Neutral Citation [2013] IEHC 133

THE HIGH COURT

[2012 No. 15 SP]

BETWEEN/

EWAEN FRED OGIERIAKHI

PLAINTIFF

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND THE ATTORNEY GENERAL AND AN POST

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 5th March 2013

1. It may seem curious that a simple idea which has been a core value of European Union law since the establishment of the original European Economic Community in 1957 – namely, the free movement of persons - should have given rise to a legal regime which has often proved to be highly complex in its practical operation. The present case may be regarded as a contemporary example of just this very point, since to anticipate somewhat, I have found it necessary to refer a number of questions to the Court of Justice pursuant to Article 267 TFEU concerning the interpretation of these free movement rules.

2. The plaintiff is originally a Nigerian national who arrived in Ireland in May, 1998 whereupon he sought asylum. One year later he married a French national, Laetitia Georges, in May, 1999 and then withdrew the asylum application. He was given a residence permit by the Minister for Justice on 11th October, 1999.

3. That marriage split up in the course of 2001. A few months thereafter Mr.Ogieriakhi left the accommodation in which he had previously been living with Ms. Georges in order to make a new life with an Irish national, Ms. Catherine Madden. Ms. Georges and Mr.Ogieriakhi divorced in January, 2009 and Mr.Ogieriakhi and Ms. Madden married later that year in June, 2009. Mr.Ogieriakhi was later granted Irish citizenship by naturalisation in 2012.

4. In these proceedings the plaintiff now sues the State in a Francovich-style action for damages claiming that the State failed properly to transpose the provisions of Directive 2004/38/EC ("the 2004 Directive") into domestic law. The plaintiff can only succeed in such a claim if it can be shown that the Member State in question failed properly to transpose the relevant provisions of Union law; that such a breach of Union law was a sufficiently serious one and that he or she suffered loss as a result: see Joined Cases C – 6/90 and C-9/90 *Francovich v. Italian Republic* [1991] ECR I-5357, para. 35.

5. In these proceedings, Mr. Ogieriakhi has represented himself. Unlike many litigants in person, he has legal training and qualifications. There is no doubt at all but that he is an immensely erudite and accomplished advocate/litigant.

6. The starting point for this claim is the fact that Mr. Ogieriakhi was dismissed from his position as a postal sorter in An Post in October, 2007 on the *sole* ground that, as a non-EEA national, he had no right to work without a work permit. While it is accepted that Mr. Ogieriakhi did not have such a work permit, his case was that he had already acquired a right of permanent residence in Ireland by virtue of Article 16 of the 2004 Directive and that he accordingly had an entitlement to work in the same manner as an Irish citizen or, for that matter, another EU or EEA national exercising free movement rights. As the Minister for Justice, Equality and Law Reform had already taken the view that the plaintiff had no such entitlement, An Post proceeded to dismiss him on this ground once this matter came to its attention. It is important to stress that the plaintiff's supposedly illegal status within the State was the sole basis for his dismissal and that An Post would have been willing to employ him if he could show that he was legally entitled to work in the State. It was essentially for this reason that this dismissal was subsequently adjudged not to be unfair by the Employment Appeals Tribunal by decision dated the 14th July 2008.

7. If the plaintiff's argument is correct, then it is plain that he has suffered a grave injustice in the manner in which he came to be dismissed by An Post (a wholly State owned organisation). Certainly, questions of causation and proof of loss have not featured prominently in this case. Accordingly the State (which has also taken over the defence of these proceedings on behalf of An Post) does not really dispute that *if* the plaintiff had acquired such a right of permanent residence and *if* the manner in which the Directive was transposed constituted a serious breach of Union law, then in those circumstances it must be accepted that such breach caused the plaintiff loss (*i.e.*, in the case, the dismissal from employment), even if the extent of such loss may also be a matter of dispute. In the hearing before me, the focus, therefore, has been on whether the plaintiff's rights have in fact been infringed by the manner in which the 2004 Directive has been transposed and, if so, whether this breach can be regarded as a sufficiently serious one for the purposes of the *Francovich* doctrine.

