Neutral Citation: [2017] IEHC 161

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 723 JR]

BETWEEN

LOTI MUNTEANU

APPLICANT

AND

MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 3rd day of March 2017

Introduction

1. The primary issue in this case is the application to migrant European Union citizens of the so-called "*right to reside*" test set out in Irish social welfare legislation. The right to reside in the State is, by statute, a constituent element of the "habitual residence condition" ("the HRC") which underpins entitlement to nearly all social welfare payments. The current regime is that any claimant for a social welfare payment must a) have a right to reside in the State and b) actually be habitually resident here. Irish citizens must satisfy the HRC but are automatically deemed to have a right to reside.

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.

4. It is helpful to consider the European legislation and some relevant case-law before looking at the evidence in the case.

European legislation

Treaty Provisions

5. Article 18 of the Treaty on the Functioning of the European Union ("the TFEU") sets out a general prohibition on discrimination on grounds of nationality within the scope of application of the Treaty, without prejudice to any special provisions contained therein.

6. Article 21 provides for the right of European Union citizens to move and to reside freely within Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. This is, of course, one of the fundamental pillars of the Union.

7. Specific measures in relation to freedom of movement of workers are contained in Article 45 of the TFEU (formerly Article 39 of the Treaty Establishing the European Community ("the TEC")). The article states that such freedom of movement entails the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment. Paragraph 3 reads in full as follows:

> *"It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health;*
>
> *a) to accept offers of employment actually made;*
>
> *b) to move freely within the territory of the Member States for this purpose;*
>
> *c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
>
> *d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission."*
>
> *8. Article 48 provides as follows:*
>
> *"The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:*
>
> *a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;*
>
> *b) payment of benefits to persons resident in the territories of Member States."*

Directive 2004/38/EC

9. Directive 2004/38/EC (hereafter "the directive") is concerned with, inter alia, the right of residence consequent upon the right of

free movement. It codifies and amends previous legislation that had dealt separately with workers, self-employed persons, students and other economically inactive persons, and its provisions apply to all Union citizens in these categories.

10. The recitals refer to the free movement of persons as one of the fundamental freedoms of the internal market. Recital 11 observes that the fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent on the fulfilment of administrative procedures. However, the right is not unqualified. Recital 10 stipulates that persons exercising their right of residence should not become "an unreasonable burden" on the social assistance system of the host Member State during an initial period of residence. For this reason, the right of residence for Union citizens for periods in excess of three months should be subject to conditions.

11. Recital 16 states the converse proposition – that, as long as they do not become an "unreasonable burden" on the social assistance system, beneficiaries of the right of residence should not be expelled. It continues:

> *"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. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security."*

12. Article 6 of the directive provides that all Union citizens have a right of residence on the territory of another Member State for a period of up to three months without any conditions other than the requirement to hold a valid identity card or passport.

13. Article 7 deals with the right to remain after the expiry of the three month period. All Union citizens have a right of residence for longer than three months if

- (Article 7(1)(a)) - they are working or self-employed in the host State; or if

- (Article 7(1)(b)) - they have "*sufficient resources*" for themselves and their family members not to become "*a burden*" on the social assistance system of the host State and have comprehensive sickness insurance; or if

- (Article 7(1)(c)) they are enrolled in a particular form of educational establishment.

14. By virtue of Article 7(3), a Union citizen who is no longer a worker or a self-employed person may nonetheless retain that status if he or she is temporarily unable to work due to accident or illness; or is in duly recorded involuntary unemployment after having been employed for more than one year and is registered as a jobseeker; or is in duly recorded involuntary unemployment after completing a fixed-term contract of less than a year or having become involuntarily unemployed during the first twelve months and is registered as a jobseeker (in which case the status of worker can be retained for at least six months); or has embarked upon vocational training.

15. The situation of persons who become unemployed in a host State and remain there seeking employment was considered in Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v. Arbeitsgemeinschaft* (ARGE) Nürnberg. In each of these two cases, the applicant had worked in Germany for a very short period of time. Each had then received social assistance for a time, which was terminated on the basis that the relevant legislation stipulated that persons whose right of residence arose solely out of the search for employment had no right to social assistance benefits.

16. The Court noted firstly that according to its settled case-law the concept of "*worker*" has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker. The fact that the employment is of short duration, or that the income from employment is lower than the minimum required for subsistence, does not prevent the person concerned from being a "*worker*" and nor does an application to the State for financial assistance.

17. The Court ruled that in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it was not possible to exclude from the scope of the Treaty right to freedom of movement benefits of a financial nature intended to facilitate access to employment. It was, however, legitimate for a Member State to grant such an allowance only after a real link had been established between the jobseeker and the labour market of the State. At paragraph 39 the Court said:

> *"39. The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question (Collins, paragraph 70).*
>
> *40. It follows that nationals of the Member States seeking employment in another Member State who have established real links with the labour market of that State can rely on Article 39(2) EC in order to receive a benefit of a financial nature intended to facilitate access to the labour market.*
>
> *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 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.*
>
> *43. A condition such as that in Paragraph 7(1) of the SGB II, under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment.*
>
> *44. In any event, the derogation provided for in Article 24(2) of Directive 2004/38 must be interpreted in accordance with Article 39(2) EC."*

18. In Case C-140/12 *Pensionsversicherungsanstalt v. Brey* the Court said that, having regard to the fact that the right to freedom of movement is a fundamental principle of EU law, the conditions laid down in Article 7(1)(b) of the directive must be construed narrowly and in compliance with the limits imposed by EU law and the principle of proportionality. At paragraph 69 the Court said:

"…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."

