

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 180 JR.]

BETWEEN

ALEXANDRU MACOVEI

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 21st day of July, 2017

1. The applicant challenges the decision made by the respondent refusing him Jobseeker's Allowance in respect of a three week period from the 5th to 27th February, 2014 amounting to the sum of €432.00. He is a Romanian national who moved to Ireland on or about 10th January, 2014 for the purpose of seeking and taking up employment in the State. He made numerous applications and attempts to obtain employment from mid-January to mid-February 2014. He applied for Jobseeker's Allowance on 5th February, 2014, twenty-six days after his arrival in the State. This was refused in a decision dated 11th February, 2014 by the deciding officer who stated:-

"One of the qualifying conditions is that you must be habitually resident in this State.

I have decided that you do not satisfy the condition of being habitually resident in this State for the following reason(s):-

- (1) Your length and continuity of residence in Ireland immediately prior to your claim for Jobseeker's Allowance does not provide for approval of your habitual residence in Ireland.
- (2) You have lived all your life outside Ireland.
- (3) Your centre of interest is not Ireland.
- (4) You have no links or family ties in Ireland.
- (5) Your immediate family do not reside in Ireland.
- (6) You retain a bank account abroad.
- (7) Your future intentions to remain in Ireland are short-term.
- (8) You do not have an employment record in Ireland.
- (9) From the evidence produced to-date there is nothing to substantiate that you are habitually resident in the State."

The applicant was informed in the same letter that if he wished to send more documentary evidence or information relevant to the case, and considered the decision to be incorrect, the decision would be reviewed by a deciding officer. He was also informed that he could appeal the decision to an independent Social Welfare Appeals Officer within twenty-one days.

2. The applicant's solicitors sought a review of this decision under s. 301 of the Social Welfare Consolidation Act 2005 (as amended) on the following basis:-

"We say that our client, an EU National, is entitled to equal treatment particularly in relation to the social welfare rights of fellow jobseekers in this State. We say that in particular, our client is entitled to receive Jobseeker's Allowance in this State for a period of six months pursuant to Article 1 and Article 5 of Regulation 492/2011 (formerly Regulation 1612/68). We further say that the Habitual Residence Condition cannot be applied to our client's Jobseeker's Allowance application and that a Habitual Residence Condition is not a requirement for receipt of this payment. Furthermore, we say that s. 246 of the Social Welfare Consolidation Act 2005 (as amended) is incompatible with European Union law."

The letter accepted that the applicant was "obligated to provide evidence to your Department that he is genuinely seeking employment in this State" and sample applications for nine positions for which he had applied in the State were enclosed.

3. By letter dated the 10th March, 2014 the applicant was informed that his application seeking a revision of the earlier decision had been refused. The letter stated:-

"Mr. Macovei is exercising his freedom of movement as a EEA citizen while job seeking and residing in Ireland. EEA nationals who move in search of employment may benefit from equal treatment under Regulation 1612/68 in relation to employment on the basis of Article 7(2).

As Mr. Macovei has not had employment in Ireland, he must satisfy the Habitual Residence Condition in order to access the same social and tax advantages as national workers, Jobseeker's Allowance in this case.

Mr. Macovei made a claim for Jobseeker's Allowance on 5th February, 2014. The following was taken into account in reaching a decision in this case:

- (1) Mr. Macovei stated he intended to remain in Ireland for a period of between three to five years.
- (2) Mr. Macovei failed to secure employment in the State before travelling to Ireland on 10th January, 2014.
- (3) Mr. Macovei has no history of previous employment in Ireland.
- (4) Mr. Macovei has maintained a bank account in Romania.
- (5) Mr. Macovei has no dependents in Ireland.
- (6) Mr. Macovei failed to show that his main centre of interest is in Ireland."

The decision maker then recites the previous decision and the reasons for same as set out in the letter of 11th February, 2014 and added:-

"I have revisited the case and as no new evidence has been presented, I am of the opinion that the original decision should stand as I see no grounds, within the information provided, to revise the decision."

Mr. Macovei was also informed of a right to appeal this decision to an independent Social Welfare Appeals Office at no cost to himself.