8. It follows, accordingly, that he first question to be considered is whether the plaintiff had established a right to permanent residence in the wake of the coming into force of the 2004 Directive. It is to this question to which we can turn.

Article 16 of the 2004 Directive and the right of permanent residence

9. Article 16(1) of the 2004 Directive provides:

> "Union citizens who have resided legally for a continuous period of five years in the host Member States shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III."

10. Article 16(2) adds that:

> "Paragraph 1 shall apply also to family members who not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years."

11. Article 16(4) further provides that:

"Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period of exceeding two consecutive years."

12. The 2004 Directive came into force on 30th April, 2006. If, therefore, Mr. Ogieriakhi's residence within the State between 1999 and 2004 satisfies the requirements of the Directive, it follows that he would have been entitled to permanent residence within the State as and from that date.

Ms. Georges' residence with the State
13. It has to be accepted that, in the first instance, at least, Mr. Ogieriakhi's entitlement (such as it may be) is entirely dependent on whether it can be shown that Ms. Georges herself complied with the requirements of Article 16 during the course of the relevant period between October, 1999 and October, 2004.

14. There seems little doubt but that Ms. Georges satisfied the requirement of Article 16(1) of the 2004 Directive in her own right. She resided legally in the State for a continuous period of five years, commencing in 1998 until December 2004, at which point she appears to have returned permanently to France. One of the particular difficulties in the present case is that as a result of a District Court order made (it seems) at some stage in either 2001 or 2002, Ms. Georges and Mr. Ogieriakhi agreed to live apart and not to have any further contact with each other. It is accordingly difficult in Ms. Georges' absence to establish precisely her movements (and, indeed, her intentions) at particular points in time, especially during the calendar year of 2004. Mr. Ogieriakhi has long lost contact with Ms. Georges and her present whereabouts would appear to be unknown.

15. However, inquiries made by An Garda Siochána in the context of earlier applications made by Mr. Ogieriakhi for permission to stay in Ireland established that Ms.Georges remained in Ireland until at least the middle of December, 2004. This is borne out by the records held by the Department of Social Protection, as this evidence shows that Ms. Georges paid social security contributions based on her employment (Pay Related Social Insurance) ("PRSI") from October, 1998 until 27th June, 2003, and from 19th August, 2003 to 21st November, 2003. There are also records of her having worked for two days on 14th and 15th October, 2004. These records further show that she made claims for unemployment benefit between 7th July, 2003 until 12th May, 2004; from 11th June, 2004 until 8th August, 2004 and from 1st November, 2004 until 1st December, 2004.

16. Officials from the Department of Social Protection also made inquiries with a particular employer which strongly suggested that Ms. George was working between July, 2004 to some time in October 2004, but this was never confirmed to them in writing by her then employer. On the balance of the evidence I nevertheless feel that I must conclude that she was working during this period as well.

17. It follows, accordingly, that Ms. Georges was employed for all bar approximately nine months between October, 1999 and October, 2004. She otherwise applied for and obtained social security payments which were premised on the basis that she was applying for work. There was only one month during that five month period – namely from 12th May, 2004, to 11th June, 2004 – when she appears to have been neither in employment nor obtaining employment-related social security payments. Given, however, that Union citizens enjoy an unqualified right of residence in other Member States for up to three months, this one month period in which she was neither working nor (it would seem) actively seeking work must also be adjudged to be lawful residence for this purpose.

18. In these circumstances it must be accepted that Ms. Georges resided legally in Ireland for a continuous period of five years between October, 1999 and October, 2004.

The relationship between Ms. Georges and Mr. Ogieriakhi
19. It is next necessary to consider the relationship between Ms. Georges and Mr. Ogieriakhi. The parties were married on 18th May, 1999. They were then living in 2 Seville Place, Summerhill, Dublin 1 and as Mr. Ogierakhi was an asylum seeker at the time, the rent for the premises was paid by the Department of Social Protection.