19. At paragraph 72 it said:

"By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable burden' on the social assistance system of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, 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. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary (see, by analogy, Grzelczyk, paragraph 44; Bidar, paragraph 56; and Förster, paragraph 48)."

20. Article 8 deals, in the main, with administrative formalities. However, it is worth noting Article 8(4) prohibits Member States from setting a fixed sum to be regarded as "*sufficient resources*" for the purposes of Article 7, but must take into account the personal circumstances of the person concerned. The amount ultimately regarded as being sufficient may not be higher than the threshold below which nationals of the Member State become eligible for social assistance or, where this criterion is not applicable, higher than the minimum social security pension paid by the host State.

21. The issue in *Brey* arose from an application by a retired German national living in Austria for a "compensatory supplement" to his pension, a payment classified by the Court as social assistance. His application had been unsuccessful on the basis that the right of residence under Austrian law required him to show, in effect, that he had "*sufficient resources*" not to need such a supplement.

22. The Court held that the combination of Articles 7(1)(b), 8(4) 24(1) and (2) of the directive meant that national legislation could not automatically bar the grant of a benefit, without consideration of the applicant's circumstances, by making the right of residence for an economically inactive person conditional upon having sufficient resources not to apply for that benefit. The mere fact that a person received social assistance was not enough to show that he constituted an unreasonable burden. The Court stated that when dealing with an economically inactive Union citizen such as Mr. Brey the host State was obliged to carry out an overall assessment of the specific burden which granting the benefit would place on the social assistance system as a whole by reference to his personal circumstances. It should take into account, inter alia, the amount and regularity of his income, the fact that he had been issued with a certificate of residence and the period for which the benefit in question was likely to be paid to him.

23. One of the most important provisions, as far as this case is concerned, is Article 14 of the directive, which reads in full as follows:

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

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

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

a) the Union citizens are workers or self-employed persons, or

b) the Union citizen entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

24. Article 24(1) provides that, subject to such specific provisions as are expressly provided for in the Treaty and secondary law, EU citizens and their family members residing in a host country "*on the basis of this Directive*" are to enjoy equal treatment with nationals of that country within the scope of the Treaty. However, Article 24(2) provides for derogation from this principle to the extent that the host State is not obliged to confer entitlement to social assistance during the first three months of residence, or after that period where the individual's continuing right to be in the State is based on Article 14(4)(b).

25. In *Vatsouras and Koupatantze* the CJEU ruled that 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 the derogation in Article 24(2) of Directive 2004/38/EC.

26. In Case C-333/13 *Dano v. Jobcenter Leipzig* the CJEU said that it followed from the reference in Article 24 to residence "*on the basis of this Directive*" that, so far as access to social benefits were concerned, a Union citizen could claim equal treatment with nationals of the host State only if his residence in the territory of the host State complied with the conditions of the directive.

27. In the same judgment, the Court analysed the effect of the directive in paragraph 70 *et seq*. as follows:

"70. First, in the case of periods of residence of up to three months, Article 6 of Directive 2004/38 limits the conditions and formalities for the right of residence to the requirement to hold a valid identity card or passport and, under Article 14(1) of the directive, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State (judgment in Ziolkowski and Szeja, C-424/10 and C-425/10, EU:C:2011:866, paragraph 39). In accordance with Article 24(2) of Directive 2004/38, the host

Member State is thus not obliged to confer entitlement to social benefits on a national of another Member State or his family members during that period.

71. Second, for periods of residence longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State (judgment in Ziolkowski and Szeja, EU:C:2011:866, paragraph 40).

…

73. In order to determine whether economically inactive Union citizens, in the situation of the applicants in the main proceedings, whose period of residence in the host Member State has been longer than three months but shorter than five years, can claim equal treatment with nationals of that Member State so far as concerns entitlement to social benefits, it must therefore be examined whether the residence of those citizens complies with the conditions in Article 7(1)(b) of Directive 2004/38. Those conditions include the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members.

74. To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.

75. It should be added that, as regards the condition requiring possession of sufficient resources, Directive 2004/38 distinguishes between (i) persons who are working and (ii) those who are not. Under Article 7(1)(a) of Directive 2004/38, the first group of Union citizens in the host Member State have the right of residence without having to fulfil any other condition. On the other hand, persons who are economically inactive are required by Article 7(1)(b) of the directive to meet the condition that they have sufficient resources of their own.

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."

Regulation (EC) 883/2004

28. As described by the CJEU in *Brey*, Regulation (EC) 883/2004 (hereafter "the regulation" except where otherwise indicated) does not seek to establish a common scheme of social security in the EU or curtail the existence of different national schemes. Its sole objective is to ensure the coordination of such schemes. Article 4 sets out the key principle that, unless otherwise provided for in the regulation, persons to whom it applies are to enjoy the same benefits and be subject to the same obligations under the legislation of the host State as the nationals thereof.

