THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2020] IECA 7

Record Number: 2018:000055

Judicial Review High Court

Record No. 2016/774JR

Whelan J.
Haughton J.
Murray J.

BETWEEN/

KRISTINA KOZINCEVA

APPLICANT/APPELLANT

- AND –

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 28th day of January, 2020

Introduction

1. This appeal concerns the appellant, a Latvian woman and an EU citizen, who, in the exercise of her freedom of movement rights, came to the State and took up employment. This was casual part-time work in a shop in Stillorgan, County Dublin. She became entitled to register for the Jobseekers Allowance ("JSA") payment of which is administered by the respondent. She claimed JSA through the respondent Minister's Clondalkin "Intreo" Centre as she was resident in their area. This was paid initially.

2. Unfortunately the appellant then became homeless. Although she continued in her part-time employment she lost the JSA in April 2016 when she failed to provide certain work dockets from her employer to Clondalkin "Intreo" Centre as required to claim that allowance. When she came to re-apply later that year she was ultimately advised by the Clondalkin Area Manager in a letter dated 14th September, 2016 that "We are unable to reopen this claim as evidence to confirm that she was living in the catchment has not been provided". She was "required to provide proof that she is currently residing in the Clondalkin/Lucan/Newcastle area". This was something she asserts she could not do as she was then of no fixed abode, and she maintained that she had been refused the JSA on account of homelessness.

3. Accordingly she commenced these Judicial Review proceedings seeking –

   (i) An order of *certiorari* quashing "the decision of the Respondent made on the 24th September, 2016";

   (ii) A Declaration that the decision to refuse JSA based on homelessness was *ultra vires* the Social Welfare Consolidation Act, 2005;

(iii) A Declaration that "the Respondent has unlawfully fettered his statutory discretion by failing to decide the applicant's application in accordance with legislation";

(iv) Damages for breach of statutory duty; and

(v) Costs; and

(vi) Further and other relief as to the court might deem meet.

4. Following the grant of leave to seek judicial review by Moriarty J. on 27th September, 2016, the Chief State Solicitor's office ("CSSO") wrote on behalf of the Minister to the appellant's solicitor Eileen McCabe on 10th November, 2016 inviting submission "of evidence of days worked from April 2016 to the present so that the Respondent can process same to see if the Applicant is due any back payments". The requisite application forms were sent by the applicant's solicitor on 16th December, 2016 and forwarded by the CSSO "to the Department" on 20th December, 2016. A sum of €2,450.20 was transferred to the appellant on 22nd December, 2016, apparently in discharge of all back payments of JSA.

5. Despite this payment, which counsel for the respondent argued in the High Court and this court rendered the application moot, the application proceeded before Meenan J. on 17th January, 2018, and the key part of his decision reads:

"27. There is no dispute but that if the applicant had been denied the allowance on the grounds that she was homeless that such would be ultra vires and unlawful. However, in my view this is not the situation here.

28. Section 141(9) provides that a person is not entitled to the allowance "unless he or she is habitually resident in the State….". It is a sad fact that a person can be, like the applicant, "habitually resident in the State" but still "homeless".

29. It is not unreasonable that to administer payment of the allowance there is a requirement that the recipient be residing in within the catchment area of a particular centre responsible for payment. What appears to be required is residency and not necessarily a fixed home address.

30. This was clearly the situation of the applicant in early 2016 when, although homeless, she was "resident" in the catchment area of the Clondalkin Intreo centre and was paid the allowance. This situation was repeated in November/December 2016 when the applicant, still unfortunately homeless, was now within the catchment area of the Dun Laoghaire Intreo centre and was duly paid the allowance.

31. It would appear, based on the affidavit of Michael Thompson, Assistant Principal, Clondalkin Intreo centre, that the decision of April 2016 not to pay the applicant her allowance was due to failure to submit the requisite work dockets, although this was not referred to in the letter of 14th September, 2016. In my view, the contents

of said letter cannot be construed so as to amount to a decision that the applicant was not entitled to the allowance because she was "homeless".

32. It seems to me that the respondent acted appropriately in seeking to give what assistance they could to the applicant given her circumstances. I refer to the meeting which took place on 29th August, 2016 whereby the applicant was requested to provide details of all the addresses that she had lived in since January 2016. This information was provided by the applicant but, unfortunately, did not give sufficient details linking her to the catchment area of the Clondalkin Intreo centre. Hence the letter of 14th September, 2016.

33. Therefore, by reason of the foregoing, I cannot conclude the applicant was refused the allowance on the basis of her being homeless. It follows that the applicant is not entitled to the reliefs sought herein."

6. For reasons that will be given later in this judgment I do not consider the appellant's claim to be moot and accordingly as the merits of claim fall to be considered it is appropriate to set out the relevant legislative provisions and the facts more fully.

Jobseekers Allowance - and the statutory provisions

7. The basic entitlement to the JSA arises under s.141(1) of the Social Welfare Consolidation Act, 2005 (as amended):

"(1) Subject to the Act, a person shall be entitled to jobseeker's allowance in respect of any week of unemployment where –

(a) the person has attained the age of 18 years and has not attained pensionable age,

(b) the person proves unemployment in the prescribed manner, and

(c) the person's weekly means, subject to subsection (2)(d), do not exceed the amount of jobseeker's allowance (including any increases of jobseeker's allowance) that would be payable to the person under the Chapter if that person had no means."

8. Ensuing subsections govern the periods of unemployment that are reckonable, the treatment of means where there are couples, and other matters that are not directly relevant to this case. To qualify the applicant must prove that they are employed for less than four days per week. Subsection (4) stipulates that for each day that JSA is sought the person must be *inter alia* "(a)…capable of work" and "(c) genuinely seeking, but is unable to obtain, suitable employment having regard to the person's age, physique, education, normal occupation, place of residence and family circumstances."

9. Section 141(9) (as amended) which is most relevant to the present case then provides:

"(9) A person shall not be entitled to jobseeker's allowance under this section unless he or she is habitually resident in the State."

