance sought.

58 It follows from the express reference in Article 24(2) of Directive 2004/38 to Article 14(4)(b) thereof that the host Member State may refuse to grant any social assistance to a Union citizen whose right of residence is based solely on that latter provision.

59 It must be stated in this connection that, although the Court has held that Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (judgment in Brey, C 140/12, EU:C:2013:565, paragraphs 64, 69 and 78), no such individual assessment is necessary in circumstances such as those at issue in the main proceedings.

60 Directive 2004/38, establishing a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity."

93. It is obvious to this court from the above that the ECJ was cognisant of the fact that under German law the Alimanovics had lost their status as workers after the expiry of the six months period provided for in German law. Neither the Advocate General nor the ECJ commented upon or criticised this aspect of the case or that the German law had wrongly transposed Art.7 (3)(c). It seems to me that much of the ECJ's focus was on the provisions of Art.14 (3) and (4) of the Directive.

94. Those provisions state:

"3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged."

95. While in *Alimanovic* the ECJ clearly states that for the purposes of seeking access to social assistance an EU citizen may rely on Art.14(4)(b) to establish a right of residence, at least for a period, even after the expiry of the time period referred to in Art.7(3)(c), I am satisfied that in so finding the ECJ did not hold that Member States cannot choose a six months time limit under Article 7 (3), as both this State and Germany did. There is nothing in the judgment to support the applicants' contention that Article 7 (3) requires an open-ended period longer than six months for the retention of status of worker in cases where an EU citizen was in employment less than twelve months. Were the applicant's general contention to be accepted there would be no reason for the Directive to have differentiated between employment for less than a year and employment in excess of a year. I accept the respondent's counsel's argument that the open-ended interpretation which the applicants seek to put on Article 7 (3) would in effect negate the gradual system for the retention of status of worker for which Article 7 of the Directive provides, and which the ECJ recognised in *Alimanovic*. Thus, I find that the *Alimanovic* ruling when read in its overall context does not assist the applicants in this case (notwithstanding the reliance placed by the applicants' counsel on paragraphs 56-57) insofar as they rely on that judgment in support of their argument that Reg. 6(2)(d) wrongly transposes Art.7(3)(c) of the Directive.

96. The real question to be determined in these proceedings is whether the factual matrix which pertained to the second named applicant as put forward by the first named applicant to the respondent was such that the respondent should not have concluded (as it did in the decision of 3rd December, 2014) that the second named applicant did not retain the status of worker in accordance with Regulation 6 (2) (c) (iii) and Regulation 6 (2) (d).

97. To put the applicant's counsel's argument into context, it is necessary to reprise the timeline regarding the second named applicant's employment history in the State. By the time of the review application on 9th May, 2014, the second named applicant was in her third month of involuntary unemployment and was registered as a job seeker. Thus, the provisions of Regulation 6 (2) (c) (iii)

were being met (subject to proof thereof), in recognition of the second named applicant's entitlement to remain in the State in the six months period provided for in the Regulations. By the time of the applicants' legal representative's next communication with the respondent (on 3rd November 2014), the second named applicant was six months pregnant and experiencing mental health difficulties, both of which facts were advised to the respondent. Under cover of the same letter, the respondent was also furnished with documentation from "Intreo" and the Department of Social Protection which documented effectively the second named applicant's status as a job seeker. Presumably this information was being furnished to satisfy the requirements of Regulation 6 (2) (c) (iii). Reference was made in the letter to the intention to submit further evidence in relation to the mental health issue "shortly". Even if the intention expressed in the letter related to the second named applicant's pregnancy as well as the mental health issue, it is common case that no further evidence was submitted in either regard. This was against the backdrop of the letter of 7th November, 2014 which issued from the respondent.

98. The court notes that no argument has been advanced in this case in relation to the mental health issues, rather the case that is advanced relates to the second named applicant's pregnancy and the applicant's counsel's contention, in essence, that once the second named applicant's pregnancy was made known to the respondent, the onus fell on the respondent to examine this aspect of the case for the purpose of establishing whether the second named applicant's status as a worker remained extant notwithstanding that she had not re-entered employment within the six months period following the involuntarily cessation of her employment on 16th February, 2014.

99. The question to be determined, as I see it, is twofold. The first issue is whether the information on the pregnancy as conveyed in the letter of 3rd November 2014 put the respondent on enquiry that the second named applicant continued to retain her status of worker notwithstanding that there was no evidence of her having re-entered the workforce prior to 17th August 2014 (the latter date being the six months' expiry date for the purposes of the Reg. 6(2)(d) of the 2006 Regulations). In essence, the applicants' counsel submits that the respondent should have followed up the issue of the second named applicant's pregnancy with the applicants prior to rendering a decision on the first named applicant's application for a residence card.