29. The regulation applies to*, inter alia*, nationals of one Member State residing in another Member State who are or who have been subject to the legislation of one or more Member States, as well as to members of their families. The general rule is that persons to whom the regulation applies should be subject to the legislation of one Member State only.

30. "*Residence*", for the purposes of the regulation, means the "*place where a person habitually resides*".

31. Article 3 provides that the regulation applies to all legislation concerning a list of specified branches of social security listed therein (which includes unemployment benefits and family benefits), and to general and special social security schemes, whether

contributory or non-contributory, except where otherwise provided. Article 3(3) makes the regulation applicable to the special non-contributory cash benefits covered by Article 70.

32. By virtue of Article 3(5)(a) the regulation does not apply to "*social assistance*".

33. Family benefits are defined as being, primarily, benefits in kind or in cash intended to meet family expenses. Article 67 provides that a person shall be entitled to such benefits in accordance with the legislation of the competent State.

34. Not all benefits are easily classifiable as either social security or social assistance. The regulation makes particular provision for "*special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance*". The payments in question, which are dealt with in Article 70, are defined as being those which

> "*(a) are intended to provide either:*
>
> *(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;*
>
> *or*
>
> *(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,*
>
> *and*
>
> *(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,*
>
> *and*
>
> *(c) are listed in Annex X."*

35. Annex X of the regulation provides a country-by-country list of relevant payments. The section relating to Ireland includes Jobseekers' Allowance, as provided for in the Social Welfare Consolidation Act 2005. Benefits covered by Article 70 are to be payable only by the State in which the person concerned resides. Under Article 70(4) the conditions of entitlement to the payment are governed by the law of that Member State.

36. According to the CJEU in Case C-286/03 *Hosse v. Land Salzburg* a benefit is to be regarded as a social security benefit in so far as, firstly, it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and, secondly, relates to one of the risks expressly listed (in what is now Article 3). The Court said, in the same case, that the concept of a social security benefit and a special non-contributory benefit were mutually exclusive, and that therefore a benefit which satisfied the criteria for the former could not also be the latter.

37. Having regard to the right of Member States to set conditions of eligibility, the Court rejected the proposition that EU law necessarily precluded national legislation under which the right to a special non-contributory cash benefit was conditional upon meeting the necessary requirements for a legal right of residence. However, the Court stressed that those requirements must themselves be consistent with EU law.

38. In Dano the CJEU confirmed that the benefits referred to in Articles 3(3) and 70 (the special non-contributory cash benefits) fell within the scope of the non-discrimination principle set out in Article 4 of the regulation and in Article 18(1) of TFEU. They are, therefore, to be granted solely in accordance with the legislation of the Member State of residence, without discrimination on grounds of nationality. However, the Court then pointed out that Article 24(2) of the directive contained a derogation from the principle of non-discrimination.

39. The Court also ruled that such benefits came within the concept of "*social assistance*" within the meaning of Article 24(2) of the directive, saying, with reference to its judgment in Brey,

> *"That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State…"*

40. Having already ruled that the directive did not preclude the exclusion of nationals of other Member States from entitlement to such benefits (see above), the Court reached the same conclusion in its interpretation of Article 4 of the regulation. Article 70 benefits are to be provided exclusively in the Member State of residence, in accordance with its legislation. There was, therefore, nothing to prevent the imposition of a condition for entitlement that economically inactive persons should have a right of residence.

41. The judgment goes on to point out that neither the regulation, the directive, or any other EU legislation are intended to lay down the conditions for receipt of Article 70 benefits, since this is left to the Member States concerned. Those conditions did not derive from the regulation or from any other EU secondary legislation. In defining the conditions of entitlement the Member States were not, therefore, implementing EU law and the Court accordingly had no jurisdiction to rule on a dispute about the substantive entitlements.

42. The judgment in Dano also deals with the relationship between the directive and these aspects of the regulation. At paragraphs 82-83 the Court said:

> *"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.

83. The same conclusion must be reached in respect of the interpretation of Article 4 of Regulation No 883/2004. The benefits at issue in the main proceedings, which constitute 'special non-contributory cash benefits' within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38 …."

43. In Case C-67/14 *Jobcenter Berlin Neukölln v. Alimanovic* the CJEU considered the entitlements of persons whose right of residence arose solely from their status as jobseekers.

44. The benefits in issue were subsistence payments for the long-term unemployed. The referring court described these payments as "special non-contributory cash benefits" intended to cover subsistence costs for persons who could not cover those costs for themselves. They were not financed by contributions, and were listed in Annex X. The CJEU found, accordingly, that they met the criteria for Article 70, even if they formed part of a scheme that also provided for benefits to facilitate the search for work. The judgment continues (at paragraph 44):

"44. That said, it should be added that, as is apparent from the Court's case-law, such benefits are also covered by the concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. …

45. However, in the present case it must be found that, as the Advocate General observed in point 72 of his Opinion, the predominant function of the benefits at issue in the main proceedings is in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity.

