THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 973 J.R.]

BETWEEN

GHEORGHE GRIGA

APPLICANT

AND

CHIEF APPEALS OFFICER, MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 24th day of October, 2017

Background Facts

1. The applicant is a Romanian national, who was born on the 14th July, 1945. On the 13th June, 2012, when he was 66 years of age, he came to Ireland to live with his daughter and son-in-law, both of whom reside and work here. The applicant's wife had passed away some time previously. It would appear that the applicant had not worked for some years due to a back injury prior to his arrival in Ireland. When he arrived, he had no source of income other than his Romanian pension of approximately €20 per week.

2. On the 10th September, 2014, the applicant applied for a State pension (non-contributory) ("SPNC"). He completed an application form which included habitual residence information. The entitlement to most forms of social welfare in this jurisdiction is contingent upon the applicant being habitually resident in Ireland. The application was refused by a Deciding Officer and this decision was appealed unsuccessfully to an Appeals Officer. A review of that decision was sought and eventually the first respondent declined to review the ruling of the Appeals Officer in a written decision of the 4th November, 2016. In these proceedings, the applicant seeks an order of certiorari quashing that decision.

The Right to the SPNC

3. The Social Welfare Consolidation Act, 2005, as Amended, provides at s. 153:

> "- Subject to this Act, a person shall be entitled to State pension (non-contributory) where—
>
> (a) the person has attained pensionable age,
>
> (b) the means of the person as calculated in accordance with the Rules contained in Part 3 of Schedule 3 do not exceed the appropriate highest amount of means at which pension may be paid to that person in accordance with section 156, and
>
> (c) the person is habitually resident in the State."

4. The provisions with regard to habitual residence are contained in s. 246 of the 2005 Act. Section 246 subs. (5) provides:

> "(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."

5. It will be seen therefore that the right to receive the SPNC is contingent upon the applicant having a right to reside in the State. The entitlement to reside in the State is governed by the terms of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015).

6. Regulation 6 deals with residence in the State and insofar as relevant to this case, provides at 6(3):

> "(3) (a) A Union citizen to whom Regulation 3(1)(a) applies may reside in the State for a period that is longer than 3 months if he or she—….
>
> (ii) has sufficient resources for himself or herself and his or her family members not to become an unreasonable burden on the social assistance system of the State, and has comprehensive sickness insurance in respect of himself or herself and his or her family members…."

7. These Regulations transpose into Irish domestic law the provisions of Directive 2004/38/EC on the right of Union citizens to move and reside freely within Member States. The recitals to the Directive that are relevant here are the following:

> "(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions…
>
> (16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social

assistance system and to proceed to his expulsion.…"

8. Article 6 of the Directive gives expression to the TFEU right of Union citizens to reside in the territory of other Member States for up to three months without any conditions.

9. Article 7 deals with the right of residence for more than three months and provides, insofar as relevant here, as follows:

> "All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:…
>
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State…"

The Decision of the 4th November, 2016

10. Although the written decision deals with a number of issues, the only one that is relevant in these proceedings is to be found at para. (e) entitled "Sufficient Resources/Unreasonable Burden". In her consideration of this issue, the first respondent said:

> "Popa and Co. Law Firm contend that without prejudice to the foregoing, the 'unreasonable burden' test must be applied to Mr. Griga's case – see S.I. 548 of 2015 and that Mr. Griga cannot be refused payments solely on the basis that he has no resources.
>
> It is fully accepted that the 'unreasonable burden' test must be applied to Mr. Griga's case and that Mr. Griga cannot be refused payment solely on the basis that he has no resources.
>
> State pension (non-contributory) pension is classified for the purposes of the EU Regulations on the co-ordination of social security systems (Regulation) (EC) No. 883/2004 of the European Parliament and of the Council as a special non-contributory benefit. The CJEU has ruled in a number of cases that such benefits are part of the social assistance system and may be considered in the context of determining a right of residence. The court has said that:
>
> *'79 To deny the Member State concerned that possibility would, as the Advocate General has stated in point 106 of his Opinion, thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.*
>
> *80 Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38 – Dano C-333/13….'*

The EU Commission in its document already referred to above (CRM/2009/0313 final) provides some guidance on the points which can be considered in determining if a person should be regarded as having sufficient resources so as not to become an unreasonable burden on the social assistance system.