20. After their marriage Mr. Ogierakhi and Ms. Georges moved to 48 North Circular Road, Dublin 7. This premises was rented in both their names, but Ms. Georges was paying the rent. In 2001 they moved to Flat 11, 2 Upper Gardiner Street, Dublin 1. On this occasion both parties were paying the rent and the lease was in both names.

21. In August, 2001 until sometime in the early part of 2002 the premises at Flat 11, 22 Glenmalure Court, St. James's Walk, Dublin 8 was leased in both their names and both parties were paying the rent. As the marriage broke up in acrimonious circumstances during this period, Ms. Georges moved out of the flat at Glenmalure Court sometime in 2001 (or perhaps early 2002) in order to take up residence with another man.

22. A few weeks later Mr. Ogierakhi moved from Glenmalure Court to 21 Liffey Vale, Lucan, Co. Dublin where he lived with his current wife, Ms. Catherine Madden, an Irish citizen and their Irish born child, Keisha Ogieriakhi, who was born in December, 2003. One may here accordingly observe that Mr. Ogieriakhi and Ms. Madden lived together as a couple in the house in Lucan from the middle of 2002 until 2005.

23. In 2005 Mr. Ogierakhi and Ms. Madden then purchased a property in Lucan, Co. Dublin. A year later they subsequently moved from Lucan to their present house in Castledermot, Co. Kildare, where they have been living ever since.

24. Ms. Georges and Mr. Ogieriakhi were divorced on 30th January, 2009, and Mr. Ogieriakhi subsequently married Ms. Madden on 23rd July, 2009.

Mr.Ogieriakhi's application for permission to reside in the State
25. Following his marriage to Ms. Georges in May 1999, Mr.Ogieriakhi thereafter applied for permission to reside within the jurisdiction on the basis of this marriage by reason of the fact that Ms. Georges had exercised her free movement rights under EU law. Mr. Ogierakhi was accordingly granted permission to reside in the State from 11th October, 1999, until 11th October, 2000.

26. This permission was further renewed in October 2000 for a further period of four years until 11th October, 2004. For the purposes of the original application to the Minister Mr.Ogierakhi and Ms. Georges were required to produce certain documents for a report thereof. They accordingly provided details of their accommodation, financial statements, their passports, a contract of employment and a payslip in respect of Ms. Georges and two recent photographs of the applicant. Thus, for example, Mr. Ogierakhi produced a rent book for 48 North Circular Road, Dublin 7, together with a letter from AOL Bertelsmann Service Operations Limited confirming that Ms. Georges was employed with that company and enclosing a number of her payslips. Mr. Ogieriakhi confirmed that he was employed with a company entitled Realtime Technologies Ltd. in 2000. Following receipt of this documentation the Minister determined that the applicant and his wife fell within the provisions of Article 10 of the 1968 Regulation.

27. Similar documentation was supplied by Mr. Ogierakhi on 17th September, 2004. On this occasion Ms. Georges confirmed that she was employed with a company called Realtime Technologies Limited.

28. On 11th September, 2004, Mr.Ogierakhi presented himself to the Office of the Garda National Immigration Bureau for the purpose of having his resident's permit renewed. On this occasion he was informed that Ms. Georges should attend in person at the office of the Bureau for the purpose of considering whether or not there was continuing compliance with the criteria laid down with regard to her erstwhile spouse's residence in this jurisdiction. Mr. Ogierakhi replied in correspondence pointing out that he could not arrange for Ms. Georges to come to the Garda National Immigration Bureau for this purpose since they had agreed to live apart. This matter was then referred by the Gardaí to the Minister and Mr. Ogierakhi's application was refused on 3rd November, 2004. The Minister refused Mr. Ogierakhi's application because it would have been necessary to show in accordance with Article 10 of the 1968 Regulation that there was a tenancy agreement rent book in the name of either the applicant or his EU national spouse and details as would identify a current contract of employment on the part of Ms. Georges.

