Neutral Citation: [2011] IEHC 532

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1331 J.R.]

BETWEEN

PETRU SOLOVASTRU AND AURICA SOLOVASTRU

APPLICANTS

AND

THE MINISTER FOR SOCIAL PROTECTION, SOCIAL WELFARE APPEALS OFFICE, THE HEALTH SERVICE EXECUTIVE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Dunne delivered the 9th day of June 2011

The applicants herein are Romanian nationals and citizens of the European Union. The first named applicant herein seeks to judicially review a number of decisions in relation to his applications for jobseekers allowance, supplementary welfare allowance and rent supplement and the second named applicant seeks to judicially review the decision in relation to her application in respect of child benefit.

Background

The first named applicant herein swore an affidavit on the 18th October, 2010, verifying the statement required to ground the application for judicial review herein. In that affidavit he stated that he arrived into the State in September, 2004, and sought employment. He worked as a carpenter. He says that he was paid in cash. It appears that he did not pay any tax in relation to his employment at this time. He went on to say that from the 1st September, 2006 to April 2007, he worked for a different company. He said that he was not aware that a work permit was required to work in the State. He said that tax and PRSI in relation to his earnings in this employment was duly returned to the Revenue Commissioners. To that extent he has exhibited a number of payslips and a P60 in respect of the year ended the 31st December, 2006. He then stated that he subsequently worked between the 1st May, 2007, until the 11th November, 2008, in a self employed capacity as a metal fixer for David and Paul Matthews trading as DPM Partitioners. He said that all tax, VAT and PRSI in respect of his earnings during that period was duly returned to the Revenue Commissioners by DPM Partitioners on his behalf. He has referred to a number of documents from the Revenue Commissioners in that regard. A letter of 16th April, 2009, was exhibited from the Revenue Commissioners which stated that:-

> "As per Revenue Commissioners records, the above named is registered as self employed from 01/05/2007 to 11/11/2008."

Mr. Joseph McGloin, Superintendent Community Welfare Officer, swore a number of affidavits herein on behalf of the respondents. In his affidavit sworn herein on the 5th January, 2011, Mr. McGloin commented that there was no evidence referred to in the affidavit of the first named applicant, to support his assertions as to his employment as a carpenter in the first instance and then subsequently with a second company during the year 2006. He went on to add that there was no evidence that the first named applicant had any lawful permission to enter and reside in the State at that time. There is some evidence before the court to show that the first named applicant was in fact employed by the second company referred to by the first named applicant in his affidavit during the year ended the 31st December, 2006, but Mr. McGloin is correct in saying that there is no evidence that the first named applicant had any lawful permission to enter and reside in the State at that time. It is unequivocally the case that the first named applicant's presence in the State prior to the 1st January, 2007, was unlawful. He had no permission to enter or to reside in the State or to work in the State prior to that date. Romania joined the EU on that date and thus the applicants, as citizens of Romania, became citizens of the European Union. The entitlement of EU citizens to enter and reside in this jurisdiction is governed by EU law and by national law. I should add that the second named applicant stated in an affidavit sworn by her on the 15th October, 2010 that she came to this state with her then three children on the 2nd February, 2007. A further three children were born in Ireland.

The Decisions under Challenge

A number of decisions have been challenged in these proceedings. All of the decisions concerned relate to benefits or allowances payable under the social welfare system. The first is a decision in relation to an application by the first named applicant for jobseekers allowance. That application was refused on the 28th August, 2009. The first named applicant appealed that decision and the appeal was rejected by a letter dated the 12th May, 2010. As a result of that decision, a review took place in respect of the first named applicant's supplementary welfare allowance and rent supplement payments by the third named respondent (HSE). The first named applicant was advised by letter dated the 8th June, 2010, that he did not meet the requirement for such a payment. The final decision which is the subject of challenge in these proceedings relates to an application by the second named defendant in respect of child benefit. A decision was made in regard to that application refusing same on the 6th April, 2009.

Delay in Seeking Judicial Review

The respondents herein have complained that the applicants have failed to act promptly in bringing their applications for judicial review on the basis that leave to apply for judicial review was obtained on the 18th October, 2010, in respect of the decisions of the 28th August, 2009, the 12th May, 2010, the 6th April, 2009 and the 8th June, 2010. It is the respondents case that there are no grounds for extending the time in which to apply for judicial review. The applicants sought to pre-empt the issue of delay by reference to correspondence which looked for a revision of the decisions of the respondents and demanded a response by the 12th October, 2010. I think it would be helpful to quote from a letter addressed to the first named respondent which contained the following paragraph:-

> "In circumstances where there is great urgency in the case, we ask that you respond to us not later than Tuesday the 12th October, 2010. We further say that in the event that you fail to respond or your response is a refusal to reverse the decision and pay to our client jobseekers allowance, we will, without further notice to you, attend the *ex parte* list on

> Wednesday 13th October, 2010, in the High Court to seek leave for judicial review and this letter will be used to fix you with costs."

A letter was sent to the second named respondent which also contained a similar paragraph. The applicants sought leave to extend the time in which to bring the application if necessary. It is relevant to note at this point that all of the decisions at issue in these proceedings are the subject of appeals within the social welfare system. It appears that those appeals have now been deferred at the request of the applicants. Thus, the issue of delay is a live issue between the parties in this case. There is a question as to whether it is appropriate to deal with the matter by way of judicial review in circumstances where the applicants have pursued appeals from the decisions complained of.

When the application for leave was made a number of reliefs sought in the statement required to ground the application for judicial review. They consisted of applications for orders of *certiorari*, declarations and in addition a number of orders of *mandamus*. For example, one of the reliefs sought was as follows:-

> "An order of *certiorari* quashing the decision, by way of refusal and/or failure, of the second named respondent of, on or about the 12th October, 2010, to provide child benefit payment to the first named applicant, pursuant to ss. 219 to 220 Social Consolidation Act 2005."