This is buttressed by s. 246(1) which contains provisions with respect to habitual residence that are applied to inter alia s. 141(9). Section 246(1)(a) and (b), and ss. (4) and (9) are relevant and provide:

"(1) A requirement, in any of the provisions specified in subsection (3), for a person to be habitually resident in the State means that –

(a) the person must be habitually resident in the State at the date of the making of the application, and the person must remain habitually resident in the State after the making of that application in order for any entitlement to subsist,

(b) the person as a worker or a self-employed person, residing in the State pursuant to article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, from –

(i) a Member State, or

(ii) a member state of the European Economic Area…

(3) The provisions of this Act referred to in subsection (1) are sections 141(9)…

(4) A deciding officer or a designated person, when determining whether a person is habitually resident in the State for the purposes of this Act, shall take into consideration all the circumstances of the case including, in particular, the following –

(a) the length and continuity of residence in the State or in any other particular country,

(b) the length and purpose of any absence from the State,

(c) the nature and passion of the person's employment,

(d) that person's main centre of interest, and

(e) the future intentions of the person concerned as they appear from all the circumstances.

(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:

(a) an Irish citizen under the Irish Nationality and Citizenship Acts 1956 to 2004;

(b) a person who has the right under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No.548 of 2015) to enter and reside in the State or is deemed under those Regulations to be lawfully resident in the State.

[(c)–(i)]

(7) The following persons shall not be regarded as being habitually resident in the State for the purpose of this Act:

[(a)-(f)]

(8) …

(9) Notwithstanding that a person has, or is taken to have in accordance with subsection (6), a right to reside in the State the determination as to whether that person is habitually resident in the State shall be made in accordance with subsections (1) and (4)."

10. It is clear from these provisions that an EU citizen who is exercising their right of free movement may qualify for JSA if they are working part-time in the State provided that such person is "habitually resident" in the State at the date of making the application, and so remains after the making of the application in order for any entitlement to subsist. It is not contested that the appellant was such a person. While s.246(7) identifies certain persons who are *not* to be regarded as being "habitually resident in the State", such as persons applying for international protection or persons in respect of whom a deportation order has been made, the appellant does not fall within any of the categories specified in that subsection.

Facts

11. The evidence considered by the trial court and this court on appeal is set out and exhibited in the following affidavits:

(i) Affidavit of Kristina Kozinceva sworn on 29 September, 2016;

(ii) Replying Affidavit of Michael Thompson, an Assistant Principal of the respondent and Area Manager for Clondalkin, sworn on 21st November, 2016;

(iii) Replying Affidavit of Neil Kavanagh, Assistant Principal, sworn on 21st November, 2016. Mr. Kavanagh swore his affidavit as the senior officer based in the respondent's office at 77 Upper Gardiner Street, Dublin 1, for Asylum seekers/New Communities Unit (ASNCU);

(iv) Second Replying Affidavit of Michael Thompson sworn on 13th June, 2017;

(v) Affidavit of Eileen McCabe, the applicant's solicitor, sworn on 21st June, 2017.

Although the court was informed that two further affidavits were sworn shortly before the hearing in the High Court, the trial judge did not consider these, and likewise I exclude them from my consideration. Further the second affidavit of Mr. Thompson sworn on 13th June, 2017 contains certain information and averments post-dating 22nd December, 2016 and in my view these have no relevance to the issues that arise for consideration in these proceedings, and to that limited extent only I do not take into account that affidavit.

12. The appellant was initially in receipt of JSA through the Kings Inn Intreo Centre. She presented to the Clondalkin Intreo Centre on or about 15th December, 2015 seeking to transfer her JSA claim from the King's Inn Intreo Centre as she had moved into the

Clondalkin catchment area. Her given address was 14 Orchard Lodge, Clondalkin, Dublin 22. The file was transferred on 18th January, 2016. There was some delay in the transfer of the file. The King's Inn Intreo Centre processed her JSA entitlement from 20th May, 2015 to 5th January, 2016. A cheque was issued in the amount of €2953.80 on 8th January 2016.

13. As the appellant was in casual employment it was necessary for her to get "casual dockets" completed and signed by her employer every week and to submit these into Clondalkin Intreo Centre. These dockets were sent in a four-weekly basis to 14 Orchard Lodge. Mr Thompson at paragraph 7 of his first affidavit averred:

> "… It is standard policy for the Respondent and to suspend a claim if casual dockets are not returned on time. If and when dockets are received, the claim is re—and stated and payments issue was heretofore."

14. Only two payments issued from the Clondalkin Intreo Centre due to dockets being returned late by the appellant. The first payment covering the period 6th January, 2016 to 22nd March 2016 issued on 24th March 2016 and was sent to 14 Orchard Lodge. When the appellant attended the Clondalkin Intreo Centre on 21st September, 2016 she stated she never received this cheque, and subsequently she was paid by electronic funds transfer.

15. The second payment issued on 8th April, 2016 covering the period 23rd March, 2016 to 5th April, 2016. This cheque was collected by the appellant at Clondalkin Intreo Centre because she signed the following note on 5th April, 2016: –

> "I want check [sic] to be posted to this office because I am homeless."

16. On 16th April, 2016 a note and incomplete dockets were received in Clondalkin Intreo Centre. Mr Thompson avers that the note advised that the appellant was no longer residing at 14 Orchard Lodge and had not been for some time, and the exhibited note bears the endorsed message "Attached handed back today above has not been living at that address for some time now" and initialled on 19 April, 2016. At para. 12 of his first affidavit Mr Thompson avers that "[t]his Deponent tried to contact the Applicant on diverse occasions using the telephone number provided by the Applicant. The number was invalid and or no longer in service." At para. 13 he says "I say and believe that the Applicant's claim was closed on 31st May, 2016 as there had been no contact from the Applicant since her claim was suspended." Thus the appellant's claim was suspended on 16th April, 2016 and "closed" on 31st May, 2016.

17. On 11th July, 2016 the appellant presented to the respondent's Asylum Seekers/New Communities Unit (ASNCU) in Upper Gardiner Street stating she was homeless. She provided two recent payslips (1st July and 8th July) and the Higher Executive Officer on duty completed a means assessment and paid an Exceptional Needs Payment (ENP) to the applicant of €64. This payment was made pending a decision on a weekly supplementary welfare payment.