29. This decision was subsequently successfully challenged by Mr.Ogierakhi in judicial review proceedings. In a decision of this Court delivered on 11th March, 2005, MacMenamin J. quashed the decision on the basis that the Minister had had no regard to information which had subsequently come to light to the effect that Ms. Georges was still in employment.

30. On this point MacMenamin J. stated:-

> "Such investigations as have been carried out tend to indicate that the applicant spouse has in fact continuing connections with this jurisdiction, has worked here within the last year, has resided here and has availed or her rights as an EU citizen to draw social welfare here. In my view this information is relevant to a consideration of the applicant's status. As is it plain such information has been adduced with a matter which was within the procurement of the respondent or other servants of the state, at the very minimum it would appear that such material would and should have a significant effect on the outcome of the decision to be made. I am satisfied that the absence of such information in the previous decision created a situation where there is an absence of fair procedures."

31. In the aftermath of this decision, the plaintiff's application was re-considered by the Minister's Immigration Division. This application was, however, again rejected by letter dated 13th April 2005 on the basis that Mr. Ogieriakhi could not show that Ms. Georges was then "currently exercising her EU Treaty rights by working or residing in the State", given that the evidence available to the Minister was to the effect that she had returned to Paris to take up employment in December 2004.

32. That decision was not challenged by the plaintiff and a subsequent action for damages against the State arising from the decision of March 2005 (which included a Francovich-style claim for damages for breach of EU law) was rejected by MacMenamin J. on 7th May 2007.

33. In the meantime the EU Treaty Rights section of the Irish Naturalisation and Immigration Service had written to Mr.Ogieriakhi on 21st September 2007 contending that as he could not establish an entitlement to reside here lawfully by reason of the exercise by a spouse of EU Treaty rights he was residing here unlawfully. Evidently applying a pre-Lassal understanding of the effect of the 2004 Directive, the Minister stated:

> "Your most recent application for residence under the provisions of the European Communities (Free Movement of Persons) Regulations 2006 cannot be processed as there is no evidence that your spouse is exercising her EU Treaty rights at the present time in the State."

34. The Minister accordingly rejected his application for permanent residence status. The Section further indicated that the Minister proposed to commence the deportation process against him on the basis that he had no further entitlement to be in the State since his previous application for residency had been refused in April 2005..

35. Undaunted by this, Mr. Ogieriakhi then commenced a fresh set of judicial review proceedings challenging this latter decision and asserting a right to permanent residence by virtue of Article 16 of the 2004 Directive, as transposed into domestic law by the European Communities (Free Movement of Persons) Regulations (No.2) 2006 (SI No. 656 of 2006)("the 2006 Regulations"). This application was rejected by this Court (Charleton J.) on 25th January 2008.

36. It would appear that Charleton J. concluded that any rights of residence which Mr. Ogieriakhi had ceased once Ms. Georges left the State in December 2004. He also appears to have concluded that the right of permanent residence conferred by Article 12 of the 2006 Regulations did not apply to residency which pre-dated the coming into force of the 2006 Regulations.

37. No appeal was immediately taken by Mr. Ogieriakhi against this decision, but following the decision of the Court of Justice in Case C-162/01 *Secretary of State for Work and Pensions v. Lassal* in October 2010, he sought to have time extended by the Supreme Court to permit an appeal to that Court. By decision of 18th February 2011 the Court refused to permit this to be done, but it did note that the Minister had agreed to review his earlier decision and that Mr. Ogieriakhi was free to pursue "such remedies including those based on Community law as he may wish."

38. Finally, on 7th November 2011 the Minister granted the plaintiff a review of the earlier September 2007 decision and concluded that he was, after all, entitled to permanent residence "as you fulfil the relevant conditions set out in the Regulations." While Mr. Barron SC accepted that this conclusion had been reached in the course of the residency application, it does not follow that the Minister is somehow estopped for the purposes of the present action from asserting that these conditions had not, in fact, been satisfied.