These include:

• The duration of benefit, is the situation temporary; is it likely that the EU citizen will get out of the safety net soon?

• Personal situation - level of connection with family members in host member state; are there any considerations pertaining to age, state of health, family and economic situation?

• Amount – total amount of aid granted? Does the EU citizen have a history of relying heavily on social assistance? Does the EU citizen have a history of contributing to the financing of social assistance in the host member state?

Having regard to these broad guidelines and the evidence that was before the Appeals Officer it is the case that the nature of the payment claimed – State pension (non-contributory) – cannot be said to be of a temporary payment. Once awarded and subject to other conditions being met, it would be payable for the foreseeable future.

It is not disputed that Mr. Griga has a connection to this State by virtue of his daughter's and her family residence in the State but the evidence adduced at the oral hearing did not, for example, ascertain that Mr. Griga's state of health was his main reason for coming to Ireland but rather that as being widowed and feeling lonely he wished to join his daughter and her family and help with minding her children.

Mr. Griga is in receipt of a Romanian pension and there is no information on file as regards his reliance on social assistance before coming to Ireland. There is no evidence of Mr. Griga having a history of contributing to the financing of social assistance in Ireland. On balance therefore it is, in my view, not unreasonable to conclude that Mr. Griga does not have sufficient resources so as not to become an unreasonable burden on the social assistance system in Ireland and given that payment of State pension (non-contributory) could not be regarded in any way as temporary, any support provided by way of State pension (non-contributory) would, more than likely, be permanent."

11. On that basis the first respondent declined to revise the decision of the Appeals Officer.

The Applicant's Case

12. The applicant makes a relatively simple point. He says it is common case that the unreasonable burden test must be applied to him. However, he says that it is illogical to suggest that a person who has received no payments can be an unreasonable burden on the social assistance system of the host Member State. This in turn must mean that the applicant must have received *some* payments before the unreasonable burden test can be applied to him.

13. The applicant further submits that the first respondent fell into error in deciding that the SPNC was a permanent rather than temporary payment. He argues that it was open to the first respondent to award the SPNC for a finite period of time and having done

so, to then carry out an assessment as to whether the applicant had become an unreasonable burden on the social assistance system. The applicant therefore contends that the unreasonable burden test was misapplied by the first respondent insofar as it was confined to determining whether or not the applicant had a right of residence, in advance of any payments being made.

14. The logical consequence of this argument is that the unreasonable burden test must be applied to persons who do not have a right of residence. Thus the applicant makes the case that a citizen of another Member State who has no right to reside in the host Member State but otherwise qualifies for the benefit is entitled to it until such time as he becomes an unreasonable burden on the host Member State's social assistance system.

15. The applicant further submits that this is the clear import of EU law as explained in *Pensionsversicherungsanstalt v. Brey* – C-140/12 and that insofar as that conflicts with Irish national legislation which imposes a right to reside test, that test must be disapplied.

Discussion

16. In *Brey*, the applicant was a German national who was in receipt of an invalidity pension from that state. He came to live in Austria and his relatively low pension was his only means of support. He applied for a compensatory supplement from the social welfare authorities in Austria. Austrian law provided that EU citizens were entitled to reside in Austria for periods in excess of three months if they had sufficient resources to support themselves without being obliged to have recourse to social assistance benefits. Accordingly, in something of a catch 22 situation, when Mr. Brey applied for compensatory supplement, it was refused on the basis that this automatically meant he did not have sufficient resources to establish a right of residence in Austria.

17. The Court of Justice of the European Union held that although his low pension could be an indication that he did not have sufficient resources to avoid becoming an unreasonable burden on Austria's social assistance system, such conclusion could not be drawn without an individual assessment of the applicant's personal circumstances to determine if granting the benefit would place such a burden on the national system. The court was therefore of the view that EU law must be interpreted as precluding national legislation which automatically, whatever the circumstances, bars the grant of a benefit to a national of another Member State who is not economically active, on the grounds that he does not meet the necessary requirements for obtaining the legal right to reside in the host Member State, since obtaining that right of residence is conditional upon the applicant having sufficient resources not to apply for the benefit.