18. The appellant sought help from Welfare Appeals, a charity that assists in applications for social welfare. By letter dated 21st July 2016 Mr Richie MacRitchie of Welfare Appeals wrote to the respondent office in Upper Gardiner Street referring to the appellant's recent history and noting that: -

> "… We understand that she became homeless, and that she was advised that the Clondalkin Local Office could no longer process her claim. We understand that Ms Kozinceva it was then referred to your office and has now been placed in payment of a Supplementary Welfare Allowance claim.
>
> Ms Kozinceva however appears and to continue to meet the conditions of Jobseekers Allowance, and as she is in part-time employment, it would appear that she is significantly disadvantaged by being placed on a BASI payment.
>
> We would be grateful if you could confirm that Ms Kozinceva's claim for Jobseekers Allowance remains open, and confirm what processes available for her to have that claim reinstated, and backdated to the date of her repeat claim documentation already submitted to the Clondalkin L.O.
>
> We understand that your services are specifically designed for those who find themselves without any fixed abode, but clearly a person cannot be treated less favourably due to their social status, or due to their housing assistance status. We are keen to ensure that Ms Kozinceva is treated in an equal manner to those who have a fixed abode, and in accordance with the Equal Status Act, as amended."

A short reply dated 27th July, 2016 from a Clerical Officer in 77 Upper Gardiner St merely recorded that the appellant had received one ENP of €64 and that she was "not in receipt of a BASI from this office". To this Mr MacRitchie responded on 28th of July 2016 –

> "Thank you for your letter of 27 July with the clarification of Ms Kozinceva's position.
>
> We would be grateful if you could confirm which office is responsible for considering Ms Kozinceva's entitlement to either a BASI SWA or Jobseekers Allowance payment. We had been advised by Clondalkin Local Office that as Ms Kozinceva is currently homeless, that it was your office that was responsible for processing any such application.
>
> We would be grateful if you could confirm the position as a matter of urgency.
>
> Yours faithfully"

Regrettably ANSCU made no response whatsoever to the critical question posed in this letter. However the appellant did return to ASNCU on 29th July when she was paid €64, and she was subsequently paid Supplementary Welfare Allowance from 28th July at this reduced rate – paid into Stillorgan Post Office at her request.

19. The appellant then involved her solicitor, Ms Eileen McCabe, who wrote two letters on her behalf on 10 August 2016 in virtually identical terms to the managers of Clondalkin Intreo Centre and ASNCU. In both letters she asked for the following: -

> "1) Confirmation that my client qualifies for payment of Jobseekers Allowance. Please set out clearly reasons for your decisions.
>
> 2) Please set out at what stage is my client's application for JA?
>
> 3) Please advise what is the average time for processing JA applications and when a decision is likely to be made."

In both letters Ms McCabe added –

> "My client is very seriously prejudiced by the delay in processing your payment and is currently accessing homeless accommodation and hostels. Her mental and physical health is affected by the stress of being homeless. Despite accommodation difficulties she has managed to keep a part-time job as a sales assistant.
>
> I write to ask you to attend to the above with the utmost urgency and I take this opportunity to advise you that should you fail to address the issues outlined above within 7 days I reserve the right to seek the protection of the courts my client without further notice to yourself."

20. Mr. Mark O'Connell (HEO) of ASNCU responded by telephoning Ms. McCabe and informing her that ASNCU does not deal with JSA and that her inquiry should be directed "to a Social Welfare Office" (para.9 of Mr. Kavanagh's affidavit).

21. Mr Thompson in Clondalkin wrote in response on 22nd August, 2016 confirming "we are currently trying to contact Ms Kozinceva in order to set up an appointment with her." As a result of this correspondence a meeting with the appellant was set up at the Clondalkin Intreo Centre on 29th August, 2016 to discuss her case with the respondent's managers. She duly attended and met with two managers. She was asked to provide details of all the addresses that she had lived in since January 2016, and a handwritten document exhibited by Mr Thompson (as part of exhibit "MT 5") records where the appellant informed them she was staying during the period 5th July to 13th August, 2016 inclusive:-

> "Kristine Kozinceva (PPS 1598164F)
>
> Providing Clondalkin Social Welfare Office information where have I been stayed since I am homeless.
>
> 5.07.16 Kingswood, Tallaght. (friend home)
>
> 6.07.16 Kingswood, Tallaght. (friend home)
>
> 7.07.16 Generator Hostel, Smithfield
>
> 8.07.16 Generator Hostel, Smithfield

9.07.16 Dublin Airport

10.07.16 Swords (ex college home)

11.07.16 Generator Hostel, Smithfield

12.07.16 Kingswood, Tallaght. (friend home)

13.07.16 Abigails Hostel, Dublin

14.07.16 Generator Hostel, Smithfield

15.07.16 Kingswood, Tallaght. (friend house)

16.07.16 Jobstown, Tallaght (friend home)

17.07.16 Jobstown, Tallaght (friend home)

18.07.16 Tallaght, (friend house)

19.07.16 Generator Hostel, Smithfield

20.07.16 Tallaght, (friend house)

21.07.16 Booterstown dart station

22.07.16 Waterford (friend house)

23.07.16 {ditto}

24.07.16 {ditto}

25.07.16 {ditto}

26.07.16 {ditto}

27.07.16 {ditto}

28.07.16 Jobstown, Tallaght

29.07.16 Jobstown, Tallaght

30.07.16 Jobstown, Tallaght

31.07.16 Wicklow Station

01.08.16 Jobstown, Tallaght

02.08.16 Jobstown, Tallaght

03.08.16 Jobstown, Tallaght

04.08.16 Generator Hostel, Smithfield

05.08.16 Richmond St. Homeless Hostel, Rathmines

06.08.16 {ditto}

07.08.16 {ditto}

08.08.16 Generator Hostel, Smithfield

09.08.16 Smithfield, (friend house)

10.08.16 {ditto}

11.08.16 {ditto}

12.08.16 Athlone (friend house)

13.08.16 {ditto}

[Further dates are indicated but are cut by photocopying process]

The balance of exhibit "MT 5" consists of receipts from Generator Hostel in Smithfield and shows that the appellant stayed there on 16th August, 2016 and from 24th August to 31st August, 2016 inclusive.

22. The picture that emerges from this document is a sad one. The appellant resorted to "couch surfing" with friends when she could, in locations as far apart as Tallaght, Waterford, Athlone and Jobstown; on other occasions she used hostels in Smithfield or Rathmines; and on three nights she had resort to sleeping rough in Dublin Airport, Booterstown Dart Station and Wicklow Station respectively. It is important to note that most of the period covered by this document post-dated the appellant's presentation to ANSCU on 11th July, and that during this period she received only Supplementary Welfare Allowance from 28th July. In a letter written by Ms McCabe to Mr Thompson on 12 September 2016 she says: -

> "My client's nightly accommodation is determined by her income. Therefore, if she has sufficient funds to stay in a private hostel she will do so, in order to avoid the dangers of a homeless shelter. She is somewhat transient in this regard and has to stay in different hotels based on their prices."