A number of the reliefs were in relation to decisions stated to have been made on or about the 12th October, 2010. Other dates were referred to elsewhere in the course of the statement required to ground the application for judicial review. During the course of the argument on the issue of delay, it was accepted by counsel on behalf of the applicants that there was in fact no decision made by any of the respondents on the 12th October, 2010. The actual date on which decisions were made have been set out in a helpful chart furnished on behalf of the applicants. The position in relation to the relevant decisions is as follows:-

> Jobseekers Allowance:
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> The first named applicant made an application for jobseekers allowance on the jobseekers allowance on the 12th November, 2008. A decision was made on the 28th August, 2009, refusing that application and an appeal was made on that date to the Social Welfare Appeals Office. The appeal was refused on the 12th May, 2010. Subsequently on the 20th July, 2010, a further appeal was made to the Chief Appeals Officer in relation to this allowance. That appeal was pending on the date of application for leave to apply for judicial review.
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> Supplementary Welfare Allowance:
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> An application was made on the 15th December, 2008, for supplementary welfare allowance and rent supplement. The application was approved and payments commenced on the 17th December 2008. On the 8th June, 2010, notice of intention to withdraw the support in four weeks time was furnished to the first named applicant herein and an appeal was submitted on the 18th June, 2010. Those payments ceased on the 30th June, 2010. An application for a review of that decision, was made on the 8th October, 2010. At the time of making the application for leave to apply for judicial review, the appeal to the HSE Appeals Officer was pending. The decision at issue in respect of supplementary welfare allowance and rent allowance is the decision made on the 8th June, 2010. I was informed that the appeal in that regard was in fact dealt with on the 21st October, 2010 and was refused. A notification of refusal was sent to the applicants on the 29th October, 2010.
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> Child Benefit:
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> An application was made by the second named applicant in respect of child benefit on the 23rd May, 2008. Benefits were paid to the second named applicant and she was notified on the 6th April, 2009, that those payments were payable only until November 2008. On the 25th April, 2009, further submissions were made by the second named applicant in regard to child benefit. On the 25th May, 2009, the refusal to pay child benefits after the month of November 2008 was affirmed. Accordingly, the date of refusal in respect of child benefit is the 25th May, 2009. An appeal was submitted to the Chief Appeals Officer on the 11th June, 2009. The appeal in respect of that issue is pending. It should be noted that the appeal in respect of jobseekers allowance and child benefit was set for hearing on the 2nd December, 2010, but was postponed at the request of the applicants.

Thus it can be seen that the relevant dates are the 12th May, 2010, in respect of jobseekers allowance, the 8th June, 2010, in respect of supplementary welfare allowance including rent supplement and the 25th May, 2009, in respect of child benefits. Those are the relevant dates for the purpose of considering the issue of delay.

I should say, in parenthesis, that it was in my view, inappropriate to insert the date of the 12th October, 2010, in the statement grounding the application for judicial review herein as the date on which the decisions were made. It was something which could have had the potential to mislead, particularly at the stage of the application for leave to apply for judicial review. There may be situations and circumstances in which it is appropriate to call upon someone to formally make a decision and where the failure to make a decision after such a call may itself, be the subject of an application for relief by way of *mandamus*. However, in this case the position was that decisions had been made, appeals had been lodged in respect of those decisions and those appeals were pending. It is in those circumstances that it seems to me to have been inappropriate to refer to a date of the 12th October, 2010, as having been the date in respect of which some decisions were said to have been made. In fairness, counsel on behalf of the applicants, accepted fully during the course of the hearing before the court that the decision dates were as outlined above and the case proceeded on that basis. It is appropriate therefore at this point to refer to O. 84, r. 21 (1) of the Rules of the Superior Courts which provides as follows:-

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the Court considers that there is good reason for extending the period within which the application shall be made."

Accordingly, it can be seen that in respect of the original statement required to ground the application for judicial review all of the relief sought by way of declarations and all of the relief sought by way of *mandamus*, were sought out of time. Certain reliefs were sought by way of *certiorari* and those reliefs were brought within the six month period provided for in the Rules of the Superior Courts. It was nonetheless contended by the respondents that the application for leave to apply for judicial review was not made promptly and consequently that the applicants were not entitled to bring these applications.

During the course of the hearing an application was made to amend the statement required to ground the application for judicial review. That application was the subject of argument during the course of the hearing. Such an application in judicial review proceedings is unusual, to say the least. Having considered the application I decided to permit the amendment sought on behalf of the applicants. The nature of the amendment sought was the withdrawal of a number of the applications for relief sought. The effect of the application to amend the statement of grounds was to simplify and narrow the issues before the court. As a result of the amendment, the following reliefs are now sought in these proceedings:

> "1. A declaration that the first named applicant is entitled to jobseekers allowance payments from the first named respondent pursuant to s. 140 Social Consolidation Act 2005.
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> 2. A declaration that the second named applicant is entitled to child benefit payments from the first named respondent pursuant to s. 219-220 Social Welfare Consolidation Act 2005.
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> 3. An order of *certiorari* quashing a decision of the second named respondent, of on or about 12th May, 2010, to uphold and confirm the decision of the first named respondent to refuse jobseekers allowance payments to the first named applicant.
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> 4. An order *certiorari* quashing the decision, of the third named respondent, of the 8th June, 2010, to cease payments of supplementary welfare allowance and rent supplement (allowance) to the first named applicant.
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> 5. A declaration that the first named applicant is entitled to payment of supplementary welfare allowance and rent supplement (allowance) payments under the Social Welfare Consolidation Act 2005, and Housing (Private Rented Dwellings) Act 1982.
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> 6. If necessary, an order extending time to bring the within proceedings.
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> 7. Further or other order.
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> 8. Costs.