4. The applicant secured a position of employment on the 27th February, 2014.

The Grounds

5. The main grounds relied upon by the applicant may be summarised as follows:-

- (1) The respondent failed to apply the correct test in determining whether the applicant was entitled to Jobseeker's Allowance and in particular in applying the habitual residence test. The only question that might lawfully be considered in respect of the applicant's residence in the State when considering his entitlement to Jobseeker's Allowance was whether or not he had established genuine links with the employment market of the State and for a reasonable period had genuinely sought employment in the State. It was submitted that any residence based condition could only be applied insofar as it was required to establish that link.
- (2) The applicant as a "pre-active jobseeker" enjoyed favourable treatment which included a right to seek Jobseeker's Allowance for up to six months provided he had established a genuine link with the employment market of the State and for a longer period if he could establish that he continued to seek employment and had a genuine chance of being employed.
- (3) The applicant derived a right to reside and remain in the State for the purpose of seeking to enter the labour market under Article 45(3) of the Treaty on the Functioning of the European Union (TFEU) and an entitlement to financial benefit such as Jobseeker's Allowance intended to facilitate access to employment under Article 45(2) TFEU and Articles 2 and 5 of Regulation 492/2011.
- (4) There is no minimum period for habitual residence or a period of prior employment required in order to establish an entitlement to Jobseeker's Allowance under Regulation 492/2011 and Articles 18, 20 and 45 TFEU.
- (5) A rebuttable presumption under s. 246(1) of the Social Welfare Consolidation 2005 (as amended) that a person who has not been present for two years in the State is not habitually resident in the State is contrary to and incompatible with European Union law which does not require a minimum or appreciable period of residence for the purpose of meeting the habitual residence test. In the alternative, the applicant claims that the provision unlawfully discriminates between Irish and non-Irish EU nationals and is not proportionate or objectively justified.
- (6) The decision unlawfully took into account the failure of the applicant to secure employment before moving to the State and the absence of prior employment in the State.
- (7) In the course of argument, though not specifically raised in the grounds upon which leave was granted, counsel for the applicant laid particular emphasis on the nature and purpose of Jobseeker's Allowance. It was submitted that if its purpose was to facilitate access to the labour market it was a payment that should be made to the applicant on an equal basis to that upon which it was payable to an Irish national. A distinction must be drawn between such benefits and those constituting social assistance. Ireland is not obliged to confer an entitlement to social assistance upon an EU national during the first three months of residence in Ireland under Article 24(2) of Directive 2004/38/EC. However, the applicant submits that Jobseeker's allowance was a stand-alone payment, is not social assistance under EU law and that since it is for the purpose already stated, the failure to grant it to the applicant is unlawfully discriminatory under Article 45(2) of TFEU.

The Law

6. Article 18 TFEU prohibits discrimination on grounds of nationality. Article 21 states the core freedom of European Union citizens to move and reside freely within the Member States subject to limitations and conditions laid down in the Treaties and measures adopted to give them effect. Article 45 provides that:-

"1 Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment ...

3. 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 Member States for this purpose ...”

7. A number of legal principles in respect of the rights of pre-active jobseekers are now well-established under European Union law:-

(a) Nationals of a Member State seeking employment in another State are protected by the provisions of Article 45 and the right to equal treatment in sub-paragraph 2. (*Office national de l'emploi v. Ioannidis (Case C-258/04)* [2005] E.C.R. I-08275);

(b) A benefit such as Jobseeker's Allowance, of a financial nature intended to facilitate access to employment in the labour market of a Member State is subject to the protection against discrimination under Article 45(2). (*Collins v. Secretary of State for Work and Pensions (Case C-138/02)* [2004] ECR I-2703);

(c) A national of one Member State has a right of residence in the territory of another Member State in order to pursue or seek paid employment derived from Articles 45. (*Case C-292/89 The Queen v The Immigration Appeals Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] E.C.R. I-00745 and *Case C-171/91 Tsiotras v. Landeshauptstadt Stuttgart* [1993] ECR I-02925).

Regulation 492/2011

8. The purpose of Regulation 492/2011 of 5th April 2011 on the Freedom of Movement of Workers as defined in the Preamble is to facilitate mobility of labour without discrimination and as stated in paragraph (6) to ensure that

“equality of treatment ... in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility to housing, and that obstacles to the mobility of workers be eliminated, in particular as regard the integration of the worker's family within the host country”.

