THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 236

Record Number: 2017/157

Peart J.
Edwards J.
McGovern J.

BETWEEN:

LOTI MUNTEANU

APPLICANT/APPELLANT

- AND-

MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 31ST DAY OF JULY, 2019

1. This is an appeal against an order made by the High Court (O'Malley J.) on the 15th March 2017 refusing the appellant's application for reliefs by way of judicial review of certain decisions made by the Minister disallowing her applications for Child Benefit, Jobseeker's Allowance and Supplementary Welfare Allowance.

2. The trial judge gave her reasons for declining to grant these reliefs in a written judgment delivered on the 3rd March 2017 ([2017] IEHC 161).

3. The appellant's applications for these benefits were each refused on the basis that she could not be considered to be habitually resident in the State, as she had not established a right to reside in the State having regard to Directive 2004/38/EC ("the 2004 Directive") and/or the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. No. 656 of 2006) as amended (the "2006 Regulations").

4. Section 246 (5) of the Social Welfare Consolidation Act, 2005 provides:

> "A person who does not have the right to reside in the State, shall not, for the purposes of the Act, be regarded as habitually resident in the State".

5. The Minister concluded, as explained in a letter dated 20th October 2014 that, as provided by s. 246 of the 2005 Act, the appellant could not be considered to be habitually resident in the State where she had not established a right to reside here, because (a) she is not employed or self-employed; (b) she does not have comprehensive health insurance for her and her family, nor sufficient resources to support herself and her family; (c) she is not a student, and does not have comprehensive sickness cover for herself and her dependents, being the requirements for a right of residence in another member state for a period in excess of three months as provided by S.I. 656/2006.

6. The appellant contends on the other hand that at the relevant time she was a jobseeker, and as such, she had a right to reside which derives directly from Article 45 (2) TFEU and Articles 2 and 5 of Regulation (EU) No. 492/2011. It is argued that Jobseeker's Allowance is a payment that is intended to facilitate access to the labour market, or at least that this is its predominant purpose, as well as to provide social assistance, and is not solely a payment by way of social assistance, as the Minister contends.

7. In relation to the refusal of Supplementary Welfare Allowance, it is contended that the Minister misapplied the unreasonable burden test, and that until such time as a proper individual assessment was carried out and a lawful decision made that she is an unreasonable burden on the State, she is entitled to receive that allowance. In this regard it has been submitted that the applicable test is that set out in Case C- 140/12 *Pensionsversicherungsanstalt v. Brey* ("Brey"). In so far as in certain later cases (*e.g. Dano, Alimanovic, and Garcia-Nieto*) the CJEU has found that no such individual assessment is required, the appellant submits that the particular circumstances pertaining in those cases distinguish them from the appellant's case.

8. Before proceeding further with the issues on this appeal, a brief factual background should be set out.

9. The appellant is a citizen of Romania and therefore an EU citizen. She is a member of the Roma community. In her grounding affidavit sworn on the 14th November 2014 she states that she came to this State in the year 2008 with her partner and two young children for economic reasons, and to escape discrimination in Romania. She wished to make a better life here for herself and her family. She states that she survived here economically from the time of her arrival by selling the Big Issue magazine as an unregistered self-employed person, as well as by begging and receiving charitable support by way of food vouchers.

10. She went on to state that apart from some 'exceptional needs payments' (for which a right to reside in the State is not a requirement) she has not been in receipt of social assistance from the State. She has had difficulties with the housing accommodation provided to her in Waterford and was forced to leave that location because of local aggressive opposition, and move to another location.

11. According to information that the appellant herself provided, she ceased selling the Big Issue in or around August 2013. Just over one year later on the 5th September 2014 she completed a Form UP1 in order to claim Jobseeker's Allowance in which she stated that

she was not in any employment at that date, and nor was self-employed. She did not complete that part of the form which asks certain questions as to the nature of the work she was seeking, her availability for work, the number of hours that she would accept, and details and evidence of efforts she might have made to obtain work. Nevertheless, at part 9 of the UP1 Form she declared that (a) she is unemployed and unable to get suitable full-time work; (b) she is capable of, available for, and genuinely seeking work; (c) she has not claimed, nor is she receiving, any other benefits, pension or allowance from any source apart from those shown in the form; and (d) she will notify the Department if she gets work. She declared also that this information is truthful and complete, and that she understands that if any of the information provided by her is untrue or misleading, or if she fails to disclose any relevant information, she would be required to repay any payment she might receive from the Department, and further that she might be prosecuted.