I want to consider the reliefs now sought in the context of the provisions of O.84, r. 21(1) of the Rules of the Superior Courts. I propose in the first instance to look at the decision in relation to child benefit. The application for child benefit was made in November, 2008. A decision was then made to pay child benefit and in April of 2009, it was indicated that the benefits were payable up to and including the month of November, 2008. That date reflects the time when the first named applicant ceased to work in a self employed capacity. The second named applicant was notified of the refusal to continue those payments on the 6th April, 2009 and the second named applicant sought a review of that decision on the 25th April, 2009. Following the review, the refusal was confirmed on the 25th May, 2009. An appeal from that decision was then lodged. The second named applicant was given a date for an oral hearing of the 14th September, 2010, but prior to that hearing date, her solicitors, by letter dated the 9th September, 2010, sought to have the hearing postponed. In the letter of the 9th September, 2010, it was stated:

> "In view of the fact that we have only very recently in the last week come on record on behalf of Mrs. Solovastru I will be much obliged if this hearing date could be adjourned for a later date in order to allow the writer prepare for the appeal hearing. I also advise that we have just sought our clients file under the Freedom of Information Act and I would be obliged if the hearing date could be adjourned in order to allow the writer obtain the freedom of information file and peruse same prior to the oral hearing."

It was pointed out by counsel on behalf of the respondents that the solicitors for the second named applicant had been dealing with matters on behalf of the applicants for a period of time prior to September 2010. In fact, in the affidavit of Mr. Solvastru a number of letters are exhibited commencing with a letter dated the 7th July, 2010, to various officials of the respondents. In fairness to the solicitor for the second named applicant, I think it could be strictly speaking stated that the letters commencing with the letter of the 7th July, 2010, were written on behalf of the first named applicant, while the letter of the 9th September, 2010, was the first written on behalf of the second named applicant. In any event, there is nothing in the affidavit of the second named applicant to explain or justify the delay in bringing judicial review proceedings in respect of the decision to terminate the child benefit payments. In the course of submissions I was referred to a passage from the judgment of Denham J. in the decision in *De Roiste v. Minister for Defence* [2001] 1 I.R. 190, at p. 208:-

> "In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the Court may take into account factors such as:
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> the nature of the order or actions the subject of the application;
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> the conduct of the applicant;
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> the conduct of the respondents;
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> the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed;
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> any effect which may have taken place on third parties by the order to be reviewed;
>
> public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive."

It was emphasised by Denham J. in the course of her judgment that the onus is on the applicant to meet the conditions set out in O. 84, rule 21. She stated at p. 203 of the judgment:-

> "The onus is on the applicant to meet the conditions. It is for the applicant to show that he has made the application promptly and within the time limit or that there is good reason to extend the time within which the application may be made. The conditions are not rigid as judicial review is a discretionary remedy. There remains in the Court an inherent discretion to be exercised according to the requirements of justice in the circumstances of each case."

Insofar as the second named applicant has sought relief in the form of a declaration that she is entitled to child benefit payments it is clear that such an application should have been made within three months from the date of the decision refusing the payment of child benefit. That decision was made on the 25th May, 2009. Accordingly, the application for leave to apply for judicial review in respect of the decision to refuse benefit after November 2008 was brought well outside the timeframe permitted under the rules. The onus is on an applicant in such a case to meet the conditions set out in the Rules of the Superior Courts and to show that the application has been made promptly and within the time limit or alternatively that there is a good reason to extend the time within which the application may be made.

Reference was also made to the case of *Dekra Éireann v. Minister for the Environment* [2003] 2 I.L.R.M. 2010, and in particular to a passage in the judgment of Fennelly J. at p. 239 where he stated:-

> "An applicant, who is unable to furnish good reason for his own failure to issue proceedings for judicial review 'at the earliest opportunity and in any event within three months from the date when grounds for the application first arose' will not normally be able to show a good reason for an extension of time. In particular, he cannot, without more, invoke the absence of any prejudice to the opposing party as the sole basis for the suggested good reason."

It was accordingly submitted on behalf of the respondents that the second named applicant has failed to provide an explanation for the delay. There was no justification for the delay and that the second named applicant could not invoke the absence of prejudice on the part of the respondents as the basis for the good reason for the extension of time.

Nothing has been put forward on behalf of the second named applicant to explain why an application for judicial review was not made promptly and within time. Certainly no good reason has been proffered in the affidavit before the court for this failure and no good reason has been provided for an extension of time. That being so, as far as the application for leave to apply for judicial review in respect of the decision to disallow child benefit is concerned, I am satisfied that the second named applicant is disentitled to such relief by reason of the delay in seeking leave to apply for judicial review.

Delay and the First Named Respondent
The issue of delay in relation to the first named respondent is somewhat different. Two decisions are at issue in his case. They are the decision to refuse jobseekers allowance made on the 12th May, 2010, rejecting his appeal against the earlier decision of the 28th August, 2009. The second decision relates to that in respect of supplementary welfare allowance which was made by letter dated the 8th June, 2010, notifying the first named applicant of the intention to withdraw support fully from that date. That decision flowed from the decision to refuse jobseekers allowance.

It was contended on behalf of the respondents that the first named applicant had failed to act promptly in bringing the application for *certiorari* in respect of those decisions. Further it was stated that the applications for declarations in respect of the entitlement to jobseekers allowance and supplementary welfare allowance and rent supplement were out of time. It is clearly the case that the applications for relief by way of *certiorari* are within time. However it was contended that there was a failure to make the applications promptly. The most significant of the decisions concerned in practical terms was the decision to refuse jobseekers allowance on the appeal from the decision of the Deciding Officer. As I have pointed out, the decision in relation to supplementary welfare allowance and the entitlement to rent allowance flowed from that decision. It is the case that an appeal was lodged with the Chief Appeals Officer on the 20th July, 2010, from the decision of the 12th May, 2010 in respect of jobseekers allowance and an application for review of the decision was made on the 8th October, 2010 in respect of the decision to refuse supplementary welfare and rent supplement. Correspondence was sent on behalf of the first named applicant by Northside Community Law Centre to Mr. McGloin, the Community Welfare Officer dealing with the first named applicant, commencing on the 7th July, 2010. It is interesting to note that in the course of that correspondence in a letter of the 11th August, 2009, the possibility of making an application to the High Court to judicially review the decisions to discontinue certain payments to the first named applicant was flagged. Nevertheless, this application was not in fact brought until the 18th October, 2010. In the course of his affidavit sworn herein on the 18th October, 2010, the first named applicant stated that correspondence took place "in an effort to resolve the matter without having to have recourse to legal proceedings". There is a certain irony in the fact that during the course of the proceedings it was indicated to the court that the reason for proceeding by way of judicial review was because it was perceived as being a faster remedy than that provided by the appeals procedures which were in fact invoked on behalf of the first named applicant.

