Assessing the Right to Social Assistance for EU citizens resident in Ireland: A Review of Recent Case Law

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Charles O'Sullivan[1]

1. Introduction

The right to social assistance has been much debated since the onset of the Global Financial Crisis in 2008. In Ireland, the ensuing 'Bailout Package' and austerity that formed a cornerstone of this programme brought this issue to the fore nationally,[2] leading to debates concerning the extent to which these rights should be more formally embedded within the Irish Constitution.[3] This debate has arguably only increased in importance following the onset of the COVID-19 pandemic, which had a significant economic impact on the financial resources of persons resident in Ireland. However, this has also raised questions regarding migrant access to the welfare state,[4] given the potentially disproportionate burden this has had on migrants and asylum seekers. Indeed, Walzer has argued, 'the very idea of distributive justice presupposes a bounded world within which distributions take place: a group of people committed to dividing, exchanging, and sharing social goods, first among themselves.'[5]

Consequently, this current period of uncertainty represents a unique opportunity to outline the legal protections available to migrants to access social assistance payments, which are generally based on need and not available as a right. This article will focus on access among European Union citizens, in light of the November 2020 High Court judgment in the case of *Razneas & ors v The Chief Appeals Officer & ors*.[6] On the surface, this case represented another in a long line of recent case law challenging refusals by the Department of Social Protection (DSP) to grant Jobseeker's Allowance

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[2] Delia Ferri & Charles O'Sullivan, 'The Impact of the Economic Crisis on the Irish Legal System. Between Austerity and Constitutional Rhetoric' Special Issue (30 December 2016) federalismi.it 1-29

[3] Thirty-Seventh Amendment Of The Constitution (Economic, Social And Cultural Rights) Bill 2018.

[4] Charles O'Sullivan, 'Against Ideology? Examining Social Rights in Ireland During Times of Crisis' 2020(Special Issue 1) *BioLaw Journal - Rivista di BioDiritto* (2020), 715-721.

[5] Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books, 1983), 31. Walzer also argues that 'admission and exclusion are at the core of communal independence… without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.' (Ibid, 62.)
See also, David Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007).

[6] [2020] IEHC 654.

(JA) to European Union (EU) citizens resident in Ireland engaged in more marginal forms of employment.

However, within this case came a broad range of arguments attempting to challenge the validity of immigration pre-conditions necessary in order to meet the administrative requirements for Jobseeker's Allowance and other similarly categorised payments. These included arguments based on statutory interpretation, within the relevant EU rules, a wide range of constitutional provisions, as well as the European Convention on Human Rights (ECHR). Thus, this case represents a unique opportunity, firstly to analyse and critique the potential strengths and weakness of these same arguments, and secondly, to place this individual case within its broader structural context. In doing so, the article will highlight how the Eastern European population resident in Ireland may be over-represented within the jurisprudence of the Superior Courts on the implementation of EU social welfare rules in Ireland.

In order to achieve this objective, this brief article will be structured as follows. This introduction will be followed by a section which details and assesses the various sources of law which might grant access to social assistance for EU citizens resident in Ireland. An outline of the facts of the *Razneas* case will be provided in section three, as well as highlighting the specific questions being asked of O'Regan J in the High Court. A further section will then discuss the overall judgment of the High Court, commenting upon it in detail, and underlining specific points of interest. To conclude, it will offer a comment on where this case should be situated within the more recent case law of the CJEU on access to social assistance and residence requirements, as well as their impact on marginally employed and economically-inactive persons.

2. The Relevant Law

As noted in the introduction the arguments put forward by the applicant's counsel to argue that the payment had been unlawfully refused run the gamut in terms of the various potential sources of a right to social assistance for EU citizens resident in Ireland, including: worker status under EU law; a constitutional right; and the ECHR. Thus, the case as a whole represents a unique opportunity to assess the current validity of these same arguments.

From a conceptual standpoint, it is important first to define what is meant by the term "social assistance." EU law includes three broad categories: social security; social assistance, and special non-contributory cash benefits, and these definitions are distinct from those used nationally by its

Member States. Social security, is regulated by Regulation 883/04[7] and fulfils one of ten purposes outlined in Article 3(1) of the Regulation, including sickness benefits and unemployment benefits. Standard definitions of social security will include that it is an entitlement based on previous contributions of one kind or another to a general welfare or taxation fund.[8] However, this is not always true for the purposes of EU law, as non-contributory benefits can also be included so long as: the individual seeking to claim it is placed in a legally defined position that gives rise to a right to the same payment; that the payment meets one stated objectives of social security as defined in Article 3(1) of the Regulation,[9] and that the primary purpose of the payment must not be that of subsistence.[10] A social assistance payment is therefore broadly considered to be one which does not pursue one of the objectives outlined in Article 3(1) of Regulation 883/04, and which has as its primary purpose the subsistence of the individual in question i.e. that greater than 50% of the objective is subsistence.[11] This will also invariably lead to social assistance schemes being non-contributory in nature,[12] and imply that a means test is conducted.[13] Lastly, special non-contributory cash benefits are payments which have been brought within the scope of Regulation 883/04 and thus become another form of social security benefit. However, they may share the more common characteristic of social assistance - being discretionary and non-contributory in nature. They are not portable, meaning that they cannot be brought from the original Member State to the new host State,[14] and this provides a clear dividing line between these and 'pure' social security payments. Payments of this nature are always potentially subject to a residency requirement.[15]

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[7] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) OJ L 166, 30.4.2004, p. 1–123.