46. It follows from those considerations that those benefits cannot be characterised as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State (see, to that effect, judgment in Vatsouras and Koupatantze, C-22/08 and C-23/08, EU:C:2009:344, paragraph 45) but, as the Advocate General observed in points 66 to 71 of his Opinion, must be regarded as 'social assistance' within the meaning of Article 24(2) of Directive 2004/38."

45. The Court then considered whether national legislation could exclude jobseekers from other Member States from entitlement to "special non-contributory cash benefits" which also constitute social assistance, where such benefits were granted to nationals of the State who were in the same situation. In this regard the Court referred to its judgment in Dano, stating that Union citizens could claim equal treatment with nationals of the host State in relation to social assistance only if their residence complied with the conditions of Directive 2004/38/EC. Again, it said that to hold otherwise would run counter to the objective of the directive. In order to determine whether the principle of equal treatment applied it was therefore necessary to determine the lawfulness of residence. The express reference in the Article 24(2) derogation to a right of residence deriving only from Article 14(4)(b) meant that a Member State could refuse to grant social assistance to a Union citizen whose right of residence was based solely on that provision. In the following paragraph 59 the Court said:

46. The reason for this finding was that German law made it clear that the right to social assistance was retained for a period of six months after the cessation of employment. This guaranteed a "*significant level of legal certainty and transparency*", while complying with the principle of proportionality.

47. Further, the Court held in this regard that an individual assessment was not required for the purposes of an overall appraisal of the burden which the grant of a specific benefit would place on the national system of social assistance, saying that

"[I]t must be observed that the assistance awarded to a single applicant can scarcely be described as an 'unreasonable burden' for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so."

Regulation (EU) 492/2011

48. Some reliance has been placed on Regulation 492/2011 on freedom of movement for workers within the Union. Article 2 of the regulation provides as follows:

"Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom."

49. Article 5 provides that a national of a Member State who seeks employment in the territory of another Member State is to receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment.

Case C – 308/14 European Commission v. United Kingdom of Great Britain and Northern Ireland

50. During the initial hearing of this case the Court was informed that a decision was awaited from the Court of Justice of the European Union in the infringement proceedings taken by the Commission against the United Kingdom (Case C – 308/14 *European Commission v. United Kingdom of Great Britain and Northern Ireland*). Counsel for the applicant was placing significant reliance on the case made by the Commission that the "*right to reside*" test applied in the case was unlawful. The Court therefore decided to adjourn pending delivery of the judgment, and heard further submissions from the parties after it became available.

51. The Commission instituted infringement proceedings in relation to the United Kingdom requirement that an applicant for child benefit or child tax credit must have a right to reside. That right, in turn, depended in part on having sufficient financial resources to avoid becoming an unreasonable burden on the social assistance system. The benefits in question were covered by Regulation 883/2004.

52. The Commission's main argument was that, by adding the "*right to reside*" test to the "*habitual residence*" test, the United Kingdom had added a condition that did not appear in the regulation. Article 11 of the regulation provided a system of conflict rules,

with the effect of divesting national legislatures of the power to determine the ambit and conditions for their own national legislation. It was accepted by the Commission that a Member State might wish to pay benefits only to persons who had a connection with it, but the argument was that EU law had already established the means of testing whether that connection existed.

53. In the alternative, the Commission contended that the condition involved either direct or indirect discrimination, in that it was automatically satisfied in the case of United Kingdom nationals.

54. The United Kingdom contended that the *right to reside* test was a proportionate measure to ensure that benefits were paid to persons sufficiently integrated in the country, and that economically inactive persons should not become a burden on the welfare system of the host State unless they had a sufficient degree of connection to it.

55. The United Kingdom also argued that, in relation to special non-contributory cash benefits, Article 70(4) of the regulation laid down a "conflict rule". It was not to be interpreted as laying down the conditions creating a right to the benefits in question – that, in principle, was left to the national legislature.

56. On the issue of discrimination, the United Kingdom acknowledged that the measure was indirectly discriminatory. However, it submitted that it was objectively justified by the need to protect public finances and was not disproportionate.

57. The Court first considered the nature of the payments concerned. It referred to its previous case-law holding that benefits that are granted automatically to families that meet certain objective criteria relating in particular to their size, income and capital resources, without any individual and discretionary assessment of personal needs, and which are intended to meet family expenses must be regarded as social security benefits. The two payments in issue came within this definition. They were not social assistance or special non-contributory benefits.

58. In relation to the Commission's main complaint, the Court firstly referred to Article 11(3)(e) of the regulation. This provision was described as a "conflict rule" for determining the national legislation applicable to the social security benefits listed in Article 3(1) (which includes family benefits) that could be claimed by persons who were not economically active. The provision was not intended to lay down the conditions creating the right to social security benefits. In principle it was for each national legislature to lay down those conditions.

59. The Court repeated what it had said in Brey and Dano to the effect that the regulation did not preclude a national provision pursuant to which entitlement to a social benefit was conditional upon the claimant having a lawful right to reside in the host State. The first part of the Commission's case was therefore unsuccessful.