The decision of the Court of Justice in Lassal

39. Before proceeding to analyse the possible implications of these detailed facts, it is first necessary to note the implications of the important decision of the Court of Justice in Case C-162/01 *Secretary of State for Work and Pensions v. Lassal* [2010] ECR I-000. In *Lassala* French national had exercised free movement rights as a worker in the United Kingdom for a five year period between September, 1999 and February, 2005 in that she was either working or seeking work during that five year continuous period. She then left the UK for a ten month period but upon her return she was subsequently refused social security payments on the ground that she had no right of permanent residence there.

40. Following a reference from the Court of Appeal from England and Wales, the Court of Justice held that continuous periods of residence of five years which were completed *prior* to the entry into force of the 2004 Directive on 30 April 2006 were required to be

taken into account for the purposes of calculating the requisite periods of time spent in the host state for the purposes of Article 16(1). The Court further held that absences from the host state of less than two consecutive years did not affect that worker's Article 16(1) entitlement to permanent residence assuming, of course, she had already satisfied the five year's legal residence in that State.

41. Pausing at this point, Mr. Ogieriakhi naturally places a great deal of emphasis on this decision, since *Lassal* demonstrates that Ms. Georges must also be deemed to have acquired permanent residence in this State by October, 2004 for the purpose of Article 16(1), given that, as I have already found, she resided legally here for a continuous period of five years. If this is so, then it equally follows – or so the argument runs - that Mr. Ogieriakhi had acquired an autonomous right of permanent residence in this own right following that date by virtue of Article 16(2) of the 2004 Directive and as he had been continuously resident in the State since October 2004, it could not be said that he had forfeited that right for the purposes of Article 16(4), even if Ms. Georges had done so in her own case by virtue of her prolonged absence from the State since 2004.

Whether Mr.Ogieriakhi complied with the requirements of Article 16(2) of the 2004 Directive
42. Counsel for the State, Mr. Barron SC, does not fundamentally challenge a great deal of the foregoing analysis. He insists, however, that it is not enough for this purpose for Mr. Ogieriakhi to show that he was legally resident in the State during this period, but rather that in the light of the subsequent decisions of the Court of Justice in Case C-325/09 *Secretary of State for Work and Pensions v. Dias* [2011] ECR I-000 and Case C-424/10 *Ziolkowski v. Land Berlin* [2011] ECR I – 000, he must show also that this pre-April 2006 residence *satisfied the requirements of the 1968 Regulation which was then extant immediately prior to April 2006.*

43. Before addressing those issues, however, it is unclear to me whether it can be said that Mr.Ogieriakhi complied with the requirements of Article 16(2) of the 2004 Directive. Specifically, one must query whether it can truly said that he "legally resided *with* the Union citizen in the host Member State for a continuous period of five years", not least in circumstances where (by early 2002 at the absolute latest) the parties had agreed to live apart and where both spouses had commenced residing with entirely different partners. In expressing some doubts on this point, I am, of course, conscious that in Case 267/83 *Diatta* [1985] ECR 567 the Court of Justice envisaged that a non-EU national could claim the benefit of Article 10 of the 1968 Regulation even where she was living apart from her EU national spouse in another Member State. It may be observed, however, that Article 16(2) uses different and more specific language ("…legally resided with the Union citizen") as compared with Article 10 of the 1968 Regulation.

44. In these circumstances, I propose to refer to the Court of Justice pursuant to Article 267 TFEU the question of whether a non-EU national who has separated from his Union citizen spouse can thereafter be said to be "legally residing with that spouse" for the purposes of Article 16(2) of the 2004 Directive, at least where, as here, both spouses have, in any event, commenced living with different partners

The decisions in Dias and Ziolkowski
45. In Dias, a Portuguese national had entered the UK in 1998 and was issued with a residence permit in 2000. Ms. Dias worked until 2002 when she went on maternity benefit until April, 2003. She was then (voluntarily) unemployed until April 2004, from which time she worked until March, 2007. She then applied for income support and the question then arose as to whether she was entitled to permanent residence in the UK.