It is the case that the applications for relief by way of *certiorari* are within time and although it has been argued that those applications were not made promptly, it does seem to me that in circumstances where there was correspondence taking place between the solicitors on behalf of the first named applicant and the respondents in relation to the matter, I do not think it is entirely unfair to say that the first named applicant was attempting to deal with the matter otherwise than by recourse to legal proceedings. In those circumstances, I am satisfied that the application in respect of the relief by way of *certiorari* is one that can be maintained on behalf of the first named applicant in respect of the relief by way of *certiorari*. The reliefs by way of declaration are outside the time limit provided for in the Rules of the Superior Courts. Nonetheless the relief sought by way of declaration seems to me to be inextricably linked with the relief sought by way of *certiorari* and for that reason it seems to me that having regard to the overall circumstances of the case it would be appropriate to allow the application in respect of those matters to proceed and for that purpose I will extend the time in regard to the making of the applications for relief by way of declaration.

The application for judicial review
I now wish to examine the substantive matters at issue in these proceedings. The first decision under challenge herein relates to the application in respect of jobseekers allowance. This was refused on the 28th August, 2009, by a Deciding Officer who stated:-

> "As a Romanian citizen you are not permitted to claim jobseekers in Ireland unless you had a work permit for twelve consecutive months since the 1/1/06, and are therefore not available for full time work. The legislation covering this decision is s. 65(5)(a)(ii) of the Consolidation Act."

There are two errors in that decision as the relevant date that should have been referred to, is the 1/1/2007 and the relevant statutory provision is s. 141 of the Social Welfare Consolidation Act 2005. No point arises in relation to these factual errors. That decision was appealed to the Social Welfare Appeals Office and by letter dated the 12th May, 2010, the Appeals Officer stated that:-

"The decision of the local office is confirmed. Appellant has no work permit."

As a result of the decision in respect of jobseekers allowance, a review was carried out in relation to the first named applicant's entitlement to claim supplementary welfare allowance and rent supplement payments by the third named respondent, the HSE. By letter dated the 8th June, 2010, the first named applicant was informed that he did not meet the necessary habitual residence conditions which would have entitled him to those payments for a number of reasons namely, the lack of a valid work permit, the fact

that he did not have a valid work permit for any employment prior to January 2007, and that he maintained himself through self employment for a period of less than two years. Accordingly, it will be seen that it is the respondents' position that the first named applicant entitlement to benefits depends on his entitlement to jobseekers allowance.

Colum O'Neill, the Regional Manager in the Department of Social Protection with responsibility for the Dublin North Region, in an affidavit sworn herein on the 10th November, 2010, described jobseekers allowance, stating as follows:-

> "It is a condition of entitlement to jobseekers allowance that the claimant be habitually resident in the State at the date of application for payment. The essential objective of the jobseekers allowance scheme is to provide income support during periods of involuntary unemployment. This objective is underpinned by conditionality- claimants for the schemes are required to be available for and genuinely seeking full time work in order of qualify for payment.
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> Accordingly a person must be available for work in order to qualify for and continue to receive jobseekers allowance, ie. be available for work in respect of each day for which s/he declares that s/he is unemployed. A person is regarded for employment if s/he is prepared to accept at once any offers of suitable employment.
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> From a public policy perspective it follows therefore that eligibility for job seeker payments must be confined to those who are not constrained in any way, whether by virtue of personal choice or by way of legal restriction, in taking up employment. Where a person is available only to take up a particular form of employment - eg. self employment - he is not as a consequence in a position to satisfy the condition.
>
> I wish to emphasise that a person who has been self employed is not disqualified, by virtue of that fact, from receipt of jobseekers allowance. However, a person who is only available for self employment, and is prohibited from taking up employment in the State, cannot meet the condition of being 'available for employment' and so is not entitled to jobseekers allowance."

The approach taken by the respondents is such that it is necessary to consider if the first named applicant is a person who is only available for self employment or is a person constrained in any way from taking up employment in the State and is therefore someone who cannot meet the condition of being "available for employment" and thus not entitled to jobseekers allowance. At the heart of this question is the entitlement of the first named applicant and, by extension that of his wife and children, to reside in this jurisdiction which has to be considered by reference to the European Union Treaty of Accession of the 25th April, 2005, which laid down the rules applicable to the accession of Romania and Bulgaria to the European Union. It is also necessary to consider a European Directive and Regulations made in this jurisdiction implementing in national law the Directive concerned.

By reason of the Treaty, Romania and Bulgaria became members of the European Union on the 1st January, 2007. Annex 7 of the Act of Accession permitted Member States to provide for restrictions on the right of Romanian nationals to work on their territory. Under the heading "Freedom of Movement for Persons". It is stated at:-

> "1. Article 39 and the first paragraph of Article 49 of the EC Treaty shall fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71/EC between Romania on the one hand and each of the present Member States on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.
>
> 2. By way of derogation from Articles 1 to 6 of Regulation (EEC) No. 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bi-lateral agreements, regulating access to their labour markets by Romanian nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of accession.
>
> Romanian nationals legally working in a present Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of twelve months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.
>
> Romanian nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of twelve months or longer shall also enjoy the same rights.
>
> The Romanian nationals mentioned in the second and third sub paragraphs above shall cease to enjoy the rights contained in those sub-paragraphs if they voluntarily leave the labour market of the present Member State in question. Romanian nationals legally working in a Member State at the date of accession, or during a period when national measures are applied and who were admitted to the labour market of that Member State for a period of less than twelve months shall not enjoy these rights."