60. On the discrimination issue, the Court agreed that the requirement of a right to reside constituted indirect discrimination since it was intrinsically liable to affect nationals of other Member States more than nationals of the host State. The judgment therefore focussed on the verification process. At paragraph 79 it said:

> *"79. In order to be justified, such indirect discrimination must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective (see to this effect, in particular, judgment of 20 June 2013 in Giersch and Others, C-20/12, EU:C:2013:411, paragraph 46).*
>
> *80. In that regard, it is clear from the Court's case-law that the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State (see to this effect , in particular, judgments of 20 September 2001 in Grzelczyk, C-184/99, EU:C:2001:458, paragraph 44; of 15 March 2005 in Bidar, C-209/03, EU:C:2005:169, paragraph 56; of 19 September 2013 in Brey, C-140/12, EU:C:2013:565, paragraph 61; and of 11 November 2014 in Dano, C-333/13, EU:C:2014:2358, paragraph 63).*
>
> *…*
>
> *82. It should be recalled that, under Article 14(2) of Directive 2004/38, Union citizens and their family members are to enjoy the right of residence referred to in Articles 7, 12 and 13 of the directive so long as they meet the conditions set out therein. In specific cases, where there is a reasonable doubt as to whether a Union citizen or his family members satisfy the conditions set out in those articles, Member States may verify if those conditions are fulfilled. Article 14(2) provides that this verification is not to be carried out systematically."*

61. The Court found that on the evidence before it the Commission had not provided evidence or arguments to show that such checking as was carried out by the United Kingdom did not satisfy the conditions of proportionality, or that it was not appropriate for securing the attainment of the objective of protecting public finances, or that it went beyond what was necessary to attain that objective.

62. The CJEU therefore determined that the measures adopted by the United Kingdom were in conformity with EU law.

National legislation
The "*right to reside*" test – the Social Welfare Consolidation Act 2005

63. Section 246(5) of the Social Welfare Consolidation Act 2005, as amended by s. 15 of the Social Welfare and Pensions (No.2) Act 2009, provides that a person who does not have a right to reside in the State shall not, for the purposes of the Act, be regarded as habitually resident in the State.

64. Subject to the "*right to reside*" issue, habitual residence is a question of fact to be determined by a deciding officer or designated person under the legislation. By virtue of s.246(4) (inserted by s.30 of the Social Welfare and Pensions Act 2007), the factors to be taken into account are:

> *(a) the length and continuity of residence in the State or in any other particular country;*
>
> *(b) the length and purpose of any absence from the State;*
>
> *(c) the nature and pattern of the person's employment;*

(d) the person's main centre of interest; and

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

65. Under s.246(6)(b), a person who has a right to enter and reside pursuant to the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. 656/2006) is to be taken as having a right to reside for the purposes of the Act. However claimants must also be habitually resident as a matter of fact, and must remain habitually resident for their claims to subsist.

The Irish regulations

66. S.I. No. 656/2006 European Communities (Free Movement of Persons) (No. 2) Regulations 2006 is intended to implement Directive 2004/38/EC. It is not suggested in these proceedings that there has been inadequate transposition. Regulation 6 provides as follows:

"A Union citizen may reside in the State for a period longer than 3 months if he or she –

(i) is in employment or is self-employed in the State,

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

(iii) is enrolled in an educational establishment in the State for the principal purpose of following a course of study there, including a vocational training course, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants, or

(iv) subject to paragraph (3), is a family member accompanying or joining a Union citizen who satisfies one or more of the conditions referred to in clause (i), (ii) or (iii)."

67. The 2006 regulations have since been revoked and replaced by S.I. No. 548/2015 European Communities (Free Movement of Persons) Regulations 2015. However, they are the applicable measures so far as this case is concerned.

Background facts

68. The applicant is, as stated, a Romanian national and a citizen of the European Union. She has resided in this State with her partner and two children since in or about 2008. She has worked in the home and has at times earned an income by selling the *Big Issue* magazine, by selling flowers, by begging and with charitable support.

69. There is no doubt but that the applicant and her family have experienced serious financial and other difficulties in this State. On two occasions she has received "exceptional needs" payments to deal with urgent accommodation and other issues. A payment was approved on another occasion but was not collected by her. It should be noted that payments of this nature are not subject to the "*right to reside*" test.

70. Since the institution of these proceedings the applicant's partner has obtained employment and there is no longer an issue as to her right of residence. However, the parties are agreed that the case is not moot.

The application for Jobseekers' Allowance

71. On the 5th September, 2014, the applicant made an application for Jobseekers' Allowance. This payment replaced what used to be known as unemployment assistance, and continues to be described (in s.139 (1)(a) of the Social Welfare Consolidation Act 2005 as amended) as "assistance".

72. The statutory entitlement to and the qualifying conditions for the payment are set out in s.141 of the Social Welfare Consolidation Act 2005 as amended. For present purposes it is sufficient to describe it as a means-tested payment available to unemployed adults who prove in the prescribed manner that they are unemployed and that they are capable of, available for (subject to certain exceptions not relevant here) and genuinely seeking suitable employment. Pursuant to s.141 (9) a person is not entitled to the payment unless he or she is habitually resident in the State.