12. The Minister concluded that on the basis of the information that she herself provided, she had not established a right to reside in the State, and therefore could not be considered to be habitually resident here. The appellant draws attention to the fact that in her decision to refuse Jobseeker's Allowance, the Minister made no finding of fact that the appellant is not a jobseeker, the point being that if the appellant was at the time a jobseeker then she was not required to establish a right to reside for the purpose of satisfying the habitual residence requirement.

13. The decision to refuse her application for Supplementary Welfare Assistance was made for the following reasons, as appears from the letter dated 12th November 2014 from the Department:

> "The basis for this decision is the following:
>
> You do not have the right to reside in the State
>
> The circumstances under which a European Citizen retains the right to reside in Ireland for longer than 3 months are legislated for in the European Communities (Free Movement of Persons) No. 2 Regulations 2006, otherwise known as S.I. 656 of 2006.
>
> You are not habitually resident in the State
>
> The basis for this decision is Social Welfare (Consolidation) Act, 2005, as amended by s. 15 of Social Welfare & Pensions Act (No. 2) 2009 which provides as follows:
>
> > "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".
>
> If however, you can provide other documentary evidence to prove your right to reside in the State, I will be happy to review this decision and am sorry this decision could not be more favourable." [Emphasis in original]

14. The invitation extended in the final paragraph just quoted was not taken up by the appellant, although a letter was received from her solicitors dated 18th November 2014 seeking a revision of the decision pursuant to s. 224 of the Social Welfare Consolidation Act 2005. In this letter, the solicitors for the appellant made the following submission:

> "In respect of Supplementary Welfare Allowance and other social assistance payments, where a claimant does not have or no longer retains worker status, the appropriate test to be applied is a consideration of the claimant's overall circumstances and the application of a proportionality test to determine if the claimant has become an unreasonable burden on the social assistance system as a whole and not the application of a habitual residence test. The right to reside test which automatically excludes claimants from social welfare is wholly contrary to EU law. As an emanation of the State, your Department is under the same obligations as a national court to dis-apply conflicting provisions of national law." [Emphasis in original]

15. As for the rejection of the application for Child Benefit, it is unnecessary to address that particular ground, as counsel for the appellant has in fairness accepted, as found by the trial judge, that the ground sought to be relied upon was not one of the grounds on which leave to seek judicial review was granted. He does make the point that submissions were made on the issue in the High Court, and submits that a flexible attitude should be adopted to the question of whether it has been pleaded and raised with sufficient clarity for it to be allowed as a ground of appeal. However, I would agree that this question should be left over to another case in which it is raised with sufficient clarity.

16. In a lengthy and detailed judgment the trial judge set out extensively the relevant domestic and EU legislative provisions, and conducted an examination of relevant EU case law to which she was referred by counsel in support of their comprehensive submissions, which she acknowledged had been very helpful.

17. Commencing at para. 107 of her judgment the trial judge set out a summary of what she considered the legal position to be from the statutory framework and authorities to which she had referred. It is convenient to set out that summary verbatim from the judgment, as follows:

> "107. Article 24 (1) [of the 2004 Directive] provides, subject to the Treaty and to secondary legislation, for equal treatment for citizens and their family members residing in a host State on the basis of the directive. In order to invoke the right of equal treatment, the residence of the person concerned must therefore be in accordance with the conditions of the directive (*Dano*).
>
> 108. The right to reside for an initial three months is dependent only upon (a) the possession of valid papers and (b) not becoming an "unreasonable burden" on the social assistance system of the host State.
>
> 109. The right to reside for a longer period is dependent upon (a) being a worker or self-employed (in which case no other condition applies) or (b) in the case of an economically inactive person, having sufficient resources not to become a burden on the social assistance system and having comprehensive sickness insurance, or (c) being enrolled in specific forms of education and having comprehensive sickness insurance. These conditions are intended, *inter alia*, to prevent migrant citizens from becoming an unreasonable burden on the social assistance system. The right to reside is retained for as long as the conditions are met.

110. Where a person had the status of "worker", he or she will retain that status for at least six months in the circumstances described in Article 7 (3) of the directive. During that period the person will continue to have a right of residence and may therefore invoke the equal treatment principle during that time (*Vatsouras and Koupatantze*).