Thus it is clear that the normal EU provisions regarding the free movement of workers are not applicable to citizens of Romania during the period covered by the transitional provisions. Under the transitional provisions it was open to existing Member States to extend the period during which the transitional arrangements would apply thereby restricting access to Irish labour market for Romanian citizens. Brendan Shanahan, an assistant Principal Officer in the Department Enterprise in an affidavit sworn herein on behalf of the respondents deposed to the fact that the Irish Government on the 17th December, 2008, decided to continue to restrict access to the Irish labour market from the 1st January, 2009, until the end of 2011. Accordingly, the position in relation to Romanian citizens is that they remain subject to the transitional arrangements.

The transitional arrangements referred to above have an effect on the habitual residence of an individual from the point of view of the Social Welfare Consolidation Act 2005, as amended. Section 246 of the Social Welfare Consolidation Act 2005, provided that:-

"1. For the purpose of each provision of this Act specified in subsection (3), it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date."

That section of the 2005 Act was amended by s. 15 of the Social Welfare and Pensions (No. 2) Act 2009 as follows:-

"Section 246 as amended by the Social Welfare and Pensions Act 2008 of the Principal Act is amended by inserting the following subsections after subsection (4):

(5) Notwithstanding subsections (1) to (4) and subject to subsection (9), a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State.

(6) The following persons shall, for the purpose of subsection (5), be taken to have a right to reside in the State:

…

(b) a person who has a right to enter and reside in the State under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977) or the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997)."

The European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. No. 656 of 2006) referred in Section 246, as amended, (which will be referred to hereinafter as "the 2006 Regulations") were designed to give effect to Directive 2004/38/EC and mirror the provisions of that Directive to a significant extent. The criteria in relation to residence in the State are set out in Regulation 6 and are as follows:

"6(1) Subject to Regulation 20, a person to whom these Regulations apply may reside in the State for up to three 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 three months if he or she

(1) is in employment or is self employed in the State,

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

(3) is enrolled in an educational establishment in the State for the principle 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 dependents, or

(4) subject to para. 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 para. 3, a family member of a Union citizen who is not a national of Member State shall be entitled to reside in the State for more than three months where the Minister is satisfied by the Union citizen concerned satisfies one or more of the conditions referred to in subpara. (a)(i), (ii) or (iii)

(c) Subject to Regulation 20, a person to whom subpara. (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 a 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 FAS,

(iii) subject to subpara. (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 the job seeker with the relevant office of the Department of Social and Family Affairs and FAS, 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 subpara. (c)(iii) applies, the right to remain referred to in para. (c) shall expire six months after 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 para. 2(a)(iii) applies to remain in the State.

(b) Without prejudice to subpara. (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 subpara. (b), he or she shall notify the person of the reasons for the decision."

The equivalent of Regulation 6 in the 2006 Regulations is Article 7 of the Directive 2004/38/EC hereinafter referred to as the 2004

Directive. It is headed "Right of residence for more than three months" and, as I said earlier, the 2006 Regulations give effect to the Directive. I propose for the sake of completeness to refer to Article 7(3) which is in the following terms:-

> "For the purposes of para. 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."

Article 14 of the 2004 Directive provides at paragraph 2:-

> "Union citizens and their family members shall have the right of residence provided for in Article 7, 12 and 13 as long as they meet the conditions set out therein."

That provision is mirrored in Regulation 11(1) of the 2006 Regulations which provides as follows:-

> "A person residing in the State under Regulation 6(2), 9 or 10 shall be entitled to continue to reside in the State for as long as he or she satisfies that regulation."

The key contention on the part of the first named applicant is that as a self employed person for the purpose of Regulation 2A(1) he satisfies the conditions set out in Regulation 6(2)(c)(ii) in that he is "in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job seeker". On that basis it is argued that the Department of Social Protection's Supplementary Welfare Allowance Habitual Residence operational guidelines which provides as follows:-

> "Where the employment lasted more than a year, the status of worker is retained as long as they remain on the live register and are also registered with FAS."

Accordingly the key to the first named applicant's entitlement to jobseekers allowance lies in the interpretation of the provisions of Regulation 6 of the 2006 Regulations.

There is no decided Irish case on the interpretation of Regulation 6 and I was referred to a decision of the Court of Appeal in the United Kingdom on the interpretation of Article 7, *R. (Tilianu) v. Secretary of State for Work and Pensions* [2010] E.W.C.A. Civ. 1397. The issue in that case was stated to be:-

> "Whether a an EU citizen who is no longer a self employed person retains the status of worker or self- employed person in the circumstances described in subparas. (b) and (c) of Article 7(3) of Directive 2004/38 by virtue of his previous employment as a self employed person."

That question had been answered in the negative in the court below. The applicant in that case was also a Romanian national and an EU citizen. He had some employment in the United Kingdom working under the construction industry scheme. He also worked for a short period of time for an uncle. He then went into hospital for a period of time and whilst in hospital he claimed employment and support allowance and subsequently, jobseekers allowance. He then applied for a crisis loan from the Social Fund. The allowances were refused on the grounds that having no right to reside in the United Kingdom he was not habitually resident. It was noted in the case that that issue of habitual residence has not been directly challenged. In the course of the proceedings Mr. Tilianu had sought by way of judicial review a declaration that self employment comes within the meaning of "employment" in Article 7(3)(b) and (c) of the Directive. Comment was made in the course of the judgement of the Court of Appeal about the fact that the Court had to answer the question raised in the case without reference to ascertained facts. In particular they complained of the fact that the true employment status of the appellant in the case was not known at each material time. The position in the case before me is different in the sense that it is clear that prior to 2007 the first named applicant was unlawfully present in the jurisdiction. It is also clear that for a period of time he was self employed and therefore during that period there is no issue but that he was entitled to be within the jurisdiction.