Little wonder then that the appellant's mental and physical health were affected by the stress of being homeless. It is a testament to the appellant that during this period she continued to work part-time in Stillorgan. Perhaps it was a case of "needs must". I have little doubt but that her nightly accommodation and living conditions during this period would have been far more comfortable had she been in receipt of JSA.

23. Before passing on from this, the evidence as to precisely where the appellant was finding accommodation between 5th April, 2016 and 5th July, 2016 is unclear and incomplete. However a further document within exhibit "MT 5" has handwriting that suggests the appellant informed the managers that from 5th April, 2016 she was "staying with friend", and in May 2016 "sleeping rough".

24. The outcome of the meeting on 29th August, 2016 is dealt with at paragraph 17 of Mr Thompson's first affidavit. After referring to the details provided by the appellant as to the addresses she had lived in, he states –

> "This was supplied and deemed to be insufficient as she did not provide any details linking her to the catchment area of Clondalkin."

There is no evidence that the appellant was advised of this outcome at the time; still less is there any evidence of any advice being given to the appellant suggesting what she should do next or where she could make application for JSA.

25. As the outcome was also not notified to Ms McCabe she was obliged to write as she did on and 12th September, 2016 to Mr Thompson, marked "Urgent", referring to previous communications and stating: -

> "Ms Kozinceva has attended for interview, submitted all material she has to support her claim and has been in daily contact with your office. But as of this morning 12th September, a decision on your application has not been received.
>
> As you are fully aware, the delay in processing your application is causing my client enormous distress.
>
> For the avoidance of any doubt please be advised:
>
> 1. My client is homeless and therefore cannot provide a permanent address for her Jobseekers Allowance claim. Please confirm that my client is entitled to claim jobseekers allowance capitalise that in circumstances where she is no fixed abode.
> 2. My client's nightly accommodation is determined by her income…
> 3. If you require any further documentation to processes application please contact myself forthwith in relation to same and please set out for what reason the said documentation is required.
>
> My client is seriously prejudiced by this delay as she cannot apply for rent supplement until she is approved for Jobseekers."

26. Mr Thompson replied by letter dated 14 September 2016 as follows: -

> "Dear Eileen,
>
> I refer to your letter dated 12 September 2016 and your subsequent telephone call this afternoon.
>
> I wish to confirm that Kristine's Jobseekers Allowance claim in Clondalkin Intreo Centre has been closed since April 2016. We are unable to reopen this claim is evidence to confirm that she was living in the catchment has not been provided.
>
> In order for Kristine to submit a new application for Jobseekers Allowance she would be required to provide evidence that she is currently residing in the Clondalkin/Lucan/Newcastle area. To date this has not been provided.
>
> If you require any further information please do not hesitate to contact me. Yours sincerely,"

27. These judicial review proceedings were filed on 27th September, 2016, on which date Moriarty J. granted leave to seek judicial review.

28. While denying any decision was made on 14th September, 2016, and denying any entitlement to judicial review, in a letter dated 24th October, 2016 that is not exhibited but is referred to in a follow up letter of 10th November, 2016 the CSSO on behalf of the respondent invited the appellant "to submit evidence of days worked from April 2016 to the present so that the Respondent can process same to see if the Applicant is due any back payments." Ms. McCabe wrote back on 16th November, 2016 enclosing "completed forms as requested", and adding –

> "Ms Kozinceva remains homeless and has advised me that as the most constant part of life is a work in Stillorgan, she would be most grateful if claim could now be dealt with by the nearest intreo office, which is in Dun Laoghaire."

Enclosed with the letter were a copy of the appellant's contract of employment as a sales assistant, and the requisite Form with details and a Declaration duly signed by the employer together with vouching for days worked and wages received – in short all that was required for claiming JSA.

29. The CSSO responded on 20 December 2016 confirming receipt and stating: –

> "We confirm that the forms have been forwarded to the Department for processing in the normal manner. Please contact the Department directly if your client has any further queries in relation to processing of her application."

30. There is no direct evidence as to what office of the respondent processed this claim. The request to contact "the Department directly" with queries would suggest it was dealt with at Department head office. If it was, as the appellant's solicitor had requested, dealt with in Dun Laoghaire, that was not a JSA area in which the appellant was "currently residing" although it was the area in which she worked. At any rate it was at this stage processed speedily, resulting in payment of €2,450.20 by electronic fund transfer into the appellant's own account on 22nd December, 2016.

The damages claim

31. As the Statement of Grounds and the affidavit evidence maintain a claim for damages in the event that the application for judicial review is successful, it is convenient to address such claim at this stage as it is a potential answer to the respondent's argument that the proceedings are moot if such a claim can be maintained.

32. The damages claim concerns firstly the adequacy of the arrears payment made on 22nd December, 2016, and secondly a possible claim to general damages. However only the former needs to be considered in light of the concession by counsel for the appellant that general damages could not be pursued unless the appellant could show misfeasance in public office, and his advice to the court that such a claim was not being pursued.

33. The basis of the financial loss claim is breach of statutory duty *viz*. the failure to pay to the appellant her full JSA entitlement, and consequential financial loss. Surprisingly no exhibited document explains how the figure of €2,450 for arrears is calculated, and no breakdown is given in the affidavits. Mr. Thompson in his second affidavit at para. 8 simply states "I say and believe that the Respondent does not owe any further back payment to the Applicant herein."

34. In responding to this on the applicant's behalf Ms. McCabe avers as follows:

> "7. I say that as a direct result of the said fixed policy in place by the Respondent, between the 21 April 2016 and 28 July 2016 the applicant went without any weekly payments and was therefore unable to access fixed accommodation and had to resort to emergency homeless accommodation or sleep rough. I estimate the applicant is at a financial loss during this period of c. €2300. However, in the absence of a detailed breakdown from the respondent of what payments were made between May and July 2016, the applicant cannot say what her net loss is with certainty.
>
> 8. I say that when the respondent finally put the applicant on a supplementary welfare payment on 28 July 2016 she was at a loss of over €60 per week, since the casual labour that she was employed in was offset against a supplementary payment whereas if she had been on a Jobseekers Allowance payment she could have earned €60 per week without any such offset.
>
> 9. …
>
> 10. …
>
> 11. I say at paragraph 8 of Mr Thompson's affidavit he states "*I say and believe that the Respondent does not have any further back payment to the Applicant herein*". I say this is not accurate given the unlawful refusal of the applicant's application for Jobseekers Allowance at first instance.
>
> 12. …
>
> 13. I say that the applicant suffered serious stress and anxiety as a result of the Respondent's failure to grant her Jobseekers Allowance in accordance with the legislation. I say that she also suffered significant financial loss. The respondent did transfer €2450 after these proceedings initiated. However the applicant estimates that lost to her from offset allowances and loss of jobseekers payment is circa €3000. I say that as a result of the reduced weekly payments she had to reside on occasion in emergency homeless shelters and to sleep rough."