111. Member States may not set a fixed figure to satisfy the requirement of "sufficient resources", and may not determine an amount higher than that permitted by the criteria in Article 8 of the directive.

112. Under Article 14 (4) (b), a migrant citizen is also protected against expulsion if he or she entered the State as a jobseeker and can provide evidence of a continuing search for employment and a genuine chance of being employed. However, under Article 24 (2) Member States are permitted to derogate from the principle of equal treatment in respect of social assistance that might otherwise be payable to migrant citizens during their first three months of residence, or for a longer period if the continuing right of residence of the individual concerned derives from Article 14 (4) (b).

113. A Member State is entitled to refuse to grant social benefits to economically inactive Union citizens who exercise their freedom of movement in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence. Otherwise, persons who arrive in a Member State without sufficient resources to provide for themselves could automatically claim the benefit intended to cover the beneficiary's subsistence costs (*Dano*).

114. A benefit is a social security benefit insofar as, firstly, it is granted to the recipients without an individual and discretionary assessment of personal needs, on the basis of objective criteria and a legally defined position, and secondly, relates to one of the risks listed in Article 3 of the regulation (*Hosse, Commission v. United Kingdom*). The concepts of social security and a special non-contributory cash benefit are mutually exclusive (*Hosse*).

115. Neither the directive nor the regulation preclude national legislation that makes entitlement to a social security benefit conditional upon the claimant having a lawful right to reside in the host State (*Brey, Dano, Commission v. United Kingdom*).

116. Benefits intended to facilitate access to employment are not to be regarded as "social assistance" within the meaning of the derogation. A citizen of the Union who is a jobseeker and can show a real link with the labour market of the host State may not be excluded from such benefits (*Vatsouras and Koupatantze*).

117. However, a benefit which meets the criteria for a special non-contributory cash benefit is covered by Article 70 [of Regulation (EC) No. 883/2004 on the coordination of social security systems – "the Co-ordination Regulation"] even if it forms part of a scheme that provides benefits to facilitate the search for work (*Alimanovic*). Article 70 benefits are covered by the concept of "social assistance", and cannot be characterised as benefits of a financial nature intended to facilitate access to the labour market (*Alimanovic*).

118. The conditions of eligibility for benefits covered by Article 70 are to be determined solely by the legislation of the Member State concerned. Article 24 (1) does not preclude national legislation that excludes from access to special non-contributory cash benefits nationals of other Member States who do not have a right of residence under the Directive (*Hosse, Dano*).

119. Migrant Union citizens may claim access to social assistance schemes, to which recourse may be had by an individual who does not have sufficient resources to meet his own basic needs and the needs of his family, only if their residence complies with the conditions laid down by the Directive (*Dano, Alimanovic*). The derogation in Article 24 (2) permits a Member State to refuse access to such schemes to a person whose right to reside is based solely on a continuing search for employment.

120. The Member State may be required to assess the individual situation of the person concerned before finding that his or her residence is placing an unreasonable burden on the social assistance system (*Brey, Dano*), but not if the national legislation complies with the directive and displays sufficient levels of legal certainty, transparency and proportionality (*Alimanovic*). Further, an individual assessment may not be required if the Member State can show that an accumulation of all the individual claims that would be submitted would result in an unreasonable burden (*Alimanovic, Commission v. United Kingdom*).

121. The requirement of a right to reside constitutes indirect discrimination. As such, it must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective. The grant of a benefit may have consequences for the overall level of assistance which may be accorded by the State (*Commission v. United Kingdom*). Regard may be had to the consequences of an accumulation of claims (A*limanovic*)."

18. Having described that legislative structure, the trial judge then expressed her conclusions in relation to the refusal of Jobseeker's Allowance as follows:

"122. In this case, counsel for the applicant has submitted that the issue before the Court is the lawfulness of test applied, and that the Court is not being asked to make findings of fact. That is correct in so far as it goes, but I think it is fair to point out, firstly, that it was for the applicant to make the factual case for herself in her claims for the various payments and in the interview with the social welfare inspector. The letters written on her behalf by her solicitor do not take issue with any material factual assertions in the respondent's correspondence. Secondly, an applicant for judicial review who says that the wrong test was applied is generally under an obligation to demonstrate, by reference to the facts, that a different test could have produced a more beneficial result. It is not sufficient, in my view, to say that the applicant would be in a position to produce different evidence if required.