It would be helpful to refer to a number of passages from the judgment of Sedley LJ. At para. 8 of his judgment, having referred to the difficulty of dealing with the matter given the lack of information as to the true employment status of the appellant, he went on to say:

> "The reason why this may not only matter but be crucial is that the concept or status of self employment, on which the present question of law turns, is elusive. It is, first of all, an oxymoron: you cannot in law or in common sense be employed by yourself. What it signifies in English is carrying on business on your behalf by providing services to others. Its counterpoint in both the Treaty and Directives is 'worker'. The equivalent in the French version of the Directive are travailleur non salarié - a non salaried worker - and travailleur salarié; in the German version selbstsandiger - literally a free standing person - and arbeitnehmer -literally one who takes work. These disparities of language and usage, however, are not problematical because they are subsumed in the autonomous meaning given by EU law to both concepts. For EU purposes, a worker is anyone who, irrespective of the legal label put on the relationship, "performs services for and under the direction of another person in return for which he receives remuneration", as contrasted with "independent providers of services": *Allonby v. Accrington and Rossendale College* [2004] I.C.R. 1328 (ECJ), para. 67 to 68.
>
> We do not know where Mr. Tilianu comes on this spectrum; but Mr. Cox's case is that, even if he falls outside the Catholic EU class of "worker" and turns out to have been an independent provider of services, the appellant is still entitled to the benefits he claims. The unlikelihood of this being the case with an unskilled building worker underscores the

inappropriateness of litigating on a bare hypothesis."

Lord Justice Sedley then set out the provisions of Article 7. He then continued:-

> "If the appellant retains the status of a self employed person under Article 7(3), he has a right to reside, is not a 'person from abroad' within the meaning of the relevant social security legislation and will in principle be eligible to claim jobseekers allowance and a crisis loan from the social fund. The contest is as to whether subpara. (3)(b) and (c) of this Article include the self employed. Mr. Cox says they do: Mr. Coppel says they do not. The breadth and depth of the learning and argument which have been deployed over a day and a half in this Court in debating this simple question are truly impressive, but one starts with the simple fact that on their face the true provisions relate to persons who have been workers within the autonomous meaning of that word, (and which for all we still know may have included Mr. Tilianu.)
>
> Since Mr. Cox accepts as much, it has fallen to him, as Lord Justice Scott Baker predicted it would when granting permission to appeal, to displace this apparent limitation.
>
> The Deputy Judge put his conclusions this way:
>
> "The wording of the Directive is not apt in Article 7(3)(b) to (d) to cover self employed persons. A distinction is drawn between workers, and having the status of worker on the one hand and self employed persons on the other. That distinction is made in Article 7(1) and 7(3). Where 'status of worker" is used in Article 7(3) it is referring to someone in employment as opposed to a self employed person. When the same phrase is used in Article 7(3)(c) and (d) in my judgment it has that same meaning. The use of the words 'involuntary unemployment' in sub Article (b) is not apt for those who have been self employed and in any event is followed by the words 'having been employed for more than one year'. A 'jobseeker' is a person seeking employment rather than self employment. Similar points can be made in relation to (c). Mr. Cox points first to the fact that para. 3(a) plainly refers to both classes of claimant. This is true but neutral: it is as consistent with a deliberate contract between (a) and the succeeding sub paragraphs as it is with identity of purpose."

In the conclusion of the judgment it was found that the "endeavour to enlarge the apparent and natural meaning of Article 7(3)(c)" was defeated. Lord Justice Sedely concluded his judgment by saying:-

> "It is perfectly true, as Mr. Cox pointed out, that Mr. Coppel's meaning will have the unedifying result that if X is working on his own account as a taxi driver and employing his brother Y in his business, and if their vehicle is wreaked, putting them both out of work, Y will have rights under the Directive which X will not have. But few bright-line rules (and the present distinction is such a rule once employment status has been ascertained) do not throw up anomalies at the margins. Such anomalies as this cannot in my judgment undo or qualify what is otherwise the rule's plain meaning."

Accordingly in that case it was found that a self employed person did not come within the meaning of "employment" in Article 7(3)(b) and (c) of the Directive.

I will come back to this decision at a later point in this judgement.

I now want to deal with submissions made on behalf of the first named applicant in relation to the Right of Establishment which includes, inter alia, the right to take up and pursue activities as self-employed persons. In this context I was referred to the Treaty on the functioning of the European Union and in particular to that part of the treaty dealing with free movement of persons, services and capital which is dealt with in Chap. 1 of Title 4 and Chap. 2 which deals with the right of establishment. Article 45(1) provides in general terms for freedom of movement of workers within the Union. Article 48 goes on to say:-

> "The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self employed migrant workers and their dependants:
>
> (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
>
> (b) payment of benefits to persons resident in the territories of Member States."
>
> Article 49 states:-
>
> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."
>
> Reference was also made to the provisions of Article 53 which provides as follows:-
>
> "1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self employed persons."

Based on those provisions it was submitted that a self employed person fell into two different categories, namely, first as an individual who was a worker in the broader sense to whom personal rights attached. It was submitted that in that sense they came within the definition of workers contained in Chap. 1 of Title 4. Separate and distinct from their right as a worker, there was a right of establishment. That allowed them to take up activity as a self employed person and to set up and manage undertakings as provided for in Article 54. In other words there was a status of self employment which allowed the individual to effectively operate as a

"business unit" entity. It was submitted that the overall effect of the Treaty provisions was that persons who are self employed are not to be discriminated against and that at a personal level they fall to be treated in like manner as workers. It was thus submitted that the provisions of the 2004 Directive should be interpreted in the light of the provisions of the Treaty.