9. Paragraph (7) emphasises that the principle of non-discrimination between workers in the Union means that “the same priority as regards employment” should be enjoyed by all nationals of the Member States as those enjoyed by nationals of the host State.

10. Article 2 of the Regulation provides that any national of a Member State may exchange applications for employment and enter and perform contracts in accordance with law and “without any discrimination resulting therefrom”. Article 5 provides that:

“A national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment”

Section 2 of the Regulation addresses “Employment and equality of treatment”. Article 7(1) provides that a ‘worker’ who is a national of a Member State shall not be treated differently from national workers by reason of nationality in respect of any conditions of employment and work. Article 7(2) states that a worker “shall enjoy the same social and tax advantages as national workers”. It is a provision that applies to ‘workers’.

11. This regulation does not concern the right to job-seekers allowance for pre-operative workers from their arrival in the State. The purpose of the regulation is to ensure equality of treatment of workers. Article 2 and 5 are intended to ensure that there is no discrimination on the grounds of nationality against workers in taking up employment or activity as an employed person “with the same priority as nationals” of a Member State of which they are not a national, and that they should enjoy the same assistance as that afforded by the “employment offices” in the host state to nationals of that State when seeking employment here. It does not address “social assistance” for job-seekers. In *Centre public d'aide sociale de Courcelles v. Lebon (Case C-316/85)* [1987] E.C.R. I-2811, the European Court of Justice stated:-

“...the right to equal treatment with regard to social and tax advantages applies only to workers. Those who move in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 48 of the EEC Treaty [now Article 45 TFEU] and Articles 2 and 5 of Regulation No 1612/68 [now Reg.492/2011].”

The entitlement to apply for Job-Seekers Allowance is derived from national law and European Union legislation which complements and is to be interpreted consistently with Regulation 492/2011. The jurisprudence of the European Court requires that access to Job-seekers Allowance falls to be considered with the asserted right of a European Union citizen to reside in another Member State and avail of its “social assistance” benefits on an equal basis to European citizens who are nationals of and resident in the host Member State while seeking employment.

Directive 2004/38/EC

12. Directive 2004/38/EC of 29 April 2004 concerns the right of citizens of the Union and their family members to reside freely within the territory of a Member State. The recitals in the Preamble indicate that the purpose of the Directive is to codify and review the existing instruments dealing separately with workers, self-employed persons, students and “other inactive persons” in order to strengthen the right of freedom of movement. Recital 9 notes that Union citizens should have a right of residence in a host Member State for a period not exceeding three months without being subject to any conditions or formalities and “without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.”

13. Article 6 of the Directive provides that all Union citizens have a right to reside in a host Member State for up to three months without any condition other than the holding of a valid identity card. Article 7 provides that an EU citizen has a right to remain in the host State beyond the three month period if he/she is working or self-employed there or if they have sufficient resources for themselves and their family members so as not to become a “burden” on the social assistance system of the State or if they are enrolled in certain types of education. Article 7(3) provides *inter alia* that a Union citizen who becomes involuntarily unemployed during the first twelve months and is registered as a job-seeker may retain the status of worker for at least twelve months.

14. The Court of Justice ruled in *Case C-292/89 Antonissen*, at par.14 that the right to reside subsisted for at least six months or longer “if the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged.”

15. In *Vatsouras and Koupatanze v Arbeitsgemeinschaft (Arge) Nurnberg (Cases C-22/08 and C-23/08)* [2009] E.C.R. I- 04585 the applicants worked in Germany for a short time and were refused social assistance benefit on the basis that the legislation provided that they were not entitled to it if their right of residence derived solely from seeking employment. The CJEU held that the applicants

had a right of establishment and equal treatment. It was therefore not possible to exclude them from benefits of a financial kind intended to facilitate their access to employment. However, a Member State was entitled to provide that in order to qualify for the benefit the applicant must establish a real link with the labour market. That link could be determined by establishing that the person has for a reasonable period genuinely sought work in the Member State. Thus EU nationals who have established real links with the labour market were entitled to apply for benefits of a financial nature intended to facilitate access to the labour market. The Court also stated that it was for the national authorities and courts to determine the existence of such a real link, assess the constituent elements of the benefit (including its purpose) and the conditions subject to which it is granted.