100. Was there such an onus on the respondent? I do not believe that there was in the circumstances of this case. According to the second named applicant's affidavit of 7th October 2015, she became pregnant in the summer of 2014 and gave birth to the applicant's child on 28th March 2015. That information suggests that the second named applicant became pregnant some two to three months or so prior to the 17th August, 2014. There was no case made by the applicants either in the correspondence of 3rd November 2014 or indeed at any stage between the time of the discovery of her pregnancy and the 3rd November 2014 (or indeed thereafter) that the second named applicant was either unable to work, or more particularly in her case, unable to look for work because of her pregnancy. It seems to me that the thrust of the 3rd November 2014 letter, in particular the documentary evidence furnished therewith, continued to convey that she was a job seeker in receipt of job seekers' allowance. There was nothing on the face of the letter to suggest that her status as a job seeker had altered by virtue of her pregnancy. From the contents of the letter of 3rd November, 2014, the respondent had no reason to believe that the second named applicant was asserting that because she was pregnant she retained her status as worker. If such an assertion was to be made, it should have been made to the respondent, but was not.

101. The second more fundamental issue is whether the second named applicant's pregnant state of itself aids the contention made on the applicants' behalf in these proceedings that at the time of the respondent's consideration of the review application (and indeed thereafter) the second named applicant had not lost her status as a worker.

102. In support of the argument that the respondent erroneously concluded that the second named applicant had not retained her status as a worker, counsel for the applicant relies on the decision of the ECJ in *Saint Prix v. Secretary of State for Work and Pensions* (Case C-507/12).

103. In *Saint Prix* the relevant facts were as follows:

104. Ms Saint Prix, a French national, entered the UK in July, 2006 and worked there as a teacher between 1st September, 2006 and 1st August, 2007. She then enrolled on a University course between 17th September, 2007 and 27th June, 2008. During that period she became pregnant with an expected confinement date of 2nd June, 2008. She left her University course in January 2008 and registered with an employment agency and took up agency work in nursery schools. On 12th March when nearly six months pregnant she gave up that work as the demands of the work became too strenuous for her due to her pregnancy. She looked for a few days, without success, for work more suited to her pregnancy. On 18th March, 2008, she made a claim for income support. Her claim for income support was refused. The First Tier Tribunal upheld her appeal against the refusal. That decision was reversed by the Upper Tribunal. The UK Court of Appeal affirmed the Upper Tribunal. The Supreme Court of the United Kingdom (the referring court) asked the ECJ, in essence, whether EU law, and in particular Article 45 TFEU and Article 7 of Directive 2004/38, are to be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, retains the status of "worker" within the meaning of those articles.

105. The referring court considered that when adopting that Directive, the EU legislature intended to codify the existing legislation and case-law, but that it did not intend to exclude further development of the concept of "worker" that would take into account situations not expressly considered when it was adopted. The UK Supreme Court was of the view that the CJEU may, therefore, decide to extend this concept of "worker" to pregnant women who give up work for a reasonable period.

106. In *Saint Prix*, the referring court's concerns were described by the ECJ in the following terms:

> *"24 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether EU law, and in particular Article 45 TFEU and Article 7 of Directive 2004/38, are to be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, retains the status of 'worker' within the meaning of those articles."*

107. The ECJ went on to state:

> *"29 In that regard, the Court has consistently held that pregnancy must be clearly distinguished from illness, in that pregnancy is not in any way comparable with a pathological condition (see to that effect, inter alia, Webb, C 32/93, EU:C:1994:300, paragraph 25 and the case-law cited).*
>
> *30 It follows that a woman in the situation of Ms Saint Prix, who temporarily gives up work because of the late stages of her pregnancy and the aftermath of childbirth, cannot be regarded as a person temporarily unable to work as the result of an illness, in accordance with Article 7(3)(a) of Directive 2004/38.*

31 However, it does not follow from either Article 7 of Directive 2004/38, considered as a whole, or from the other provisions of that directive, that, in such circumstances, a citizen of the Union who does not fulfil the conditions laid down in that article is, therefore, systematically deprived of the status of 'worker', within the meaning of Article 45 TFEU.

……

35 The Court has thus also held that, in the context of Article 45 TFEU, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned, as a rule, loses the status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker (Caves Krier Frères, C 379/11, EU:C:2012:798, paragraph 26 and the case-law cited).

36 Consequently, and for the purposes of the present case, it must be pointed out that freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment (see, inter alia, Antonissen, C 292/89, EU:C:1991:80, paragraph 13).

37 It follows that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (see, to that effect, Lair, 39/86, EU:C:1988:322, paragraphs 31 and 36).

38 In those circumstances, it cannot be argued, contrary to what the United Kingdom Government contends, that Article 7(3) of Directive 2004/38 lists exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status.

39 In the present case, it is clear from the order for reference, a finding not contested by the parties in the main proceeding, that Ms Saint Prix was employed in the territory of the United Kingdom before giving up work, less than three months before the birth of her child, because of the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth. She returned to work three months after the birth of her child, without having left the territory of that Member State during the period of interruption of her professional activity.

40 The fact that such constraints require a woman to give up work during the period needed for recovery does not, in principle, deprive her of the status of 'worker' within the meaning Article 45 TFEU.

……..