46. This issue was again referred to the Court of Justice by the Court of Appeal for England and Wales. The Court of Justice held that periods of residence completed before the end of April 2006 on the basis solely of a residence permit validly issued pursuant to Directive 68/360 without the conditions governing entitlement to any right of residence having been complied with, cannot be regarded as having been completed legally for the purposes of the acquisition of the right of permanent residence under Article 16(1).

47. In *Ziolkowski* the Court of Justice held that it was insufficient for this purpose that, for example, a Polish national who had lived legally in Germany for a long period had been granted humanitarian leave to remain, since that residence did not fulfil the requirements of the pre-2006 Community/Union legislation then in force. In other words, while Mr.Ziolkowki certainly resided lawfully in Germany for the requisite period, his residence was sanctioned by national law and the right to reside was not in virtue of the applicable community legislation then extant, namely, Regulation No.1612/68.

48. In the present case Mr. Barron SC contends that the plaintiff's pre-2006 residence did not satisfy these particular requirements in two respects. First, it was said that Ms. Georges was not a "worker" for the purposes of Article 10 for the entirety of the five year period. Second, it was contended that the requirements of Article 10(3) were not complied with in that Ms. Georges did not supply or make available housing to Mr. Ogieriakhi following her departure from the family home sometime between 2001 and 2002. We may consider these issues in turn.

Was Ms. Georges a "worker" at all times during the period between October 1999 and October 2004?
49. There is no doubt whatever but that the evidence clearly establishes that Ms. Georges was physically and lawfully resident in the State between 1998 and the end of 2004. Nor can there be any doubt but that in the critical period between October 1999 and October 2004 Ms. Georges was employed up to the end of June, 2003. It also appears that she worked between the middle of August, 2003 until the middle of November, 2003 and from July, 2004 until October, 2004.

50. At this remove it is all but impossible in her absence to make a judgment as to why she was unemployed from the periods between July, 2003 and August, 2003 and from the end of November, 2003 until July, 2004. As it was, however, a period when unemployment in Ireland was at a historic low, one might be tempted to infer that she had elected voluntarily to give up employment. Nevertheless, as Ms. Georges applied for and duly obtained social security benefits for most of these periods of unemployment, these payments, under the applicable law, could only properly have been paid if the authorities were satisfied that she was actively looking for work or was engaged in part-time work. The Court of Justice has, of course, confirmed that a person who is genuinely seeking work must also be classified as a worker: see, e.g., Case 66/85 *Lawrie-Blum* [1986] ECR 2122 (at para. 17) and Case C-43/99 *Leclere* [2001] ECR I-4265 (at para. 55).

51. As we have already noted, there appears, however, to be a one month period between the middle of May and the middle of June, 2004 when she was neither employed nor drawing social security payments.

52. Reviewing the evidence as a whole I find myself coming to the conclusion that Ms. Georges must be regarded as having been a "worker" for the entirety of this five year period. She was employed for most of that period and, save, perhaps for one four week period between 12th May 2004 and 11th June 2004 when she was neither working nor claiming social security payments, the fact that she obtained employment-related social security payments during nearly all of her periods of unemployment demonstrates that she must have been actively seeking work for most of that period.

The requirements of Article 10(3) of the 1968 Regulation

53. So far as the second of these requirements is concerned, it may be noted that Article 10(3) of the 1968 Regulation provided that:

> "For the purposes of paragraph 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; the provision, however, must not give rise to discrimination between national workers and workers from other Member States."

54. At the time of the *de facto* break up of the marriage in 2001 and early 2002, the various houses and apartments in which the Ogieriakhis had stayed had been rented in both names and both spouses paid the rent since shortly after they first got married in May 1999. It is clear, however, that Ms. Georges then left the family home to take up residence with another man. The State accordingly maintains that after 2001/2002 Mr. Ogieriakhi's residence was not in accordance with the conditions specified in Article 10(3) since after the date she left the family home Ms. Georges did not have "available for [her] family housing considered as normal" for employees. There is, moreover, no doubt at all that during the period from the middle of 2002 until the expiry of the five year period in October, 2004 Mr. Ogieriakhi was living with Ms. Madden at the house in Lucan. It could not be suggested that this was housing that was in any sense provided or made available by Ms. Georges.