I was also referred to Council Directive 75/34 EEC of the 17th December, 1974. Obviously, that Directive predates the 2004 Directive namely Council Directive 75/34 EEC of the 17th December, 1974. It is stated in the preamble to that Directive *inter alia*, as follows:-

> "Whereas it is normal for a person to prolong a period of permanent residence in the territory of a Member State by remaining there after having pursued an activity there; whereas the absence of a right so to remain in such circumstances is an obstacle to the attainment of freedom of establishment; whereas, as regards employed persons, the conditions under which such a right may be exercised has already been laid down by Regulation by No. 1251/70(5)"
>
> Article 1 of the 1974 Directive provides as follows:-
>
> "Member States shall, under the conditions laid down in this Directive, abolish restrictions on the right to remain in their territory in favour of another Member State who have pursued activities as self employed persons in their territory, and members of their families, as defined in Article 1 of Directive No. 73/148 EEC."

Accordingly, it was pointed out that the European Union as time went on gave more and more rights to self employed persons so as to create similar rights and entitlements for self employed persons as those enjoyed by workers.

There is no doubt that there has been a change in relation to the manner in which the status of the self employed person has been developed in the European Union as evidenced by the provisions to which I have just refer red. This changing position is also apparent in the provisions of Article 49 of the Treaty on the functioning of the European Union. Nevertheless, one must also bear in mind Annex 7 in relation to the nationals of Romania which provide for a derogation from Article 49 to the extent provided for in the transitional provisions of which reference has already been made. In any event, the right of establishment does not, in my view, answer the question at the heart of these proceedings.

It must also be borne in mind that running through the Treaties and Directives to which I was referred in the course of argument there is a clear distinction apparent between the self employed person and that of a worker and the rights that flow from the respective status of persons who are either self-employed or workers.

Reference was also made in the course of the submissions to the judgment in the case of *I B. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Unreported, High Court, 15th October, 2009, Cooke J.). That case also involved a consideration of the 2006 Regulations. The precise issue in that case concerned an application under the 2006 Regulations for a permanent residence certificate. In the course of his judgment, Cooke J. described the scheme of the Regulations and also considered the terms of Annex 7. At para. 16 of the judgment he stated:-

> "The explicit purpose of S.I. No. 656 of 2006 is to give effect to the 2004 Directive so that the rights created by the Directive must be taken as implemented in those Regulations. A directive which has been transposed into national law can, however, have indirect effect. Thus, to the extent that the 2006 Regulations may be ambiguous or lacking in clarity, it is clear that they must be construed by reference to the provisions of the Directive. It is only where a regulation cannot be so construed such that the available interpretation fails to give effect, or gives inadequate or incorrect effect, to a relevant provision of the directive that it is necessary or appropriate to have recourse to the objective and intended effect of the directive."

It was not suggested to me that the Regulation failed to give effect or gave inadequate or incorrect effect to a specific provision of the Directive.

Counsel on behalf of the respondents examined and compared the provisions of Regulation of the 2006 Regulations and Article 7 of the 2004 Directive. It was pointed out that even if the first named applicant was "employed" the right to reside in the jurisdiction would have ceased after six months. In that regard, reference was made to the provisions of Regulation 6(2)(d) which provides "in a case to which subpara.(c)(iii) applies the right to remain referred to in para. (c) shall expire six months after the cessation of the activity concerned unless the person concerned enters into employment within the period". In any event, it was contended on behalf of the respondents that Regulation 6(2)(c)(iii) was not applicable to the first named applicant and that the only possible part of the Regulation that could be applicable to the first named applicant was that contained in Regulation 6(2)(ii), namely, that the applicant was in "duly recorded involuntary unemployment". The central point of the respondents' argument is that the phrase "duly recorded involuntary unemployment'' cannot apply to the first named applicant.

Counsel on behalf of the respondents also referred to the *Tilianu* decision and placed particular reliance on the decision of the High Court, 2010 EWHC 213, delivered by Mr. Christopher Symons, QC (Sitting as a Deputy Judge of the High Court). In the course of his judgment Mr. Symons stated at para. 42:

> "In my judgment there is no doubt as to the meaning of the Directive. There has been historically a distinction in the way those who have been in employment and those that have been self employed are treated under EU law. It does not seem to me to be credible that a change which would have the effect of bringing a new group of people into the social assistance system would have been introduced without mention either in the recitals or in the travaux preparatoires. Other changes that were made were signalled as one might expect.
>
> Further, the reading of the Directive is not apt in Article 7(3)(b) to (d) to cover self employed persons. A distinction is drawn between workers, and having the status of worker on the one hand and self employed persons on the other. That distinction is made in Article 7(1) and 7(3) where "status of worker" is used in Article 7(3) it is referring to someone in employment as opposed to a self employed person. When the same phrase is used in article 7(3)(c) and (d) in my judgment it has that same meaning. The use of words "involuntary unemployment" in sub Article (b) is not apt for those who have been self employed and in any event it is followed by the words "having been employed for more than one year". A "jobseeker" is a person seeking employment rather than self employment. Similar points can be made in relation to (c)"

It was urged on me that I should adopt that reasoning in construing the 2006 Regulations.

Decision

It is important at the outset to acknowledge that there is a distinction between those who are in employment and those who are self employed which is apparent throughout European Union law. The distinctions can be seen in such provisions as Article 45 of the Treaty on the functioning of the European Union which deals with the free movement of workers and Article 49 which deals with the right of establishment which is applicable to those who are self employed. This distinction is also reflected in various Directives.

It must also be borne in mind that the right of an EU citizen to reside in another Member State is not unrestricted. It is governed by the 2004 Directive and in this country, that Directive has been implemented by the 2006 Regulations. The Regulations lay down various conditions which are applicable to EU citizens who wish to reside in this State.