73. On the application form the applicant stated that she had never been employed in Ireland but that she had been self-employed selling the *Big Issue*. She had not had any other employment in an EU country in the previous two years. She left blank the section asking for details as to the type of work she was looking for, her availability in terms of hours, or any attempts to get work. She said that she was not currently self-employed, working part-time, or engaged with a Community Employment Scheme, Solas or a Local Employment Services course. She was registered with the Integration Support Unit and was due to start English classes for an hour a week. At the foot of the form she signed a statutory declaration that she was unemployed and unable to get suitable full-time work and that she was capable of, available for and genuinely seeking work.

74. In the accompanying "application for habitual residence" the applicant said that she had looked for work since coming to Ireland but could not find any because of her lack of English.

75. For the purpose of this claim the applicant met with a social welfare inspector, who reported her as saying that she had last sold the *Big Issue* in August 2013 and as having no tangible evidence of any other income. On 20th October, 2014, the respondent refused the application on the basis that the applicant did not satisfy the condition of being habitually resident in Ireland, as she did not have a right to reside in the State. Reference was made to s.246 of the Act and to the conditions, set out in S.I. 656/06, upon which EU citizens have a right to reside beyond an initial period of three months. It was stated that the applicant fulfilled none of these conditions, and that her right to reside had expired when she ceased to be engaged in genuine and effective self-employment – that is, when she ceased to sell the *Big Issue*. The letter also referred to the HRC as a qualifying condition for Supplementary Allowance, although the applicant had not at that time made an application for this payment.

76. By letter dated 31st October, 2014, the applicant, through her solicitor, sought a revision of the decision of 20th October, 2014. It was argued, firstly, that Jobseekers Allowance was a payment that came within Regulation 883/2004 and that the "*right to reside*" requirement could not lawfully be applied to payments covered by that regulation. Since the regulation contained a guarantee of equal treatment, the "*right to reside*" requirement was incompatible with EU law insofar as it automatically excluded some claimants without reference to their personal circumstances. It was also argued that a jobseeker could enjoy direct protection under Art. 45 of the Treaty on the Functioning of the European Union, and was entitled to the benefit of Regulation 492/2011. The respondent was,

therefore, obliged to consider whether or not the applicant had established genuine links with the employment market in the State by seeking employment here for a reasonable period.

77. It was further argued that, in respect of Supplementary Welfare Allowance and other social assistance payments, if a claimant does not have or no longer has worker status, the appropriate test is a consideration of the claimant's overall circumstances and the application of a proportionality test to determine if he or she has become an unreasonable burden on the social assistance system. To automatically exclude a claimant by application of the HRC was therefore unlawful.

78. By letter dated the 6th November, 2014, the respondent repeated the view that the applicant could not be regarded as habitually resident in the State. It was noted that the case would be reviewed if she obtained a declaration from the Department of Justice and Equality that she had a right to reside. (It is common case that the applicant could not have satisfied the test for this particular procedure.) In relation to the reference by the applicant's solicitor to EU Regulation 883/2004 it was stated that Jobseekers Allowance was listed in Annex X of the regulation, with the status of a "Special Non-Contributory Benefit". Accordingly, under Art. 70 of the regulation, it was a benefit provided "*exclusively in the Member State in which the persons reside and in accordance with its legislation*".

79. The applicant was advised of her right to appeal the decision. It was also noted that the applicant had not as yet formally applied for SWA and that an appointment had been made for her with a view to initiating that process.

The Application for Child Benefit

80. The statutory entitlement to Child Benefit is set out in s. 219 et seq. of the Act of 2005 as amended. This payment is not dependent on means, but is payable in respect of, with some few exceptions, every child ordinarily resident in the State. However, the person to whom the payment is made must be a "qualified person". Such a person must be habitually resident in the State.

81. On the 1st August, 2014, the applicant made an application for Child Benefit. For this purpose she submitted an "Application form for Habitual Residence Condition". The form contains the question "How do you plan to support yourself in the Republic of Ireland?" The applicant's reply was:

> *"I learn an English language. I hope to find a job. My family is been supported by charity organisation. Previously contracted by the Big Issue as self employed person selling magazine."*

82. In the section headed "Your work details" the applicant answered "no" to two questions – whether she had always worked since coming to the State, and whether she was currently employed. A section requesting details of all previous employments in the State was left blank.

83. On 16th October, 2014 this claim was refused on the ground that the applicant did not satisfy the HRC, by reference to s. 246. By letter dated 31st October, 2014, the applicant's solicitor challenged this decision on the basis that Regulation 883/2004 applied and that the regulation did not contain a requirement to have a right to reside. The only applicable test was whether the claimant was habitually resident.

84. The respondent refused, by letter dated the 6th November, 2014, to revise the earlier decision. The contention that the applicant qualified for Child Benefit under Regulation 883/2004 was rejected. It was stated that in order to be exempted from HRC under this regulation the migrant worker must be either employed, in self-employment or in receipt of Jobseekers Benefit. In the applicant's case, none of these features were present and the application fell to be determined under domestic legislation. Section 246 and S.I. 656/2006 were again referred to, and the suggestion made that the applicant seek a declaration from the Department of Justice and Equality.