16. Recital 21 of the Directive provides that the host State may decide whether it will grant "social assistance" during the first three months of residence or for longer to Union citizens who are job-seekers.

17. Article 14 of the Directive concerns the retention of the right of residence by European citizens as long as they do not become an unreasonable burden on the social assistance system of the host State.

18. Those who enter a Member State to seek employment may not be expelled and are entitled to equal treatment with nationals of the Member State. Under Article 14.4(b) an expulsion measure may in no case be adopted if :-

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

Article 24.1 provides that subject to specific provisions expressly provided in the Treaty and secondary law "all Union citizens residing on the basis of this Directive in.... the host Member State shall enjoy equal treatment with the nationals of the Member State within the scope of the Treaty." Importantly Article 24.2 states:

"By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4) (b)..."

The cases of *Vatsouras and Koupatanze* determined that benefits of a financial kind which are intended to facilitate access to the labour market are not to be regarded as social assistance within the meaning of Article 24(2). The Court also held that Article 24(1) read in conjunction with Article 7(1) did not preclude national legislation from excluding nationals of other Member States who do not have a right of residence under Directive 2004/38 from entitlement to "special non-contributory cash benefits" within the meaning of Article 70(2) and Annex 10 of Regulation 883/2004. Thus a European Union citizen seeking employment in a Member State of which he/she is not a national enjoys a right to reside in the host Member State but is not automatically entitled to social assistance, such as a job-seeker's allowance.

Regulation (EC) 883/2004

19. Regulation (EC) 883/2004 of 29 April 2004 on the Coordination of Social Security systems under "General Provisions" also incorporates the principle of equality in Article 4:-

"Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof."

20. Article 70 of the Regulation insofar as it is relevant provides:-

"(1) This Article shall apply to 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.

(2) For the purposes of this Chapter, "special non-contributory cash benefits" means those which:

(a)....

(b)....

(c) are listed in Annex X

(3) Article 7 and the other Chapters of this Title shall not apply to the benefits referred to in Paragraph 2 of this Article.

(4) The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence."

Article 1(j) defines "residence" as "the place where a person habitually resides". In Annex X a job-seekers allowance under the Social Welfare Consolidation Act 2005 as amended is a listed benefit in respect of Ireland.

21. In *Swaddling v. Adjudication Officer (Case C-90/97)* [1999] E.C.R I-01075 (25th May 1999) the CJEU considered the meaning of "habitual residence" under an earlier Regulation No. 1408/71, a precursor to Regulation 883/2004, in respect of "special non contributory cash benefits" for employed or self-employed persons. The entitlement to this payment depended upon the applicant's residence in the territory of the Member State under whose legislation he/she was entitled to the benefit. The applicant, a United Kingdom national, applied for income support from the United Kingdom social services authorities. It was accepted that he had a settled intention to reside in the United Kingdom. The question arose whether the applicant also had to demonstrate "an appreciable period of residence" in the United Kingdom before becoming entitled to the benefit. The Court stated:-

"29 The phrase 'the Member State in which they reside' in Article 10a of Regulation No.1408/71 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..."

In *Swaddling* the Court was satisfied that for the purpose of this assessment the length of residence in the United Kingdom could not be regarded as an intrinsic element of the concept of residence under article 10a particularly when the applicant returned to his home State where his family lived, having exercised his right to free movement by working in another Member State and made it clear that he wished to remain in his native country of origin. He could not in those circumstances be refused the benefit because the period of residence completed in his country of origin was too short.