It is also important to bear in mind the provisions of Annex 7 to the Act of Accession referred to above which provides for transitional provisions applicable to nationals of Romania. The provisions of the Annex limit the full application of Article 45 (previously Article 39) and Article 49 to Romanian nationals. I have previously set out the relevant terms of Annex 7 and it is not necessary to do so again. However it is clear that Romanian nationals are subject to the transitional measures. By virtue of Annex 7, Member States may apply existing rules regulating access to their labour market. In practical terms, this means that a Romanian national can only work in this country in certain circumstances. I will refer in due course to those circumstances. Annex 7 does provide that if a worker from Romania has worked in this country lawfully for "an uninterrupted period of twelve months" then the rights in relation to freedom of movement will apply to them. It is interesting to note that Article 1 of Annex 7 expressly refers to freedom of movement of workers and the freedom to provide services. In other words, the distinction between those who are in paid employment and those who are self employed is maintained.

Given the distinction that exists in EU law between workers and those who are self employed, what is the position of the first named applicant? This issue was dealt with carefully and comprehensively in the respondents' submissions under the heading "Chronological approach". I do not propose to set out the relevant submissions verbatim but I will summarise them. The effect of the transitional provisions is that for the first named applicant to take up paid employment in this jurisdiction he would have had to comply with the existing requirements of national law. Accordingly, in order to take up paid employment, the first named applicant in accordance with existing requirements of national law would have had to have a work permit as provided for in the Employment Permits Acts 2003 to 2006. Prior to the accession of Romania as a member of the European Union on the 1st January, 2007, the first named applicant was unlawfully present in this country. Subsequently, he was engaged in paid employment but by virtue of the transitional provisions contained in Annex 7 he was, as a Romanian national, still bound by the existing national rules and therefore obliged to have a work permit in order to enter into employment. Accordingly, during the periods when he was so employed, he was not lawfully employed in this jurisdiction and therefore did not enjoy a right of residence here.

Notwithstanding the provisions of Annex 7, it is permissible for Romanian nationals to enter the State and work in a self employed capacity and to remain here while doing so. Annex 7 does not have the same derogation in relation to the right of establishment of those who are in self employment as is applicable to those in paid employment. The first named applicant has sought to rely on Regulation 6 and in particular Regulation 6(2)(c)(ii) to assert that he is currently in duly recorded "involuntary unemployment". There is no dispute between the parties that while the first named applicant was engaged as a self employed individual, he was entitled to be here.

It is in that context that the question has arisen as to whether Regulation 6(2)(c)(ii) applies not only to those in employment but also to those who are self employed.

I have already referred in some detail to the decision in *Tilianu*. Nevertheless I want to refer briefly to a number of passages from the High Court judgment in that case, which was upheld by the Court of Appeal. It was noted by Mr. Symons Q.C. in para. 24, speaking of Article 7, as follows:-

> "The Claimant is a citizen of Romania and is therefore subject to regulation 6(2) of the Accession (Immigration and Worker Authorisation) Regulations 2006. This regulation provides a derogation from Article 45 of the new Treaty for the Functioning of the European Union (TFEU) (formerly Article 39 of the EC Treaty). That derogation has the effect that EU Nationals from these countries, including Romania, cannot base a right of residence on their jobseeker status, that is while looking for work. Thus the right to reside arises while unemployed only if the person has retained the right to reside as an employed or self-employed person."

I want to refer to the passage previously set out above in which Mr. Symons said at para. 42:-

> "In my judgment there is no doubt as to the meaning of the Directive. There has been historically a distinction in the way those who have been in employment and those that have been self-employed are treated under EU law. It does not seem to me to be credible that a change which would have the effect of bringing a new group of people into the social assistance system would have been introduced without mention either in the recitals or in the *travaux preparatoires*....
>
> Further the wording of the Directive is not apt in Articles 7(3)(b)-(d) to cover self- employed persons. A distinction is drawn between workers, and having the status of worker on the one hand and self-employed persons on the other. That distinction is made in Article 7(1) and 7(3). Where 'status of worker' is used in Article 7(3) it is referring to someone in employment as opposed to a self-employed person. When the same phrase is used in Article 7(3)(c) and (d) in my judgment it has that same meaning. The use of the words 'involuntary unemployment' in sub article (b) is not apt for those who have been self employed and in any event it is followed by the words 'having been employed for more than one year'. A 'jobseeker' is a person seeking employment rather self-employment. Similar points can be made in relation to (c)."

I agree with the interpretation by Mr. Symons Q.C. of Article 7. I see no basis for coming to a different conclusion on the interpretation of Regulation 6. I think the wording of the Regulation and indeed the Directive is quite clear. There is a clear distinction between the status of those who are workers in the sense of persons who are in employment as opposed to those who are self employed. The status of "involuntary unemployment" is in my view only capable of being applied to a person in paid employment. I do not see how that term can be applicable to a person who is self employed having regard to the provisions of Regulation 6 as a whole. Thus, it is clear that the first named applicant is not entitled to reside here and therefore cannot be entitled to look for jobseekers allowance.

The issue in relation to supplementary welfare allowance and rent supplement was at all times dependent on the outcome of the situation in relation to jobseekers allowance. That being so, I can only come to the conclusion that the first named applicant is not entitled to those allowances either and that there is no basis for challenging the decisions made by the respondents in respect of those allowances.

Consequently, the position in this case is that the first named applicant was only entitled to reside in this jurisdiction as a self employed person. He is no longer a self employed person and he is therefore not entitled to a right of residence in the jurisdiction. He is bound by the transitional provisions contained in Annex 7 in relation to nationals of Romania. He is not entitled to seek employment as a jobseeker as he does not have a work permit.

Given the conclusions I have reached, it is not necessary for me to consider the effect of the appeals within the Social Welfare System on the discretion of the Court in relation to the reliefs sought herein.

In conclusion, I must refuse the applications herein.