55. In Case 267/83 *Diatta v. Land Berlin* [1985] ECR 567 the applicant was a Senegalese citizen who had married a French citizen and both were resident and working in Berlin. After some time, Ms.Diatta separated from her husband with the intention of divorcing him and she moved in to separate accommodation. The local police authorities then refused to grant her an extension of her residents permit on the ground that she was no longer a family member of EC national. The German administrative court then made a reference to the Court of Justice as to whether a migrant worker's family must live permanently with that worker in order to qualify for right of residence under Article 10 of the 1968 Regulation.

56. This argument was rejected by the Court of Justice which stated:-

> "In providing that a member of a migrant worker's family has the right to install himself with the worker, Article 10 of the Regulation does not require that the member of the family in question must live permanently with the worker, but, as is clear from Article 10(3), only that the accommodation which the worker has available must be such as may be considered normal for the purpose of accommodating his family. A requirement that the family must live under the same roof permanently cannot be implied.
>
> In addition, such an interpretation of correspondence to the spirit of Article 11 of the Regulation, which gives the member of the family the right to take up any activity as an employed person throughout the territory of the Member State concerned, even though that activity is exercised at a place some distance from a place where the migrant worker resides.
>
> It must be added that the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later time."

57. It is true that in *Diatta* the Court of Justice held that Article 10(3) did not require that couples must reside together under one roof. But the present case is a very different one. The available evidence suggests that Ms. Georges abruptly left the marriage and was indifferent as to where Mr.Ogieriakhi thereafter resided. Certainly after 2001/2002 Ms. Georges had no role in supplying or making available such accommodation for Mr.Ogieriakhi.

58. It was essentially for these reasons that the State argued that the requirements of Article 10(3) were not satisfied. If that argument were correct it would mean that such a construction of the legislative provision would render the dependent third country national vulnerable and potentially exposed to reckless and irresponsible conduct on the part of the EU national spouse. If the EU national worker elected to abandon his or her spouse with the result that the third country national in question is effectively compelled to leave the erstwhile family home to find a new residence, does this mean that the Article 10(3) conditions were not thereby satisfied? Such a construction would seem at odds with an underlying objective of the legislation, namely, the effective protection of third country nationals who accompany their EU national spouse to a host Member State.

59. This is further underscored by the comments of the Court of Justice in Case C-249/86 *European Commission v. Federal Republic of Germany* [1989] ECR 1263 where the Court observed (at para. 12) that:

> "It follows…that Article 10(3) must be interpreted as meaning that the requirement to have available housing considered as normal applies solely as a condition under which each member of the worker's family is permitted to come to live with him and that once the family has been brought together, the position of the migrant worker cannot be different in regard to housing requirements from that of a worker who is a national of the Member State concerned."

60. These comments would suggest that compliance with Article 10(3) is to be measured at the moment that the third country national is permitted to live with the spouse exercising free movement rights, *i.e.*, in the present case, 12th October, 1999. If that is the case, then Article 10(3) would have been complied with in that the flat at 48 North Circular Road was being rented in joint names, with Ms. Georges paying the rent. On this analysis, therefore, it is immaterial what the housing arrangements between the parties thereafter were.

61. Given, however, that this precise issue does not appear to have been directly examined by the Court of Justice prior to the coming into force of the 2004 Directive, it is accordingly appropriate and necessary that I should also refer this question to the Court pursuant to Article 267 TFEU because it is clear from both *Dias* and *Ziolkowski* that it is also necessary to establish that the pre-2006 residence was also pursuant to the requirements of the 1968 Regulation.