22. In *Case C-333/13 Dano v. Jobcenter Leipzig* (11th November 2014) the Grand Chamber of the CJEU stated that "special non-contributory cash benefits" under Article 70(2) fell within the concept of "social assistance" within the meaning of Article 24(2) of Directive 2004/38. The court held that the concept of social assistance embraced all assistance schemes available to an individual who does not have sufficient resources to meet his/her basic needs during the course of residence in a Member State. Discrimination in providing such assistance on the grounds of nationality is prohibited by Article 24(1) of Directive 2004/38 and Article 4 of Regulation 883/2004. However, the Court noted the derogations from the principle of non-discrimination under Article 24(2) and stated that:-

(a) Under Article 24(2) the host Member State was not obliged to confer an entitlement to social assistance during the first three months of residence or any further period during which employment is sought as referred to in Article 14(4)(b);

(b) Access to social benefits may only be claimed on the basis of equal treatment with nationals of a host state if the applicant's residence in the host State complies with the conditions of Directive 2004/38;

(c) A host State is not obliged to confer social assistance entitlements upon those European Union citizens who reside there for the first three months under Article 24(2) because under Article 14(1) the right to reside is retained only as long as the citizen and his family does not become an unreasonable burden on the social assistance system of the host State; and

(d) Any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host State with regard to the grant of social benefits was an inevitable consequence of Directive 2004/38 and was founded upon the established link "by the Union legislature in Article 7... 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 State."

23. It followed that a Member State was entitled to refuse to grant social benefits to Union citizens who exercise a right to freedom of movement solely to obtain another Member State's social assistance, including a job-seeker's allowance. The Court held:-

"Article 24(1) of Directive 2004/38/EC read in conjunction with Article 7(1)(b) thereof and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain "special non-contributory cash benefits" within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of the other Member State do not have a right of residence under Directive 2004/38 in the host member State."

24. The Court ruled that "special non-contributory cash benefits" under Article 70(2) were to be provided under Article 70(4) exclusively in the Member State in which the persons concerned reside in accordance with its legislation and the grant of such benefits to Union citizens who were not economically active could be made subject to a requirement to fulfill the conditions of a right of residence under Directive 2004/38

25. In *Case C-67/14 Jobcenter Berlin Neukoln v. Alimanovic & Ors* (15th September 2015) the Court considered the entitlement of the applicants whose right of residence derived solely from their status as jobseekers. The applicant and her children were Swedish nationals. The three children were born in Germany but left the country between 1999 and 2010. The mother and eldest daughter undertook short term employment or employment promotion measures. They applied for an Annex X benefit which was the equivalent of a job-seekers allowance. The JobCenter took the view that the applicants were not entitled to the allowance because German law excluded non-national jobseekers from its benefit even though they had a right to reside in Germany. This decision was initially annulled because the exclusion from entitlement was deemed to be contrary to the prohibition against discrimination against non-national Union citizens under Article 4 of Reg 883/2004 in respect of the allowance as a "special non-contributory cash benefit" which was available to nationals of the Member State. The German Authority appealed and the German court was satisfied that under German law the applicants could not any longer rely upon a right of residence as workers and must be regarded as jobseekers under the relevant domestic legislation. As a result their entitlement to subsistence allowances was precluded under paragraph 7(2) of the German Social Code.

26. The Court of Justice was satisfied that the *Dano* case established that Article 4 of Reg.883/2004 was applicable to special non-contributory cash benefits referred to under Article 70(2) – including jobseekers allowance.

27. The court was asked to determine whether the legislation of a Member State, in accordance with which nationals of other Member States who have made use of their right to freedom of movement with the aim of seeking employment are excluded from entitlement to such benefits under Reg.883/2004, although those benefits are granted to nationals of the host Member State in the same situation, was compatible with Article 24(2) of Directive 2004/38 and Articles 18 and 45(2) of TFEU.

28. The court was satisfied that Article 24 of Directive 2004/38 and Article 4 of Reg. 883/2008 must be interpreted as not precluding a Member State from providing by law that nationals of other Member States who have entered the host State to seek employment under Article 14(4)(b) be excluded from entitlement to certain "special non-contributory cash benefits" under Article 70(2), which also constitute "social assistance" under Article 24(2) of Directive 2004/38, even though these benefits are granted to nationals of the Member State concerned who are in the same situation.