123. Such evidence as there is points clearly to the conclusion that the applicant was never a worker in this State and indeed she does not claim to have been such. Her sole economic activity appears to have been as a vendor of the *Big Issue*, and that appears to have ceased during the year prior to her applications. In the circumstances I am compelled to accept that the respondent is correct in describing her as an economically inactive person who has not shown a real link to the Irish labour market. This is not a derogatory description, and does not imply personal blame. The applicant may well be right in saying that she is handicapped by her lack of English.

124. Jobseekers' Allowance is a special non-contributory cash benefit within the meaning of Articles 3 and 70 of the

> regulation. This finding is based on the fact that it is clearly intended as a substitute cover for the risk covered by unemployment benefit (a branch of social security referred to in Article 3 (1)). It guarantees a minimum subsistence income. It is funded from taxation and is not dependent on contributions made by the beneficiary. It is listed in Annex X of the regulation.
>
> 125. In those circumstances it is clear that, even if there is some element of an intention to assist persons seeking access to the labour market, the benefit is governed by the regulation.
>
> 126. The conditions for eligibility for Jobseekers' Allowance are therefore solely a matter for national legislation. A statutory requirement of local residence in the State is not precluded by EU law."

19. As for Supplementary Welfare Allowance, the trial judge stated the following by way of conclusions:

> 127. Supplementary Welfare Allowance is a form of social assistance. As such it is not covered by the regulation. There is nothing in the directive to preclude the setting of a condition as to local residence, since it is an objective of the directive that persons exercising the right to freedom of movement should not become an unreasonable burden on the social assistance system of the host State.
>
> 128. I accept the argument made on behalf of the applicant that *Brey* has not been overruled by subsequent cases such as *Alimanovich or Commission v. United Kingdom*, and that some level of consideration of the personal circumstances of the claimant is clearly necessary. However, the reference in *Brey* to aid granted before the assessment takes place does not, in my view, mean that the State must in every case grant one or more payments of every benefit applied for before it can reach a determination. In this case, the applicant's history of some degree of self-employment was considered, as was the fact that she had not had any other source of income apart from charitable donations by individuals and organisations. She had previously needed and been granted exceptional needs payments. The level of debt incurred by her in respect of accommodation was taken into account. The conclusion that her difficulties were not temporary cannot be considered irrational. I consider that the degree of individual assessment was adequate for the purpose. It is also clear that *Brey* must be read in the light of subsequent judgments which established that the question is not simply whether the one person in question would, by himself or herself, become an unreasonable burden (since the answer to that question would always be in the negative), but the effect of granting the benefit sought to all others in similar circumstances."

20. In her notice of appeal, the appellant has identified a number of respects in which she contends that the trial judge fell into error in relation to her conclusions as to Jobseekers' Allowance and Supplementary Welfare Allowance.

21. Firstly, in relation to Jobseekers' Allowance she refers to the trial judge's conclusion at para. 117 of the judgment, which I have set out above where, by reference to the judgment in *Alimanovic*, she stated that even though a non-contributory cash benefit may include a benefit that facilitates a person's search for work, it nevertheless constitutes a "social assistance" benefit for the purposes of Article 70 of Regulation (EC) No. 883/2004 on the co-ordination of social security systems. Counsel suggests that this categorisation is problematic given the approach that has been taken by the CJEU. Counsel submits that the core question relating to Jobseekers' Allowance is whether it is a payment which is intended to facilitate access to the labour market, rather than being predominantly social assistance. If it is properly the former, then as provided by Article 70 (3) of Regulation (EC) No. 883/2004 "Article 7 and the other Chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article" -- in other words, in effect, the benefit in question (in this case the Jobseekers' Allowance") may not be made subject to a right to reside requirement. In this regard, it has to be pointed out that Annex X of Regulation 883/2004 lists as a "special non-contributory cash benefit" in relation to Ireland, inter alia, "Jobseekers' allowance (Social Welfare Consolidation Act 2005, Part 3, Chapter 4". This indicates that Ireland considers that Jobseekers' allowance is a benefit which is excluded from the provisions of Article 7, and therefore one which may be subject to a right to reside condition. It should be pointed out also that s. 139 (1) of the Social Welfare Consolidation Act, 2005 includes "jobseekers' allowance" in a list of certain payments described as "assistance under this Part". In the Act as originally enacted this form of assistance was referred to as "unemployment assistance".