45 Furthermore, it must be pointed out that EU law guarantees special protection for women in connection with maternity. In that regard, it should be noted that Article 16(3) of Directive 2004/38 provides, for the purpose of calculating the continuous period of five years of residence in the host Member State allowing Union citizens to acquire the right of permanent residence in that territory, that the continuity of that residence is not affected, inter alia, by an absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth.

46 If, by virtue of that protection, an absence for an important event such as pregnancy or childbirth does not affect the continuity of the five years of residence in the host Member State required for the granting of that right of residence, the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth, which require a woman to give up work temporarily, cannot, a fortiori, result in that woman losing her status as a worker.

47 In the light of all the foregoing considerations, the answer to the questions referred for a preliminary ruling by the referring court is that Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child."

108. I am not convinced that *Saint Prix* is authority for the arguments advanced by the applicants in these proceedings. I am not persuaded that the decision of the ECJ in *Saint Prix* supports the proposition that the second named applicant's pregnant state of itself was capable of affording her a means by which she could still be regarded as having retained her status as a worker for the purposes of the Directive. The factual matrix from which the ECJ commenced its consideration in *Saint Prix* cannot be said to equate to that of the second named applicant.

109. Consistent with its jurisprudence, in *Saint Prix* the ECJ determined the question before it not in the context of equating pregnancy to illness, rather it approached the issue from the more general perspective that a worker who has to give up work because of the physical constraints of pregnancy should not be deprived of the status of "worker" within the meaning of Art.45 TFEU.

110. While the ECJ clearly found that Article 7 (3) cannot list exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship might nevertheless continue to benefit from the status of worker, the Court itself premised its extension of the concept of worker in a case such as that in *Saint Prix* on circumstances which would "*require*" a woman to give up work. This is not the position in the present case. There was no case made to the respondent that the physical constraints of pregnancy led the second named applicant to give up work. Indeed when the second named applicant's employment ended in February, 2014 there was no pregnancy. However, she retained her right to remain for a period of six months thereafter, pursuant to Reg. 6(2)(c)(iii) and Reg. 6(2)(d). More particularly in this case, the applicants never at any stage advanced the claim that the second named applicant was unable to look for work because of her pregnancy or that she had obtained other work and was unable to engage in that employment because of her pregnancy. She never advanced such a claim within the six months period following the 16th February, 2014 or at any point thereafter. The documentary information which accompanied the letter of 3rd November, 2014 reinforced the claim that was made in the review application that the second named applicant was a job seeker. Apart from informing the respondent that the second named applicant was six months pregnant, the letter did not say that there was an inability to work or seek work. I am not satisfied that the respondent could reasonably have concluded from the letter of 3rd November, 2014 that the applicants were making the case that the very fact of the second named applicant's pregnancy altered her then status, namely as an EU citizen whose worker status had expired on 17th August, 2014. Furthermore, while the letter made reference to the second named applicant's mental health difficulties, it was not asserted that she was unable to work because of mental healthy difficulties and

indeed in the course of there proceedings there is no challenge to the respondent's failure to follow up on that particular issue.

111. Overall, I accept the respondent's submission that what is being contended for here by the applicants is that by virtue of simply being pregnant the second named applicant was exercising her EU Treaty rights by "other means" and that that should have been recognised by the respondent. I do not believe that *Saint Prix* is authority for that proposition.

112. A further issue to be decided in this case is whether there was undue reliance by the respondent on administrative formalities when processing the application and or in refusing the review application. Between the date of the review application and the decision thereon requests were made for documentary evidence of a number of matters. These requests were largely complied with on 3rd November, 2014 when evidence of the civil marriage and the second named applicant's jobseeker status was furnished save that the applicants did not furnish a letter from the second applicant's previous employer stating the reason for the cessation of employment. It was not argued by counsel for the applicants that the request for such documents constituted administrative formalities and the court finds that they could not be construed as such given that the documents related to fundamental issues for the purpose of the Regulations, namely the familial relationship and the second named applicant's jobseeker status, the latter being something which pertains to the very basis of how worker status is retained post the cessation of employment which lasted less than a year.

113. While the rationale of the refusal decision of 3rd December, 2014 is grounded essentially on the non retention of the second named applicant's status as a worker, there is however also reference in the decision to the first named applicant's failure to submit a letter from the second named applicant's previous employer stating how the second named applicant's employment ended. Insofar as there was purported reliance on the applicants' failure in this regard to refuse the application it seems to me that that reliance could constitute an administrative formality of the type contemplated by Cooke J. in *Desci* in circumstances where the reason for the cessation of the employment was known to the respondent since April, 2014 through contact made by the respondent with the employer. However, in all the circumstances of this case, this is not sufficient to vitiate the decision as the factual matrix which underlies the decision has been upheld by this court, namely that the second named applicant did not retain her status as a worker as she did re-enter employment within six months of the cessation of her employment and in circumstances where this court has held that the fact of the second named applicant's pregnancy was not sufficient to allow her benefit from the status of worker.

Summary

114. For the reasons set out in the judgment, I am not satisfied that the challenges to the decision have been made out in this case and the relief sought in the Notice of Motion is denied.