29. The Court was satisfied that the benefit in issue constituted social assistance under Article 24(2) of Directive 2004/38. The predominant function of the benefit was to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity. The benefit could not be characterised as one of a financial nature intended to facilitate access to the labour market of the Member State. The reference in the derogation under Article 24(2) was linked to the right to reside acquired and defined by Article 14(4)(b) namely that the Union citizen has entered the host state in order to seek employment and can provide evidence that they are continuing to seek employment and have a genuine chance of being engaged. The Court stated:-

"42. Since the issue of whether the benefits at issue constitute 'social assistance' or measures intended to facilitate

access to the labour market is determinative for the purpose of identifying the EU rule under which that compatibility falls to be assessed, it is necessary to classify them.

43. In this connection, it is sufficient to note that the referring court has itself characterised the benefits at issue as 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004. It states in that regard that those benefits are intended to cover subsistence costs for persons who cannot cover those costs themselves and that they are not financed through contributions, but through tax revenue. Since those benefits are moreover mentioned in Annex X to Regulation No 883/2004, they meet the conditions in Article 70(2) thereof, even if they form part of a scheme which also provides for benefits to facilitate the search for employment.

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. 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 (judgment in *Dano*...paragraph 63).

45. However, in the present case it must be found that 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*...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"

30. In this case the applicant entered the State and was entitled to do so for the purpose of seeking employment. Jobseeker's Allowance is a special non-contributory cash benefit under Annex X and the subject of Article 70(2) of Reg. 883/2004. It is a benefit which comes within the meaning of social assistance and is not to be considered as a benefit of a financial nature which is intended to facilitate access to the labour market though it may be regarded as part of a scheme that encourages engagement in the labour market. It is clear that the assessment of eligibility for the payment is means based and an applicant must have an extremely low level of income to qualify. The entitlement to the benefit is to be determined solely under the legislative provisions of the Member State namely, Irish law. It is clear from the case-law that access to social assistance benefits may be had by an EU citizen in a host State if he does not have sufficient resources to meet his essential needs and those of his family but is only entitled to obtain such payments if he complies with the conditions set out in the Directive. The derogation under Article 24(2) allows the Member State, if it so decides, to exclude access to social assistance to an applicant whose right to reside is based solely on a search for employment. The court is satisfied therefore, that the applicant was in all material respects treated in accordance with the provisions of the TFEU, the various Directive and Regulations applicable and the domestic legislation duly enacted transposing them and the rights to which he is entitled thereunder.

31. Since the case was originally argued judgment was delivered in *Munteanu v. Minister for Social Protection* [2017] IEHC 161 in which O'Malley J. considered the nature and purpose of Jobseeker's Allowance as follows:-

"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...

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."

I am satisfied to adopt and apply the analysis and judgment of O'Malley J. on this issue.

32. In Ireland, persons seeking employment may apply for job-seekers allowance under the Social Welfare (Consolidation) Act 2005 whether an Irish or EU national. The statute sets the qualification criteria pursuant to which the benefit is provided in Ireland under Article 70(4).

Social Welfare(Consolidation) Act 2005

33. A non-national European Union citizen in Ireland may apply for the payment of a Job-Seekers Allowance during the period he/she is seeking employment. Section 141 of the Social Welfare (Consolidation) Act 2005 provides that a person who is over 18 years and establishes that he/she is unemployed under the Act and whose weekly means do not exceed the amount payable weekly as jobseekers allowance, is entitled to the allowance. As already noted the jobseekers allowance is one of the special non-contributory cash benefits listed in Annex X in respect of Ireland under Article 70(2)(c) of Reg 883/2004(where it is described as "Jobseeker's Allowance (Social Welfare Consolidation Act 2005, Part III, Chapter 2)"). The entitlement is contingent on the applicant being habitually resident in Ireland at the time of application and applies to both national and non-national applicants: both must establish Ireland as their place of "habitual residence" at the time of application.

34. The word "residence" under Article 70(4) falls to be interpreted in accordance with Article 1(j) of Title 1 of the Regulation which states:-

"Residence means the place where a person habitually resides".

Although Article 7 of the Regulation concerning "waiving of residence rules" provides that unless otherwise provided for by the Regulation cash benefits payable under the legislation of a Member State or the Regulation should not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary resides in a Member State other than that in which the institution responsible for providing benefits is situated, this does not apply to Jobseeker's Allowance by reason of Article 70(3).