The Application for Supplementary Welfare Allowance

85. The basic condition for entitlement to this payment is stated in s.189 of the Act of 2005 as amended. Every person in the State whose means are insufficient to meet his or her needs is entitled to Supplementary Welfare Allowance. The general principle is then cut down by a series of exclusions (for example, persons engaged in full-time education or employment are ineligible). Section 192 excludes persons who are not habitually resident in the State. However, such persons may receive payments in situations of urgency, under the conditions set out in s.201 – this was the basis for the exceptional needs payments that the applicant has received.

86. On the 4th November, 2014, the applicant applied for Basic Supplementary Allowance Payment. This was refused by letter dated the 12th November, 2014, on the ground that she did not have a right to reside in the State and was therefore not habitually resident here. Again, the decision was challenged by the applicant's solicitor, who argued (as he had previously on this issue) that where a claimant for a social assistance payment did not have, or no longer retained, worker status the appropriate approach was to apply a proportionality test to determine whether he or she had become an unreasonable burden on the social assistance system as a whole. To automatically exclude a claimant by reference to the right to reside test was said to be contrary to EU law.

87. Again, the decision was confirmed, with the respondent relying on the same statutory provisions as before. The letter continues:

> *"By her own admission, Ms Munteanu has subsisted in Ireland by begging, selling roses and foraging for food in supermarket bins. In addition, it is noted that she owes substantial arrears of rent and is unable to meet her housing needs from within her own resources. It also appears that these are not temporary or short-term problems and that her application for Supplementary Welfare Allowance is not based on a transient need. In the circumstances, her claim amounts to an unreasonable burden on the State and she is not residing in the State in accordance with the provisions of SI 656/2006."*

Submissions

88. I am grateful to counsel for their extensive and learned submissions.

89. The applicant relies on the case-law of the CJEU to the effect that the derogation provision in Article 24(2) of the Residence Directive should be interpreted narrowly, being a derogation from the principle of equal treatment. The references are to Case C-22/08 and C-23/08 *Vatsouras* and *Koupatantze*, Case 6-75/11 *Commission v. Austria*, Case C-46/*12 L.N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtt* and Case C-480/08 *Teixeira v. London Borough of Lambeth*. That proposition is not in issue and does not require further elucidation.

90. The principal argument made on behalf of the applicant is that the EU law provides different tests, depending upon the payment at issue and the claimant's individual circumstances. A Member State is not entitled to add an extra condition to that test. In this regard counsel relied on the analysis favoured by the Commission in its infringement proceedings against the United Kingdom, discussed below.

91. Counsel for the respondent argues that the test, while admittedly discriminatory, is both objectively justifiable and permissible under the case-law of the CJEU. Particular reliance is placed on the passages cited above from *Dano*. Counsel for the applicant seeks to distinguish Dano on the basis that it deals with a case where the individual concerned had entered the host State "solely" for the purpose of claiming social assistance.

92. It is accepted that the starting point in each case is whether the migrant EU citizen is habitually resident in the State. It was established in Case C-90/97 Swaddling [1999] ECR I-1075 that the concept of "habitual residence" has an EU-wide meaning. At paragraph 29 the Court said:

> *"The phrase 'the Member State in which they reside' in Article 10(a) of Regulation No 1408/71 [a precursor to the regulation of 2004] refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances …"*

93. It is accepted by the applicant that the Irish statutory test for habitual residence broadly follows this analysis.

Jobseekers' Allowance

94. It is submitted that entitlement to Jobseekers' Allowance may be derived directly from substantive Treaty provisions, namely Art. 45(2) TFEU, (which confers a right to reside on jobseekers) together with Articles 2 and 5 of Regulation 492/2011, and is not affected by Directive 2004/38. It is to be determined by reference to whether or not the person has a genuine link with the employment market of the Member State. In considering this, habitual residence should be seen only as contributing to the link.

95. The Act of 2005 categorises Jobseekers' Allowance as social assistance. However, the applicant submits that this is not conclusive and that, having regard to the case-law of the CJEU, it should be seen, rather, as a payment intended to facilitate jobseekers seeking access to labour markets. Reliance is placed, in this regard, on Vatsouras and Koupatantze. While accepting that in Brey the CJEU had held that special non-contributory cash benefits dealt with in Article 70 of the regulation were to be classified as "social assistance", and that Jobseekers' Allowance is listed in Annex X in that context, counsel argues that the Court has reiterated the protection afforded to jobseekers in Case C- 299/14 *Garcia-Nieto*. In that case the Court repeated what it had said in *Vatsouras* to the effect that if the individual established that he or she had, for a reasonable period, genuinely sought work in the host State, then that would show a real link with the labour market in that State such as would attract the protection of the equal treatment principle.

96. Counsel for the respondent makes the case that the applicant has shown no evidence of being a jobseeker and thus linked to the labour market. He says that she is economically inactive.

97. In response, counsel for the applicant says that these proceedings do not involve asking the Court to find facts, but to rule on the correct legal test.

98. The respondent argues in any event that Jobseekers' Allowance is a form of social assistance, as well as being a special non-contributory benefit within Article 70 of the regulation. It is therefore covered by the reasoning in Dano. The respondent does not accept that it is designed to facilitate access to the labour market, but says that it is a means-tested income support payment based on need. Significantly, it is not based on contributions. However, counsel argues in the alternative that it is permissible to have a "*right to reside*" test for benefits intended to facilitate access to the labour market.