18. The court noted that the aim of Directive 2004/38 is to facilitate the right of all Union citizens to move and reside freely within the territory of the Member States but it is also intended to set out conditions governing the exercise of that right which include that Union citizens who do not or no longer have worker status must have sufficient resources. The court went on to say:

> "54 It is apparent from recital 10 in the preamble to Directive 2004/38, in particular, that that condition is intended, inter alia, to prevent such persons becoming an unreasonable burden on the social assistance system of the host Member State …
>
> 55 That condition is based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances …
>
> 57 It follows that, while Regulation No 883/2004 is intended to ensure that Union citizens who have made use of the right to freedom of movement for workers retain the right to certain social security benefits granted by their Member State of origin, Directive 2004/38 allows the host Member State to impose legitimate restrictions in connection with the grant of such benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State."

19. The court went on to note:

> "63 Consequently, the fact that a national of another Member State who is not economically active may be eligible, in light of his low pension, to receive that benefit could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38 …
>
> 64 However, the competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that 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."

20. The applicant places particular reliance on the following passage in the judgment of the court:

> "69 Furthermore, 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 the person concerned, his personal circumstances, and the amount of aid which has been granted to him."

21. The applicant places particular emphasis on the concluding phrase "and the amount of aid which has been granted to him" in support of his argument that the assessment of whether or not a person has become an unreasonable burden on the social assistance system of the host Member State cannot take place until such time as aid has been granted to him for some period of time, however brief. It will be seen however, that this passage repeats more or less verbatim the terms of recital 16 to Directive 2004/38. That recital is concerned with expulsion from host Member States and the factors that should be considered before a person is expelled. One such factor to be taken into account is the amount of aid historically granted to the person whose expulsion is being considered.

22. It does not seem to me to follow from this that the CJEU was intending to hold that the unreasonable burden test could not be applied to persons who have not received any assistance. I think this is demonstrated in a subsequent passage in the same judgment:

> "78 In particular, in a case such as that before the referring court, it is important that the competent authorities of the host Member State are able, when examining the application of a Union citizen who is not economically active and is in Mr Brey's position, to take into account, inter alia, the following: the amount and the regularity of the income which he

receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him." (My emphasis).

23. This appears to clearly envisage that in assessing an application for assistance, and by inference whether the unreasonable burden test is satisfied, the host Member State is having regard prospectively to the likely duration of benefits which might be granted in future.

24. A similar argument was considered by this court in *Munteanu v. Minister for Social Protection, Ireland and the Attorney General* [2017] IEHC 161. In that case, the applicant was a Romanian national living in Ireland who sought a range of social welfare benefits all of which were refused on the grounds that the applicant had no right to reside in the State.

25. O'Malley J. identified the issue arising in the case (at p. 1-2):

> "[2.] The applicant is a Romanian national living in Ireland. She has made applications to the respondent in respect of Supplementary Welfare Allowance ('SWA'), Jobseekers' Allowance and Child Benefit. All of these applications were refused by the respondent on the grounds that the applicant did not have a right to reside in the State as required by s. 246 of the Social Welfare Consolidation Act 2005 (as amended), and was therefore ineligible for such payments. The State's case is that EU law entitles it to impose a requirement that the claimant has a 'right to reside' as defined under EU law. While accepting that the provision is discriminatory, in so far as it is one automatically satisfied by Irish nationals, it maintains that the measure is objectively justifiable to prevent persons from becoming an unreasonable burden on the State.
>
> [3.] The applicant contends that the test applied by the respondent is incompatible with EU law, and that the properly applicable test depends on the nature and objective of each of the payments in question."