35. In assessing "period of residence" under the Regulation the phrase is to be interpreted as "periods so defined or recognised by the legislation under which they were completed or considered as completed".

36. The entitlement to Jobseeker's Allowance in Ireland is governed by Chapter 2 of the Social Welfare Consolidation Act 2005 (as amended). Section 141(9) provides that a person shall not be entitled to Jobseeker's Allowance unless he or she is "habitually resident" in the State. This provision was subsequently replaced by ss. 11 and 12 of the Social Welfare and Pensions Act 2014. However, the provision was operable at the time of the making of this decision.

37. The issue of habitual residence was addressed in s. 246 of the 2005 Act as follows:-

"(1) For the purpose of each provision of this Act specified in subsection (3), it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date."

Under Section 246(3) the presumption is applicable to applications for a jobseekers allowance under s. 141(9).

38. The criteria for determining "habitual residence" are set out in Section 246(4) which states:-

"A deciding officer ... when determining whether a person is habitually resident in the State for the purpose of this Act, shall take into consideration all the circumstances of the case including in particular, the following:-

- (a) The length and continuity of residence in the State or in any other particular country,
- (b) The length and purpose of any absence from the State,
- (c) The nature and 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."

39. Section 246(9) provides that notwithstanding that a person has a right to reside in the State, the determination as to whether that person is "habitually resident" in the State must be made in accordance with sub-sections (1) and (4).

Habitual Residence

40. It is clear from Regulation 883/2004 that "residence" means "habitual residence" and that jobseeker's allowance under Article 70(4) in Ireland "shall be provided exclusively in the Member State in which the person concerned resides in accordance with its legislation" i.e. the 2005 Act as amended. Habitual residence was a common condition for eligibility for Irish and European Union nationals alike. The court does not accept that s. 246(1) is unlawfully discriminatory. The presumption applies in the same way to all applicants whether nationals of the host State or those of another Member State. If an Irish national applicant has been absent from the State for a period of two years or more the presumption arises. Furthermore, the presumption is rebuttable. It is simply an evidential rule. It means that the applicant for jobseeker's allowance will be presumed not to be habitually resident in the State unless he/she has been present in the State or in any other place within the Common Travel Area for a continuous period of two years.

41. It is clear that the deciding officer must take into account the other criteria set out in s. 246(4) quoted above. The court is satisfied that these criteria were taken into account as set out in the determination. The section does not impose an overly restrictive requirement upon a non-EU national. The provision provides for an assessment by which the extent and reality of the applicant's "habitual residence" within the State may be measured. The relevant criteria set out in s. 246(4) relate to the length and

continuity of residence in the State, patterns of absence and employment within the State, an applicant's main centre of interest and his/her future intentions. The court does not consider that the operation of the statutory presumption is in any way oppressive, discriminatory or disproportionate in the assessment of the applicant's entitlement. Habitual residence as a requirement is an appropriate means of ensuring or establishing a connection between a person and the employment market (C-Case 138/02 *Collins*) provided the criteria set are clear and proportionate to the aim to be achieved. It is recognised under EU law and domestic law as the basis upon which the entitlement to Jobseeker's Allowance may be assessed. It does not restrict or preclude access to the labour market on an unequal basis nor does it interfere with the right to residence of European Union citizens in the host State under Reg. 492/2011 or otherwise.

42. It is clear from "The Habitual Residence Condition Guidelines" (12th November, 2013) under which the scheme is administered that the respondent in applying the presumption set out in s. 246(1) did not consider that an application for jobseeker's allowance must "necessarily" be disallowed on habitual residence grounds because the applicant has not lived in Ireland for two years immediately preceding a claim. The guidelines stated that the habitual residence condition

"is a complex condition and the length and continuity of residence in the State immediately prior to a claim is only ONE aspect of the condition. It is important to note that this does not mean that such persons are presumed to be habitually resident. On the contrary such applicants' status must still be examined by reference to the five factors to determine whether the person has actually transferred their habitual residence to this State".

The guidelines have due regard for the provisions of s. 246(9) and the fact that a right of residence alone does not establish that a person is habitually resident for the purpose of receiving the benefit. The matter must be determined by reference to the factors listed in s. 246(4).