Supplementary Welfare Allowance

99. The applicant submits that the proper test for social assistance, which includes Supplementary Welfare Allowance, is the "unreasonable burden" test, together with a proportionality test as set out in *Brey*. The submission is that this involves an examination of the personal circumstances of the claimant for the purposes of an assessment whether payment to the claimant would constitute an unreasonable burden on the social assistance system of the Member State. That requires a proportionality test and an examination of the overall burden placed on the social assistance system. By contrast, the Irish "*right to reside*" test provides only a blunt mechanism that fails to take account of the different purposes of different payments.

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.

101. On behalf of the respondent it is said that, in this case, the applicant was given a reasoned decision made by reference to an assessment of her circumstances and a finding that her difficulties were not temporary, short-term or transient. However, as a matter of law there was no need to go beyond the "*right to reside*" test. Counsel also says that Brey did not create any new rules but was concerned with the legality of the "*sufficient resources*" test as applied in that case to a person who had a certificate of residence. By contrast, this State does not apply the kind of automatic threshold found to be unlawful.

102. Counsel for the respondent says that the "unreasonable burden" test is met because it is clear that the applicant's circumstances would not change and she would continue to be reliant on benefits.

Child Benefit

103. The applicant submits that Child Benefit is a social security benefit. As such, it comes under the regulation but not the directive, and the test is simply whether a claimant is habitually resident.

104. The respondent argues that it does come under the directive, and that the ratio of Dano is that those who do not meet the residence test set out in the directive can be refused a benefit on that basis. It is an area where unequal treatment is permitted.

The Commission v. United Kingdom

105. Having been afforded an opportunity to make submissions on the judgment in *Commission v. United Kingdom*, counsel for the applicant has submitted that there were evidential difficulties in respect of the Commission's case. He stresses that it appears from the judgment that the UK carried out a full assessment of personal circumstances, and contends that the case does not determine any aspect of his claim. He says that *Brey* may have been narrowed in its scope but it has not been overruled.

106. Counsel for the respondent agrees that the judgment is not dispositive but says that it confirms the Dano line of case-law and his argument that the "*right to reside*" test is lawful and justifiable. The test to be applied in respect of the "unreasonable burden" concept is fulfilled by asking if, in the case of an economically inactive person, the grant of a benefit to that person and all others in the same position would cause financial disequilibrium.

Summary

107. Article 24(1) 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 to 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 specified 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 a benefit intended to cover the beneficiary's subsistence costs (*Dano*).

114. A benefit is a social security benefit in so far 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 a social security and a special non-contributory cash benefit are mutually exclusive (*Hosse*).

115. Neither the directive not 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 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 (*Alimanovic*).

Discussion
122. In this case, Counsel for the applicant has submitted that the issue before the Court is the lawfulness of the 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 lawful residence in the State is not precluded by EU law.

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 lawful 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 *Alimanovic* or *Commission v. United Kingdom*, and that some level of consideration of the personal circumstances of a 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 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.

129. It is agreed that Child Benefit is a social security benefit. As such, the conditions for eligibility are a matter for the national legislature. The CJEU has repeated in the United Kingdom case its previously expressed view that the legislature is not precluded from imposing a requirement that a claimant be lawfully resident in the State. Again, there is no evidence to suggest that the assessment of this issue was not in compliance with the terms of the directive.

Other issues raised in the case
130. In the affidavit sworn on behalf of the respondent, Mr. Finnian Gallagher (Assistant Principal Officer in the Department) has expressed concern in relation to some of the information presented by the applicant in support of the various applications. He says that the respondent had "significant doubts" about the veracity of the information. The concerns appear to relate primarily to discrepancies in the dates upon which she has said that she was present in the State, particularly when compared with information presented by her partner for the purpose of seeking payments in his own right. Mr. Gallagher does not ask the Court to draw any particular inference from these discrepancies and it is not pleaded in the statement of opposition that they disentitle her from the relief sought. Since the respondent's reasoned decisions on the applications do not refer to any question of veracity, and since the dates would not necessarily have any relevance to the entitlement or otherwise of the applicant to the payments in question, I do not consider it appropriate to take this matter into consideration.

131. In the United Kingdom case the CJEU ruled that the verification procedures in use in the UK did not breach the prohibition on systematic verification. At the adjourned hearing before this Court counsel for the applicant has sought to argue that the Irish procedures do contravene that prohibition. Since this was not previously pleaded, dealt with in the affidavits or argued, and since the applicant does not have leave to seek relief related to it, I do not propose to consider it.

132. The Court notes that the Court of Appeal has referred certain questions to the CJEU in the case of *Gusa v. Minister for Social Protection & ors* [2016] IECA 237, in which the High Court judgment was given by Hedigan J. (see *Genov & Gusa v. Minister for Social Protection & Ors* [2013] IEHC 340). The issue of concern in that case relates to the status of a person who had been gainfully self-employed in the State for a number of years but lost his sources of work with the economic downturn. As the answer to the question posed in the reference will not determine this case I am in agreement with the parties that there is no need to delay matters further in this case pending the ruling of the CJEU.

Conclusion
133. In the circumstances I refuse the relief sought.