Decision on damages claim

35. If the appellant is entitled to claim to damages the onus is on her to prove loss and quantum on the balance of probability. As far as back payments and consequential financial loss are concerned, these should be capable of calculation with precision. Such

claims are not proven either by Ms McCabe's estimate of €2300 or the appellant's reported estimate of €3000. Ms McCabe notes the absence of a detailed breakdown giving rise to uncertainty as to any net loss. However she has not attempted a breakdown from the information available to her, or set out sufficient information to enable the respondent or the court to assess her claim in any meaningful way. Moreover discovery of relevant documents or calculations does not appear to have been pursued. In these circumstances Mr. Thompson is not required to do anything more than assert that the respondent has made full payment, and as the appellant has not discharged the onus of proof any claim to damages for unpaid arrears of JSA or consequential financial loss cannot succeed.

Mootness

36. The Respondent argued that the appellant's claim is moot insofar as she has now received all back payments in respect of JSA following the submission of a valid application by her solicitors to the CSSO.

37. There is a substantial body of jurisprudence from the Supreme Court identifying when an issue may be moot. This is helpfully summarised in the Respondent's written submissions at para. 41: -

> "An issue may be said to be moot in circumstances where:
>
> (i) There is no longer 'a live controversy' [1] or a 'real issue' [2] or any 'legal dispute' [3] between the parties;
>
> (ii) "The essential foundation of the action has disappeared;" [4]
>
> (iii) "The eventual decision [of the court] would be of no practical significance to the parties" [5];
>
> (iv) It "will not have the effect of resolving some controversy affecting or potentially effecting the rights of the parties" [6]; or,
>
> (v) it is "purely hypothetical or academic"[7] and/or renders the court "a forum for academic discourse" [8].

---

[1] *Per* Murray C.J. in *Irwin v Deasy* (Unreported, Supreme Court, 14 May 2010.

[2] *Brady v. Haughton* [2006] 1 IR 1, at 83.

[3] *Goold v. Collins* [2005] 1 IRLM 1, at 13 *O'Brien v. the Personal Injuries Assessment Board* [2007] 1IR 328 at 333 and *Irwin v. Deasy* Unreported, Supreme Court, 14th May, 2010.

[4] *Per* McKechnie J. in *Lofinmakin v. Minister for Justice* [2013] IESC 49 at paragraph 51(ii).

[5] *Per* Hardiman J. (Geoghegan and Fennelly JJ. concurring) in *Goold v. Collins supra*.

[6] *Per* Hardiman J. (Geoghehan and Fennelly JJ. concurring) in *Goold v. Collins supra*. (citing the judgment of the Supreme Court of Canada in Borowski v. Canada [1989] 1 SCR of 342); reaffirmed by the Supreme Court (per Murray CJ., Denham and Fennelly JJ concurring) in *O'Brien supra* and, more recently, in *Irwin v. Deasy supra*.

[7] *Per* Murray C.J., (Denham and Fennelly JJ concurring) in *O'Brien supra* at 334.

[8] *Per* Denham J. in *Re Bula Ltd.* Unreported, Supreme Court, 11th April 2003.

38. There are however exceptions to the general rule that a court will not hear or determine an issue that is moot, or that becomes moot after a trial at first instant and prior to an appeal. One such exception was *O'Brien v. Personal Injuries Assessment Board (no.2)* [2007] 1 I.R. 328, which concerned whether the Respondent Board had a statutory responsibility to deal directly with an applicant's solicitors. After the proceedings were determined in the High Court, and an appeal was filed, the applicant received an authorisation permitting him to institute a personal injury claim against his employer. The applicant argued that his judicial review proceedings concerning the lawfulness of the Respondent's practice of refusing to communicate with their solicitors was moot and that the appeal should not proceed to hearing, the Board wished to proceed because it concerned an issue which, if determined in the High Court, could affect many other cases. Murray C.J. pointed out at page 334: -

> "[20] Where, as in this case, a party has a bona fide interest in appealing against a declaratory order of the High Court which is not confined to past events peculiar to the particular case which has been resolved in one way or another, the court should be reluctant to deprive it of its constitutional right to appeal. In this case the respondent continues to be constrained in the exercise of public powers under Statute by virtue of the declaration granted in the High Court at the instance of the applicant."

At para. 40 a further example is the case of *Irvine v. Deasy* [2010] IESC 35, where Murray C. J. stated –

> "The general practice of this Court is to decline, in principle, to decide mid-cases. In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the Court may in the interests of due and proper administration of justice determine such a question."

39. Similarly in *Okunade v. Minister for Justice* [2012] 3 IR 152, the issue was "strictly speaking moot", but because it was a test case it was permitted to proceed.

40. The jurisprudence was reviewed by McKechnie J. (with his judgment Fennelly J. agreed) in *Lofinmakin v. Minister for Justice* [2013] IESC 49, [2013] 4 I.R. 274. At p. 292 McKechnie J. stated: -

"[66] It has never been the case however that the rule of mootness is absolute: even therefore when an issue is moot, the courts have always maintained a discretion to hear and determine the point. … In any event, where the court proceeds to determine a moot point, the issue in question is not thereby reclassified: rather it remains moot, but for justifiable reasons the court will nonetheless intervene. There are therefore two steps in the evaluative process. The first is to decide whether the point is moot: if it is not, that is meant be the inquiry: if it is, and if either or both parties still wish to proceed, the second question centres on the court's discretion. The basis for the exercise of this discretion has not been particularised to any great extent and perhaps it should not be, for to do so may have the unintended effect of being overly prescriptive or of foreclosing on the limits of a discretion, with rigid or inflexible consequences.

[67] At the level of principle however it seems to me that, where the overriding interests of justice require a decision on the moot, the same should be given."