Conclusions

62. In conclusion, therefore, I have decided to adjourn the balance of this action for damages for breach of European Union law pending the outcome of the reference which I am now making to the Court of Justice pursuant to Article 267TFEU. The specific questions so referred seek guidance from that Court on the ultimate issue of whether Mr. Ogieriakhi was entitled to permanent residence within the State as and from the 30th April, 2006. Should it transpire that he was not so entitled, then it follows that the present action must fail. Conversely, even if it were to be held that he was so entitled to permanent residence, it would not necessarily follow that he would be entitled to damages, since it would be necessary to consider whether, objectively speaking, the breach was itself a sufficiently serious breach of EU law such as would entitle Mr. Ogieriakhi to succeed.

63. At this juncture, however, one further issue arises. As I have already indicated, the State have emphasised that even if it were to be held that the refusal to grant Mr.Ogieriakhi permanent residence amounted to a breach of EU law, this would not necessarily satisfy the *Francovich* criteria, specifically because – it is said – of the lack of obviousness of the breach. In this regard, Mr. Barron SC highlights the complexities of the issues presented and the fact that the precise contours of these free movement rights (and the consequential obligations placed on States) have only been clarified by a series of decisions of the Court of Justice in cases such as *Lassal, Dias* and *Ziolkowski*.

64. Here it must be recalled that the clarity and precision of the rule which has been breached is one of the factors which a court is obliged to consider: see Case C-46/93 and C-48/93 *Brasserie du Pecheur SA* [1996] ECR I- 1029, para. 56. It is also plain from the decision in Case C-392/93 *R. v. HM Treasury, ex p. British Telecommunications Ltd*. [1996] ECR 1631, paras. 43 and 44 that where a particular Directive is "imprecisely worded" and legitimately capable of bearing a variety of different interpretations which are not manifestly contrary to the objective of the Directive, then the fact that no guidance was available to the Member State in question from the case-law of the Court of Justice "as to the interpretation of the provision at issue" or that the Commission did not previously raise the matter with the Member State are factors which may legitimately be taken into account in assessing whether there has been a sufficiently serious breach of European law.

65. Given, however, that I have decided to make a reference to the Court of Justice pursuant to Article 267TFEU on what might be termed the substantive issue of the plaintiff's free movement entitlements, I propose also to pose one further slightly disparate question, namely, assuming that the plaintiff does ultimately establish that the State has been a breach of Union law, whether the fact that I have found it necessary to make a reference on the substantive issue is itself a factor to which I can have regard in determining whether the breach of Union law was an obvious one.

66. It follows, therefore, that I will accordingly adjourn the present proceedings pending the outcome of the reference to the Court of Justice pursuant to Article 267 TFEU of the following questions:

Question 1
Can it be said that the spouse of an EU national who was not at the time himself a national of a Member State has "legally resided with the Union citizen in the host Member State for a continuous period of five years" for the purposes of Article 16(2) of Directive 2004/38/EC, in circumstances where the couple had married in May 1999, where a right of residency was granted in October 1999 and where by early 2002 at the absolute latest the parties had agreed to live apart and where both spouses had commenced residing with entirely different partners by late 2002?

Question 2
If the answer to Question 1 is in the affirmative and bearing in mind that the third country national claiming a right to permanent residence pursuant to Article 16(2) based on five years continuous residence prior to April 2006 must also show that his or her residency was in compliance with, *inter alia*, the requirements of Article 10(3) of Regulation (EEC) No. 1612/68, does the fact that during the currency of that putative five year period the EU national left the family home and the third country national then commenced to reside with another individual in a new family home which was not supplied or provided for by (erstwhile) the EU national spouse mean that the requirements of Article 10(3) of Regulation 1612/68 are not thereby satisfied?

Question 3
If the answer to Question 1 is in the affirmative and the answer to Question 2 is in the negative, then for the purposes of assessing whether a Member State has wrongfully transposed or otherwise failed properly to apply the requirements of Article 16(2) of the 2004 Directive, is the fact that the national court hearing an action for damages for breach of Union law has found it necessary to make a reference on the substantive question of the plaintiff's entitlement to permanent residence is itself a factor to which that court can have regard in determining whether the breach of Union law was an obvious one?