22. Nevertheless, the appellant argues that notwithstanding the fact that Jobseekers' Allowance has been included in Annex X of the Regulation and is therefore categorised as a social assistance payment, and notwithstanding that in s. 139 of the 2005 Act it is described as "assistance", it is in fact a payment whose purpose should be seen as predominantly to support and facilitate a jobseeker's access to the labour market, and therefore a benefit which may not be made subject to a right to reside condition.

23. In support of that submission, counsel argues that the classification by the national legislature is not determinative of whether the benefit is one by way of social assistance. In that regard he has referred to the judgment of the Court of Justice in Case-78/91 *Hughes v. Chief Adjudication Officer, Belfast* [1992] ECR 1-04839, in which at para. 14 the Court stated:

> "The Court has repeatedly held that the distinction between benefits excluded from the scope of the Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation."

24. In the light of that statement, counsel has submitted that an examination of the qualifying conditions of Jobseekers Allowance strongly supports the proposition that the predominant purpose is to facilitate access to the labour market by persons who are unemployed, capable of work, available for work and genuinely seeking but unable to obtain employment. It is submitted that accordingly the predominant purpose is not social assistance as submitted by the Minister, but rather a payment intended to facilitate access to the labour market by persons such as the appellant.

25. As for the contention that the inclusion of Jobseekers' Allowance within Annex X determines the question also, counsel has referred to *Case C-299/05 Commission of the European Communities v. European Parliament and Council of the European Union* [2007] I-08695. In that case the question arose as to whether certain benefits which had been included in Annex IIa of Regulation No. 647/2005 as being 'special non-contributory benefits' were in fact 'sickness benefits' and their inclusion in Annex IIa of the Regulation was an error of law which thereby vitiated the Regulation. The Court found that the particular benefits were sickness benefits and ought not to have been included, and that the particular provisions of the Regulation should be annulled. By the same process of reasoning counsel submits that this Court should not consider that because Jobseekers' Allowance is included in Annex X, that this is determinative of the question whether that allowance is as a matter of law a social assistance payment and not one whose predominant purpose is to assist or facilitate persons such as the appellant to access the labour market, and to which no right to reside requirement specified in Article 7 of the Regulation applies.

26. Counsel referred also to the fact that in Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703, the CJEU found that a payment under United Kingdom legislation, which was akin to the Jobseekers' allowance here, was in fact a payment intended to facilitate access to the labour market even though it had been included in a list of "special non-contributory cash benefits".

27. In response, the respondent relies upon the fact that a pre-condition to an entitlement to Jobseekers' Allowance is by virtue of s. 245 of the 2005 Act that the claimant be habitually resident in the State, and that having no right to reside in the State the appellant cannot, given the provisions of s. 246 (5) of the Act, be considered to be habitually resident here. That was the reason given for refusing the application for Jobseekers' Allowance in the Minister's letter of refusal dated 20th October 2014, as affirmed in letter dated 6th November 2014 following a requested review of the original decision under s. 301 of the Act of 2005.

28. That being the case, the respondent has submitted that the only way that the appellant might overcome that obstacle is to satisfy the Minister that she is under EU law properly to be considered to be a jobseeker, and as such is residing lawfully in this State.

29. In that regard, the Minister refers to the UP1 application form that the appellant completed when applying for Jobseekers' Allowance and to the undoubted fact that while she completed the final declaration declaring, *inter alia*, that she was (a) unemployed and unable to get suitable full-time work, (b) that she is capable of available for and genuinely seeking work, it had to be borne in mind also that she failed to provide any responses at all when asked for certain details at Q. 19 on the form, such as the type of work she was looking for, whether she was available full-time for work, whether she was looking for full-time work, the number of hours work she would accept and, in particular perhaps, "where have you tried to get work? Please attach any documentary evidence". It is submitted that in such circumstances, there is no reality to her own assertion that she is genuinely seeking employment. The Minister has also pointed to the fact that it is not in dispute that such self-employment (unregistered) as she engaged upon by selling the Big Issue ended in August 2013, some 14 months prior to her making this application for Jobseekers Allowance. It is submitted that any right to reside which she enjoyed by reason of such unregistered self-employment selling that magazine came to an end when, on her own admission, that self-employment ceased around August 2013.