41. McKechnie J., as did the Supreme Court in *Goold, Brady* and *O'Brien*, drew on the Canadian case of *Borowski v. Canada* (Attorney General) [1989] 1 S.C.R. 342 to identify the underlying rationale for the rule, albeit that he approached such decision with "a measure of reserve". McKechnie J states:

"…Sopinka J., in giving the Canadian Supreme Court's judgment explained:-

(i) [T]hat even where an issue may be redundant for the purposes of the existing proceedings, nonetheless the same may still retain its character as a matter of live controversy, if a decision would be beneficial to either party in related proceedings: this he referred to as a decision having "collateral consequences" and gave as an example a case where a civil dispute about the 'necessity' for a licence to operate a restaurant had been settled, but where because of its expiry, criminal charges were still pending against the operator;

(ii) that expense may still be justifiably incurred in determining an important and recurring point, otherwise moot, which by the nature of the proceedings is likely to evade review if the doctrine is strictly applied: he instanced the validity of interlocutory injunctions given as part of industrial disputes which in his experience were almost always resolved by appeal date; and

(iii) that the courts, should always be mindful of their true role as the adjudicative branch of government."

42. From his review of the authorities McKechnie J. at p.298 sought to distil the principles as follows: -

"[82] From the relevant authorities thus reviewed and leaving aside the issue of costs which is dealt with separately (para. 102 *infra et seq*), the legal position can be summarised as follows: -

(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;

(ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a *lis*, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably (*sic*) determined;

(iii) the rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model;

(iv) it follows as a direct consequence of this rationale, that the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions;

(v) that rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. the process therefore has a two step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness:

(vi) in conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved it will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice;

(vii) matters of a more particular nature which will influence this decision include:-

(a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for eh case to retain its essential characteristic of a legal dispute;

(b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;

(c) the type of relief claimed and the discretionary nature (if any) of its granting, for example, *certiorari*;

(d) the opportunity for further review of the issue(s) in actual cases;

(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any decision might impact on their functions or responsibilities;

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;

(g) the impact on judicial policy and on the future direction of such policy;

(h) the general importance to justice and the administration of justice to any such decision, including its value to legal certainty as measured against the social cost of the *status quo*;

(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and

the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework."

43. This jurisprudence on mootness and the exceptions that may justify a court determining an issue that is moot was most recently reprised and applied by in *Gorman v. Ombudsman for Defence Forces* [2019] IESC 95 where the Supreme Court decided an appeal notwithstanding that it had become moot because of the retirement from the Defence Forces of the applicant and the retirement of the relevant incumbent of the Office of Ombudsman.

44. To the list enunciated by McKechnie J one might usefully add the consideration that in a case before an appellate court, where (whether because the lower court determined that the case was not moot, or because the case becomes moot after that decision) it may in some cases be undesirable to refuse to decide the appeal leaving that decision unreviewed and therefore (where wrong) undisturbed, even though the decision may function as a precedent in other cases. Similar considerations were identified (albeit in the particular context of the Supreme Court which, of course, now only hears appeals in matters determined to be of public importance) by O'Donnell J. in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 IR 751 at [27].

45. In considering this issue I have also found particularly helpful the judgment of Murray C.J. in *O'Brien* supra. In allowing the Personal Injury Assessment Board's appeal to proceed he found that the Board has "*bona fide* interest in appealing" as "the respondent continues to be constrained in the exercise of public powers under Statute by virtue of the declaration granted in the High Court at the instance of the applicant" (para. [20]). However he went on to give a second reason for refusing the application to dismiss on grounds of mootness: -

"[22] On these grounds alone I would dismiss the application but I do think another aspect of the consequence of the order of the High Court is that it defines obligations which the respondent owes under statute to the applicant not only as regard his past claim but as regards any future claim which he might have for personal injuries. Counsel for the applicant expressed the view that this was a rather extreme possibility but nonetheless acknowledged, as he was inevitably bound to do, that if a situation arose in the future where the applicant had a claim for personal injuries he would rely on the declaration of the High Court as regards

> s. 7 of the Act of 2003 as one which required the respondent to deal with any solicitor appointed to act for him. I do not think it is necessary to consider simply the level of probability in the applicant being unfortunate enough to have some accident in the future, whether at work or on our roads, which might lead him to bring a claim for personal injuries. It seems to me sufficient to state that one cannot preclude that as a real possibility, and is not one that is so remote as to be purely hypothetical. It seems to me somewhat anomalous, to say the least, that the applicant in these proceedings would acknowledge his right to rely on the decision of the High Court at some, at least possible, future occasion but at the same time maintain in these proceedings that the appeal is entirely moot. The foregoing scenario underscores the fact that in seeking and obtaining the declaration as to the correct interpretation of s. 7 of the Act of 2003 in these proceedings, the applicant obtained a ruling determining how the respondent should exercise public statutory powers *vis-á-vis* him which is binding as between the parties not only as regards the circumstances of the particular case but as regards any future event."

46. In the present case the Respondent argued that the appellant was challenging the letter dated 14th September, 2016 which merely confirmed the April 2016 decision to close the file on the appellant's JSA claim, and merely indicated that the appellant would have to submit a valid application within the Intreo centre catchment area where she was "currently resident"; and that the appellant then made a valid application for JSA in December 2016 which was approved and in respect of which payment, including all back payments were made, thus rendering her claim moot.

47. In reply Counsel for the appellant urged on the Court that, even if a damages claim could not be pursued the circumstances of the appellant were such that she was at a risk of further homelessness, and were that to occur she would be faced with the same predicament of not knowing where to lodge her application for JSA because by definition she would "not be currently resident" in any particular catchment area.

Decision on mootness

48. Adopting the two-stage approach, the claim for *certiorari* in respect of the purported decision of 14th September, 2016 is moot because the appellant has in fact been able to apply for JSA for all arrears up to that date and indeed for all her entitlement up to and including 22nd December, 2016, and this has been paid in full.

49. Furthermore, as I have already found, the appellant cannot sustain any claim for damages independently of the claim to arrears because she has not satisfied the onus of proof that rests with her to demonstrate as a matter of probability that she suffered losses over and above the arrears.

50. The appellant also seeks declaratory relief to the effect that the decision to refuse JSA is/was unlawful. Insofar as this must be taken to refer to the letter dated 14th September, 2016 and the events leading up to that letter which are pleaded in the Statement of Grounds, that is also rendered moot insofar as the JSA for the relevant period has in fact now been paid to the applicant.