43. The guidelines elaborate extensively on how each sub-heading under the subsection is to be addressed (pp. 18 to 26). At para.7.1 the guidelines state that habitual residence cannot be determined simply by reference to a specific period of residence in a State. Where a person has been in Ireland for only a short period he/ she may be unable to establish habitual residence. However, it is noted that a short period does not automatically prove that an applicant has maintained his/her main centre of interest abroad.

44. Periods of residence abroad and the nature of that residence prior to the date of the latest arrival in Ireland may be relevant in assessing a person's main centre of interest and intentions. Similarly, a link with the employment market of the host state is also a relevant matter. It is clear that the decision-maker in this case had regard to each of the relevant factors. It is also clear that these factors encompass consideration of the link which the applicant had with the employment market of the State. As also noted in the guidelines:-

"The term 'habitually resident' is not defined in Irish law, but it generally conveys a degree of permanence – meaning that a person has been here for some time, from a date in the past, and is intending to stay for a period into the foreseeable future. It implies a close association between the applicant and the country from which payment is claimed and relies heavily on fact. In certain instances, it is possible for someone to have arrived in Ireland for the first time and be habitually resident immediately, for example, program refugees. ... An applicant who satisfies the (habitual residence condition) must, of course, also satisfy the other conditions of entitlement in order to receive the payment claimed. Therefore, the deciding officer or determining officer should bear in mind that habitual residence is only one condition and be mindful of the need to be proportionate in its aim, which is to ensure that there is a link between the claimant and the State ..."

The court does not consider that the guidelines or the statutory provisions to which they apply are unlawfully discriminatory or incompatible with the law of the European Union, Articles 18, 21 and/or 45 of the TFEU or the jurisprudence or the CJEU.

Conclusion

45. The applicant has a right of residence in Ireland as a European Union citizen seeking employment within the State. He was entitled to exercise that right when seeking employment and to be afforded equal treatment under Article 24(1) of Directive 2004/38 while doing so and to be assisted by the State in its employment offices in the same way as Irish nationals. However, this was subject to the right of the host Member State to derogate under Article 24(2) in respect of the granting of social assistance to him under Article 14(4)(b). Thus it was open to the Government to exclude the applicant from the benefit of social assistance in the form of jobseeker's allowance in respect of the period during which employment was sought in the initial period following his arrival in the State. The applicant was not vested under Union law with a right to social assistance in the form of job-seeker's allowance payable to him by the State in the first three months following his arrival or during any subsequent period during which he might continue his search for employment.

46. The 2005 Act as amended nevertheless permitted the applicant to apply on the same basis as Irish nationals for jobseekers allowance "in accordance with its legislation" under the 2005 Act as amended and as contemplated by Article 70(4) of Reg. 883/2004.

47. The court is satisfied that the respondent was entitled to take into account the applicant's failure to secure employment before his arrival in the State or the absence of prior employment in the State when considering his application. These are two of many factors relevant to the nature and pattern of his employment under s.246(4)(c) of the Act which were properly taken into consideration by the decision-makers.

48. The applicant was granted the right to apply for job-seekers allowance on the same basis as an Irish national and the same evidential presumption operated in both cases. There was no discrimination in that regard.

49. There is no minimum time for which a person must be present or "habitually resident" in the State before an application may be made. The statutory presumption under s.246(1) that a person who was not present in the State for a two year period prior to the application is not habitually resident in the State was rebuttable and applied to all applicants. The determination of entitlement must be based on the criteria set out in s.246(4). The provisions are not unlawfully discriminatory.

50. In determining the applicant's place of habitual residence account must be taken of his family situation, the reasons for his move, the length and continuity of his residence in the State, his employment history and connection with the employment market of the State in accordance with the CJEU jurisprudence. The 2005 Act as amended sets criteria for the determination of "habitual residence" which give effect to this jurisprudence and which are also the subject of the guidelines applicable. The criteria were applied in the decisions made in respect of the applicant's case.

51. The court is satisfied that the decision to refuse the applicant the job-seekers allowance was in accordance with law and that the applicant has failed to establish that the decision was legally flawed on any of the grounds advanced. The application is refused.