30. In this regard, the Minister has referred to Article 7 (3) of the Directive EC/38/2004 ("Residence Directive") which provides:

> "3. For the purposes of paragraph 1 (a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
>
> (a) He/she is temporarily unable to work as a 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 12 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."

31. The Minister correctly points to the fact that the appellant has not advanced any evidence in order to bring herself within the above provisions, and therefore cannot claim to enjoy a right of residence by virtue of Article 7 of that Regulation. That leads on to the issue which is at the core of this appeal, namely whether the Minister was correct in law to refuse the appellant's application for Jobseekers Allowance because she did not have a right to reside in the State at the relevant time, and therefore could not satisfy the habitual residence requirement which the Minister contends must be satisfied given the predominantly social assistance nature of the Jobseekers Allowance and its inclusion in Annex X of Regulation (EC) NO. 883/2004.

32. The appellant has sought to persuade this court that the trial judge was wrong to have concluded that Jobseekers Allowance is a social assistance payment, and not one intended to facilitate access to the labour market. At para. 124 of her judgment, the trial judge, as set out above, described the allowance as "a special non-contributory cash benefit within the meaning of Articles 3 and 70 of the Regulation, and stated that "this finding is based on the fact that it is clearly intended as a substitute cover for the risk covered by unemployment benefit (a branch of social security referred to in Article 3 (1)" and that "it guarantees a minimum subsistence income [which] .. is funded from taxation and is not dependent on contributions made by the beneficiary" and "is listed in Annex X of the regulation".

33. The real question on the facts of the present case is whether the Court is persuaded that the trial judge fell into error when she concluded that Jobseekers' Allowance was in the nature of social assistance and not a payment made to facilitate access to the labour market. If it is the latter then no habitual residence requirement, which is itself dependent upon having a right to reside, may be imposed as it would come within the waiver in Article 7 of the co-ordination directive (883/2004/EC). Nevertheless, even in the case of the latter, the appellant would have to satisfy the Minister that she is a genuine jobseeker. But I do not consider that it is necessary or even permissible for this Court to decide whether the appellant fulfils the requirements for being considered a genuine jobseeker, as the decision against her in relation to her application for Jobseekers Allowance was refused only on the ground that she could not satisfy the habitual residence test because she has no right to reside.

34. In my view counsel for the appellant is correct to submit that there has been no finding of fact made as to whether she is a jobseeker, even though it is implicit that she is not considered to be one, since if she was, there would be no requirement that she be habitually resident here, and therefore the question of her having a right to reside wold not be considered.

35. Questions such as whether the appellant has established a real link between herself and the labour market, and/or has established that she has over the course of a reasonable period of time genuinely sought work here since August 2013 when her unregistered self-employment ceased would then arise for consideration. But they are not matters that arise for decision on this appeal.

36. To answer that question the Court needs to consider the nature, purpose and conditions of the jobseekers' allowance payment. While the Court would naturally be entitled to have regard to the fact that it is described as social assistance within s. 139 of the Act of 2005 and that it has been included by the State within the list of special non-contributory cash benefits in Annex X of Regulation (EC) No. 883/2004, these are not of themselves determinative.

37. In *Vatsouras and Koupatantze* – (Joined Cases C-22/08 and 23/08) the CJEU stated at para. 41-42:

> "41. It is for the competent national authorities and, where appropriate, the national courts to establish the existence of a real link with the labour market, but also to assess the constituent elements of that benefit, in particular its purposes and the conditions subject to which it is granted.
>
> 42. As the Advocate General has noted in point 57 of his Opinion, the objective of the benefit must be analysed according to its results and not according to its formal structure."

38. In the same case, at para. 45 the Court stated:

> 45. Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24 (2) of Directive 2004/38."

39. Some guidance can be gleaned from the judgment of the CJEU in *Brey* where the Court stated the following in relation to the concept of 'social assistance':

> "61. Accordingly, that concept must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by the individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State …
>
> 62. As regards the compensatory supplement at issue in the main proceedings, it is clear from paragraphs 33 to 36 above that that benefit may be regarded as coming under the 'social assistance system' of the Member State concerned. As the Court found in paragraphs 29 and 30 of *Shalka*, that benefit, which is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, is funded in full by the public authorities, without any contribution being made by insured persons."