51. However, the second question that must be considered is whether, in the exercise of its discretion, this Court should nonetheless hear and determine the application for declaratory relief. In my view it should do so for a number of reasons. Firstly I agree with the submission of Counsel for the appellant that the Court is entitled to take judicial notice of the fact that persons with a history of homelessness are at increased risk of suffering further homelessness in the future. The appellant became homeless in April 2016, and remained homeless as lately as 16th November, 2016 (letter of that date from Ms. McCabe to the CSSO). Secondly, while the situation in which the appellant found herself in 2016 *viz*. homeless yet continuing to be in part-time casual employment, was described by Counsel for the Respondent as "unusual", such circumstances cannot be unique. It is a distressing fact that in our society there are many homeless people – most recent published estimates suggesting in excess of 10,000. Most homeless persons find temporary accommodation, but some end up sleeping rough. It is inevitable that at any given time some of them– it may be a small number – will be working and entitled to JSA. Equally it is inevitable that some people who are working will, like the appellant, become homeless and have occasion to apply for JSA at a time when they are not in a position to prove that they are "currently residing" within any designated Intreo catchment area.

52. In *O'Brien* Murray C.J. considered the test of whether Mr. O'Brien might have any future claim for personal injuries was one of "real possibility, and is not one that is remote as to be purely hypothetical". It seems to me that the appellant in the present case, with a history of homelessness, is at very real risk in the future of finding herself in the situation in which she found herself in 2016. Thus, the controversy in the present case potentially affects her future rights.

53. Furthermore, nothing that has been said or exhibited by or on behalf of the Respondent in the present proceedings addresses the simple question of where a homeless person is meant to apply for JSA in the future. In my view the personal consequences for such a homeless person are not confined to the applicant's circumstances and are of such significance that they point to an overriding interest of justice that requires there to be a decision on this point.

54. In coming to this view I have had regard to the matters listed by McKechnie J. in *Lofinmakin* at subpara. [82](vii) which he considers will influence the exercise of the Court's discretion, although he was at pains to point out in para. [83] that these are "indicative only and are not intended in any way to be exhaustive and may well have to be adjusted to reflect the particular circumstances of any given situation.". I find of particular relevance the considerations at (b), (e), and (f). Under (b) I am of the view that the issue that is raised is important and is likely to recur. Under (e) the "character or status of the parties and in particular whether such be public or private" is of particular relevance. It is of the nature of applicants for JSA that they are seeking full time employment and are at financial disadvantage, and this can only be aggravated by homelessness. Under (f) the claim relates to a public law namely statutory rights arising under the Social Welfare Consolidation Act, 2005, as amended, and the procedure to be followed in order to claim them. I am of the view that there is a potential benefit and

utility to this court taking a decision on the issue, which will benefit both a future homeless applicant for JSA, and the respondent, and that this will give a measure of a legal certainty.

55. Under consideration (i) there is a resource cost that I have considered before exercising the discretion to determine a moot issue. In my view this is not a significant consideration in the present case where the proceedings were heard in one day in the High Court and one day on appeal, particularly in light of the more weighty matters just discussed. Moreover, in this case the parties did not seek (correctly, I should add) to have the issue of mootness determined as a stand-alone question. The entire appeal has been heard, the costs have been incurred on both sides, and mootness is relevant only to the issue of whether the Court should decline to decide the substantive case.

Merits

Letter of 14th September, 2016.

56. The first issue that arises is the respondent's argument, with which the trial judge agreed, that "the contents of the said letter [of 14th September, 2016] could not be construed so as to amount to a decision that the appellant was not entitled to the allowance because she was 'homeless'." (para. 31 of the judgment). The basis for this argument is that the letter merely confirmed the decision in April to close the appellant's JSA claim and was not in itself a decision to refuse JSA.

57. Strictly speaking this submission is correct in that the letter of 14th September does not decide that the appellant is not entitled to JSA, or even convey a decision to that effect. Nor does it say that she is not entitled to JSA because she is homeless. Indeed it deserves to be emphasised that the respondent Minister has never taken a decision to refuse the appellant JSA because she was homeless.

58. However in my judgment this submission and the learned trial judge's decision in relation to it take too narrow a view of the import of the letter and the context in which it was written, and consequently the learned trial judge erred in failing to deal with the broader reach of the appellant's claims, and indeed the core issue in these proceedings. In her Statement of Grounds the appellant criticises the respondent for adopting "an arbitrary and inflexible policy which fettered the proper exercise of his duty" (Ground (e)23) and making "an unjustified distinction between the applicant herein and applicants [for JSA] who are not homeless" (Ground (e)28). The pleas at Grounds (e) 31 and 32 are perhaps most pertinent:

> "31. The applicant has a legitimate expectation her application for jobseeker's allowance would be processed notwithstanding her homelessness.
>
> 32. The process was so fundamentally flawed that the Applicant is entitled to the reliefs sought within this statement of grounds. The manner in which it was conducted amounts to a de facto denial of the right to fair procedures."

59. Thus the appellant's claim extends beyond the assertion that the letter of 14th September was a refusal of JSA. It includes a claim that in exchanges culminating with that letter she was effectively denied a process by which her application for JSA, to which she had a statutory entitlement, could be lodged, accepted and determined by the Minister, and that this was *ultra vires* and a breach of fair procedures. This is also apparent from the Grounds of Appeal, and is best encapsulated in Grounds 3 and 7:

> "Ground 3
>
> The learned trial Judge failed to consider or determine the issue as to whether the Appellant, a transient homeless person and therefore not residing in any particular social welfare catchment area, was entitled to register for [JSA] and how that was expected to be achieved given the approach of the Respondent prior to the institution of proceedings;
>
> Ground 7
>
> The learned trial judge failed to hold that as a result of the procedures designed and adopted by the Respondent, her servants or agents had in effect determined that the Appellant was ineligible for [JSA] because of her state of homelessness."