26. In the course of her judgment, O'Malley J. referred to a number of passages from the judgment of the CJEU in *Dano v. Jobcentre Leipzig Case* C-333/13, some of which were also referred to in the first respondent's decision under challenge, including the following:

> "76 Therefore, Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence.
>
> 77 As the Advocate General has observed in points 93 and 96 of his Opinion, any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in Article 7 of the directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.
>
> 78 A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.
>
> 79 To deny the Member State concerned that possibility would, as the Advocate General has stated in point 106 of his Opinion, thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.
>
> 80 Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.
>
> 81 In the main proceedings, according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State under Directive 2004/38. Therefore, as has been stated in paragraph 69 of the present judgment, they cannot invoke the principle of non-discrimination in Article 24(1) of the directive.
>
> 82 Accordingly, Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, does not preclude national legislation such as that at issue in the main proceedings in so far as it excludes nationals of other Member States who do not have a right of residence under Directive 2004/38 in the host Member State from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004."

27. These passages appear to run directly contrary to the argument advanced by the applicant in this case. If the applicant's argument is correct, it can only mean that upon arriving in the State without sufficient resources to provide for himself, a national of another Member State would automatically be entitled to the benefit claimed, at least until such time as a determination is made that he has become an unreasonable burden on the social assistance system of the State.

28. The judgment in *Dano* on the other hand appears to expressly recognise the entitlement of Member States to legislate to avoid that situation arising by requiring a right of residence as a prerequisite to the grant of benefit. The specific examination identified by the CJEU in *Dano* that the host Member State is required to undertake is one to determine whether the applicant has sufficient resources to qualify for a right of residence.

29. In my view therefore, these decisions of the CJEU do not support the proposition that the "unreasonable burden" assessment can only be undertaken after the applicant has been in receipt of the benefit claimed for a specific period of time. Indeed, it would appear that the same argument was put forward in *Munteanu* where O'Malley J. noted (at p. 43):

> "[100.] Counsel argues that the letter from the respondent quoted at paragraph 87 above does not amount to a proper assessment for the purposes of the 'unreasonable burden' test. He submits that the case-law of the CJEU supports the proposition that a finding that a person is an 'unreasonable burden' cannot be reached until at least some payments have been made."

30. The applicant in *Munteanu* also relied on *Brey* as authority for that proposition. It was dealt with by O'Malley J. in the following

way (at p. 51):

> "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."

31. As some of the authorities point out, it could of course scarcely be suggested that an application for social assistance by a single individual would of itself be capable of constituting an unreasonable burden on the social assistance system of the host Member State. Rather, the assessment is concerned with whether the grant of such assistance to persons in the same category as the applicant could have that result. As O'Malley J. noted (at p. 51):

> "It is also clear that *Brey* must be read in the light of subsequent judgments which establish 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."

32. It must follow that since the grant of assistance to a single individual could never of itself be regarded as imposing an unreasonable burden on the social assistance system of the State, there can equally be no requirement to grant such assistance for a limited period before carrying such assessment.

Conclusion

33. I therefore reject the applicant's submission that the first respondent was required to direct payment of the SPNC to the applicant for a limited duration before carrying out the "unreasonable burden" assessment. I believe that the respondents' contention that the first respondent in fact had no power to direct a payment on such basis is correct. The language of s. 153 of the 2005 Act is mandatory – "shall be entitled" – and the assessment of entitlement is to be made at the date of the application. If the applicant is habitually resident in the State and complies with the other conditions, he or she is entitled to the SPNC as of right.

34. In the normal way, as the first respondent suggests in her decision, such payment would be expected to continue for the duration of the applicant's life. In that sense, it is permanent. The applicant argued that no payment under the social welfare system can be regarded as permanent because it is liable to end at any stage if the conditions required for its grant are no longer fulfilled.

35. Of course that is true but it does not mean that the payment should not be regarded as permanent. It seems to me that what the applicant is contending is that permanent equates to irrevocable. However to my mind, permanent imports the notion of a payment intended to endure indefinitely as distinct from a temporary payment which is of limited duration. There was therefore in my opinion no error of law in the first respondent's determination in this regard.

36. There is no dispute about the findings of fact made by the first respondent. It is common case that the applicant does not have sufficient resources to support himself. I am therefore of the view that the first respondent was entitled to come to the conclusion that the applicant does not have sufficient resources so as not to become an unreasonable burden on the social assistance system in Ireland. It must follow therefore that the determination by the respondents that the applicant has no right to reside in the State means that he has no right to claim the SPNC.

37. For these reasons therefore, I will dismiss this application.