40. The appellant is correct to submit that merely because the national legislature has designated jobseekers' allowance as being within Annex X of the co-ordination regulation, or has elsewhere described it as 'social assistance', and considers it to be such, is not dispositive. The label ascribed to it does not define its true character. Equally, the appellant, who completed a UP1 form in the manner she did, by merely signing the form immediately below declarations (a), (b), (c) and (d) as set out above, but provided none of the very relevant information requested at Q. 19 of the form, does not by so doing become a jobseeker.

41. The Court must consider the nature and purpose of the jobseekers' allowance. As stated by the CJEU at para. 42 of its judgment in *Vatsouris and Koupatantze*: "… the objective of the benefit must be analysed according to its results and not according to its formal structure". This question is also a matter for the national courts to determine. The CJEU stated in the same case at para. 41:

> "41. It is for the competent national authorities and, where appropriate, the national courts not only to establish the existence of a real link with the labour market, but also to assess the constituent elements of that benefit, in particular its purposes and conditions subject to which it is granted."

42. In that regard it can be noted that the amount of the jobseekers' allowance is virtually identical in amount to the Supplementary Welfare Allowance. Each is in the amount of €203 or thereabouts. There is nothing to indicate that there is any element of the jobseekers' allowance payment that reflects any additional costs which one could reasonably associate with seeking employment, over and above what is required, as with Supplementary Welfare Allowance, for basic living and the maintenance of human dignity. It is in effect a basic minimal subsistence payment made to a qualifying unemployed person, as opposed to a payment to a person which is designed and intended to assist/enable the person to gain employment.

43. The Court can have regard to the fact that the State has included the Jobseekers' Allowance within Annex X of the co-ordination regulation, as being a special non-contributory cash benefit and therefore not subject to Article 7, even though, as I have stated, that is not dispositive. There is not, in my view, anything manifestly inconsistent with the nature of the jobseekers' allowance payment and its designation within Annex X, or indeed within s. 139 of the Act of 2005 as "assistance".

44. In my view the trial judge was correct to conclude, as she did for reasons set forth at para. 124 of her judgment, that Jobseekers' Allowance is a special non-contributory cash benefit within the meaning of Articles 3 and 70 of the Regulation, and that the regulation applied, and that it may therefore be subject to an habitual residence requirement which itself depends upon there being a right to reside.

45. Counsel for the appellant argued that in so far as there might be a doubt, in the light of the case law of the CJEU about whether jobseekers' allowance constitutes a social assistance payment or a payment in the nature of a benefit intended to facilitate access to the labour market, this Court should make a reference under Article 267 TFEU to the CJEU. I do not consider that this step is necessary on the facts of this case.

46. As for the refusal of the appellant's application for Supplementary Welfare Allowance, there is clearly nothing to preclude the imposition of an habitual residence requirement, as stated by the trial judge, which in turn presupposes a right to reside. The co-ordination regulation excludes from its ambit, *inter alia*, "social and medical assistance" and therefore an habitual residence condition is not prohibited by virtue of Article 7. The appellant in her circumstances, where she did not come within Article 6 of the Residence Directive, or fulfil the requirements of Article 7 (a), (b) or (c) could only have a right to reside if, *inter alia*, she established that she was a jobseeker. As I have already concluded, she excluded herself from any possibility of being so considered by failing to complete Q. 19 of the UP1 form. Her mere assertion that she was a jobseeker does not so constitute her. Her right to reside therefore came to an end when she ceased self-employment in August 2013. The Minister's decision as recorded in her letter dated 27th November 2014 was firstly that the appellant had no right to reside in the State. She could not therefore fulfil the habitual residence requirement, and in any event, as stated by the Minister "her claim amounts to an unreasonable burden on the State …".

47. I am satisfied that the trial judge was correct to conclude as she did at para. 123 of her judgment (see para. 18 above).

48. It is clear from the appellant's submissions that she accepts that the State is entitled under EU law to make the granting of Supplementary Welfare Allowance subject to the appellant having a right to reside, provided that such a requirement is in accordance

with EU law. She accepts that the imposition of the 'unreasonable burden test" is a legitimate restriction. The appellant relies heavily upon the judgment of the CJEU in *Brey*, and submits in the light of *Brey* that a person in the position of the appellant who has no right of residence is nevertheless entitled to social assistance until such time as she is considered to be an unreasonable burden on the State. The Minister contends that *Brey* does not support that proposition when properly understood.