60. These broader claims were not determined by the learned trial judge who erred in failing to view the letter of 14th September 2016 in the context of the preceding correspondence and the meeting of the Clondalkin managers with the appellant on 29th August, 2016. Following the initial advice given to the appellant by Clondalkin Intreo Centre in July that they could not process her claim and that she should apply to the respondent's Gardiner Street office, Mr. MacRitchie specifically asked on her behalf in his letter of 21st July, 2016 addressed to that office to "confirm what process is available for her to have that claim reinstated, and backdated…", and his letter of 28th July, 2016 to the same office asking "if you could confirm which office is responsible for considering [her claim] …" regrettably went unanswered. In the absence of any answer, Ms. McCabe's letters to both Gardiner Street and Clondalkin on 10th August, 2016 similarly pressed the respondent to attend to the matter and her letter to Clondalkin expressly sought confirmation that "my client is entitled to claim Jobseekers Allowance at your Intreo office in circumstances where she is of no fixed abode."

61. It is surprising, in the light of this correspondence, that during the course of the meeting with the two managers on 29th August, 2016 in which she laid out her unfortunate recent history of homelessness the appellant was not informed as to where or how she should apply to renew/reinstate her claim. In Ms. McCabe's follow-up letter of 12th September, 2016 and her telephone call on 14th September, 2016 that immediately prompted Mr. Thompson's letter of 14th September, 2016, she made it plain that she was seeking "*a decision on her application*" and that the "delay in processing her *application*" was causing the appellant distress.

62. From this I conclude that by 14th September, 2016 it should have been obvious to the respondent's staff that the appellant was a person who wanted to renew her application for JSA, and was asking the respondent/its agents either to accept and decide her application in Clondalkin Intreo Centre or to confirm where, in light of her homelessness, she should make the application in order to have it processed by the respondent.

63. It follows that in all the circumstances the letter of 14th September, 2016 must be viewed as an effective failure by the respondent to accept the appellant's re-application for JSA, or to have in place a process or pathway for homeless persons such as the appellant to claim their entitlement to JSA. It was therefore a letter the contents of which in effect deprived the appellant of recourse to the respondent for her statutory entitlement and is amenable to judicial review.

"Currently residing"

64. Viewed in this light the second issue is whether the letter sent on the Minister's behalf by Clondalkin Intreo Centre of 14th September 2016 was unlawful in requiring the appellant who was then homeless to provide evidence of where "she is currently residing" in order to establish the Intreo area in which to submit a new application.

65. In determining whether an appellant for JSA is "habitually resident in the State" the deciding officer is constrained by s.246 of the 2005 Act (as amended), and is specifically confined to taking into account the considerations listed in subsection (4), set out earlier. Whether such person is "homeless" or "of no fixed abode" is not a consideration. There is no statutory requirement that at the date of application, or subsequently, such person must be resident or remain resident or have a "current residence" within a particular catchment area designated by the respondent. Moreover the appellant does not come within the categories of persons in subsection (7) "not regarded as habitually resident in the State".

66. The respondent has published Guidelines detailing how an appellant may qualify and apply for JSA, and the documentation required to substantiate a claim. These were the subject of discovery by the respondent but were not opened to the court as it was common case that they do not address the particular difficulties facing an appellant who is homeless.

67. It follows that imposing a requirement of proof of current residence in a particular catchment area for a person who was known to be homeless as a precondition to making an application for JSA was *ultra vires* the powers conferred on the Minister in the legislation. It had the effect of unlawfully denying the appellant access to the administrative process by which her claim to JSA could be determined, and pursuant to which she could be paid her statutory entitlement. I find unconvincing and circular the argument (para. 62 of the respondent's written submissions) that the requirement to claim JSA in an Intreo Centre where a person resides "…in no way precludes a homeless person like the Appellant from obtaining [JSA] if a proper application is made…the Appellant was not required to provide evidence of a permanent address". The appellant/her advisors went from pillar to post and ended up being told she could only

apply in the catchment where she was "currently resident" in circumstances where she did not "reside" in any particular place in the State.

68. It is well established that there is an implied power to perform an action where it can fairly be regarded as incidental to or consequential upon a matter that is expressly authorised in legislation – see for example *McCarron v Kearney* [2010] IESC 28, 3 IR 302, at para.38 *per* Fennelly J. Clearly the respondent enjoys the implied power under the 2005 Act to establish procedures for the administration of JSA in accordance with the statutory eligibility criteria. Apart from information sufficient to decide whether a given applicant for JSA is "habitually resident in the State", it is entirely understandable that the respondent will need to be satisfied that a particular claim is not fraudulent – for example by being made in a false name, or twice in two different Intreo centres, or where the applicant is working full time. For these reasons in normal circumstances it may be reasonable for the administrative process to require an applicant to provide a current residential address. However these exigencies and the implied power cannot justify the imposition or application of a further residential requirement in respect of an applicant who is known to be homeless and who cannot comply, and for whom by definition there is no catchment area in which they are currently residing. Such applicants fall outside the norm, and different considerations apply. In this respect the learned trial judge erred in so far as he appeared to decide that even in the case of homeless applicants it is not unreasonable for there to be a requirement of residence in a particular catchment area.

69. This failure is not overcome by the fact that the appellant's claim, subsequent to the issue of these proceedings, was accepted by the respondent and dealt with by the Dun Laoghaire Intreo Centre at her request. This of course was done in response to the issue of proceedings, but nonetheless tends to support the appellant's case in that the reason it was dealt with in Dun Laoghaire was because she had a presence in that catchment through her job and she could conveniently collect payment from the Stillorgan Post Office – not because she resided there, temporarily or otherwise. While it is entirely a matter for the respondent, this special treatment of her claim suggests a possible practical means by which applications for JSA by homeless people might be made and processed in the future.

Relief

70. As arrears of JSA have been paid to the appellant, and as I have already determined that the appellant cannot pursue her claim for damages, in my judgment the only relief to which she can be entitled are appropriate declarations. While this is discretionary, as with the granting of any relief sought by way of judicial review, in my view this is an appropriate case in which to make declarations having regard to the need to ensure all possible support to homeless persons who have entitlements, and the risk that the appellant might again find herself as a homeless person making an application to another office of the respondent for JSA. Subject to hearing counsel further I would be disposed to make the following declarations:

    1. A Declaration that by virtue of the letter dated 14 September 2016 from Clondalkin Intreo Centre to the appellant's solicitor Ms. Eileen McCabe the respondent acted

ultra vires in requiring the appellant in applying for Job Seekers Allowance while homeless to provide evidence that she was “currently residing” in a particular Intreo Centre catchment area; and

2. A Declaration that at the date of the said letter the respondent acted unlawfully in failing to have in place or publicise any or any appropriate process for inviting, making, receiving and determining applications for Job Seekers Allowance from a homeless person such as the appellant.