49. The problem that arose in *Brey* was that the national legislative provision under scrutiny was one where simply by making an application for social assistance the applicant was excluded from receiving it on the basis that the mere application itself demonstrated that he was an unreasonable burden on the state. He was automatically excluded from eligibility and received no individual assessment as to whether or not he constituted an unreasonable burden, as that phrase must be understood. Although, as can happen, the CJEU recast the question asked in the reference, and stated at para. 75:

> "It can be seen from paragraphs 64 to 72 above that the mere fact that a national of a Member State receives social assistance is not sufficient to show that it constitutes an unreasonable burden on the social assistance system of the host Member State."

50. There is no doubt that the appellant was what is referred to as "economically inactive" since August 2013 according to the information that she herself provided. As the Minister has submitted, and as is clear in any event from Recital 10 of the Residence Directive, the condition for lawful residence at Article 7(1)(b) which is applicable to economically inactive persons, such as the appellant, that they "have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State" is to prevent persons such as the appellant becoming an unreasonable burden on the social assistance system of the State.

51. It is clear from *Brey* that the national legislature may not provide for automatic exclusion that excludes some form of consideration of the particular circumstances of the appellant. The Court of Justice stated at para. 64 of its judgment that the national authorities cannot draw a conclusion that an applicant does not have sufficient resources to avoid becoming an unreasonable burden "without first carrying out an overall assessment of the specific burden which granting the benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned". The appellant relies upon what was stated by the Court of Justice at para. 75 of its judgment which I have stated at para. 47 above.

52. The appellant contends that this "overall assessment" did not occur in the present case, and that the decision to refuse the appellant's application for Supplementary Welfare Allowance is unlawful as a result, and should be quashed.

53. In *Brey* the Court of Justice stated at para. 69 of its judgment:

> ` "…it is clear from recital 16 in the preamble to Directive 2004/38 that, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of person concerned, his personal circumstances, and the amount of aid which has been granted to him."

54. At para. 72 of its judgment in *Brey*, the CJEU stated also:

> "…Article 7 (1) (b) … means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole".

55. In my view the trial judge was correct to conclude that the level of assessment made of the appellant's circumstances as evidenced by the Minister's letter dated 27th November 2014 on foot of a review of the earlier decision is sufficient to meet the requirements of EU law, particularly as stated in *Brey*. The trial judge expressed her conclusions in this regard at para. 128 of her judgment. I agree with them.

56. The appellant has not established a right to reside here following the cessation of her self-employment. She could have retained a right to reside if she could bring herself with Article 7(1)(b) of the residence directive (as transposed by S.I. 656/2006. A consideration of whether she had "sufficient resources" so as not to become a burden on the social assistance system of the state was required to be undertaken by the Minister. I am satisfied that the decision that this condition was not fulfilled was a valid decision made after a sufficient consideration and assessment of the personal circumstances of the appellant on the basis of such information as the appellant herself had provided, and on that basis alone it was open to the Minister to decide that the appellant did not have a right of residence by virtue of Article 7 (as transposed). She was therefore not entitled to receive Supplementary Welfare Allowance.

57. But it has to be remarked also that even if I am wrong in considering that the question of whether the appellant was properly assessed as being an unreasonable burden on the State, and on that account alone having no right of residence for the purposes of Article 7, a question which the appellant has not addressed at all apparently is the conjunctive requirement within Article 7 (1) (b) that she "have comprehensive sickness insurance cover in the host Member State". This requirement is included in the transposing Statutory Instrument 656/2006 at Article 6(2)(ii) thereof. It must follow that for that reason alone, the appellant would fail to come within the terms of Article 7 of the residence directive, and that the Minister in her submissions to this Court is correct to submit also that in a judicial review matter of this kind, an applicant for relief must demonstrate not only that she is entitled to the relief sought, but also that the granting of such relief is something from which she can derive a benefit. In circumstances where, even if she is correct, she has never contended that she had relevant health insurance in order to satisfy the additional requirement of Article 7 (1) (b), it would be a futile exercise for this court exercise its discretion by granting an order to quash the decision to refuse her application for Supplementary Welfare Allowance.

58. For all these reasons I consider that the trial judge was correct, and I would dismiss this appeal.