[8] Dorte Sindberg Martinsen, *The De-Terriorialization of Welfare,* in Gráinne De Burca (ed.), *EU Law and the Welfare State, In Search of Solidarity* (Oxford University Press, 2005), 91-92.

[9] Phillipa Watson, 'Free movement of workers and social security' 6 (1981) *European Law Review* 290.

[10] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* ECLI:EU:C:2015:597; and Case C-333/13 *Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358.

[11] Ibid.

[12] Case 187/73 *Odette Callemeyn v Belgian State* ECLI:EU:C:1974:57, paras 7-8.

[13] Case C-78/91 *Hughes* ECLI:EU:C:1992:331, para 17 - '…an individual assessment of the claimant's personal needs… is a characteristic feature of social assistance…'

[14] Case C-537/09 *Bartlett v Secretary of State for Work and Pensions* ECLI:EU:C:2011:278, para 38.

[15] Regulation 883/2004, art 70(4).

As many Member States, including Ireland, have included JA as a social assistance payment within Annex X of Regulation 883/04, this means that arguments over the categorisation of it are largely unnecessary, and that is why the article adopts 'social assistance' as the the basis for its analysis. Therefore, whilst this categorisation will be noted when discussing the overall judgment of the High Court and commented up, the following subsections will focus on the questions of what constitutes a worker for the purposes of EU law, and the constitutional and ECHR dimensions that will be discussed in detail below.

2.1. Who is a Worker?

What constitutes a worker for the purposes of Article 45 TFEU has been defined broadly by the CJEU, and it retains the sole monopoly in doing so.[16] This monopoly on defining the term 'worker' for the purposes of EU law ensures that there are no divergent definitions adopted at the Member State level which might undermine their free movement. The term 'worker' subsequently holds a 'community wide meaning,'[17] and provides a broad litmus test which Member States and the CJEU must abide by.[18] The primary criteria are whether or not: the individual performs a task; under the direction of another; in exchange for some form of remuneration; and for a period of time.[19] Each of these criteria must be interpreted in the most purposive manner possible to ensure that individuals do not unnecessarily fall outside of the scope of Article 45 TFEU and be subject to discrimination on the basis of nationality, or in this instance, be limited in their access to welfare payments.

The employment must be *effective* and *genuine* and not fall below a threshold which would render it marginal or ancillary.[20] This has meant that the temporal element, for example, can generally be satisfied by employment of between 10 and 18 hours per week but as low as an average of 2 where the

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[16] Case C-53/81 *Levin Straatssecretaris van Justitie* ECLI:EU:C:1982:105, para 13.

[17] Case C-75/63 *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* ECLI:EU:C:1964:19, para 1.

[18] Case C-53/81 *Levin v Staatssecretaris van Justitie* ECLI:EU:C:1982:105.

[19] Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284, para 17.

[20] Case 58/81 *Levin v Straatssecretaris van Justitie* ECLI:EU:C:1982:105, para 17.
See also, Case C-2/89 *Bestuur van de Sociale Verzekeringsbank v M. G. J. Kits van Heijningen* ECLI:EU:C:1990:183; Case C-543/03 *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse* ECLI:EU:C:2005:364, para 30; and Case C-516/09 *Tanja Borger v Tiroler Gebietskrankenkasse* ECLI:EU:C:2011:136, para 28.

employee is subject to an 'on-call' contract with poorly defined hours.[21] This has allowed for the enfranchisement of categories of persons who may otherwise not be considered workers under national Member State rules.[22] Remuneration is also interpreted purposively, with benefits in kind and other stipends or measures having the effect of direct remuneration capable of satisfying this condition.[23] This need not be capable of satisfying an individual's subsistence costs, and they may supplement these through welfare payments where necessary and appropriate.[24] In *Kempf*,[25] the Court opined that: '[t]he fact that he claims financial assistance payable out of the public funds of the latter member state in order to supplement the income he receives from those activities does not exclude him from the provisions of community law relating to freedom of movement for workers.'[26]

A natural consequence of this is that the economically-active worker is not required to be entirely self-sufficient so long as they can establish a genuine link to the labour market. It does however mean that the scope of the Article does not encompass those who are incapable of establishing a genuine link to the labour market. The jurisprudence of the CJEU has also expanded upon this over time, allowing for Article 45 TFEU to now cover those who are not in employment at present but are actively seeking it (jobseekers)[27] and those who have left their employment (but retain their previous status as a worker).[28]

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[21] Case C 171/88 *Ingrid Rinner-Kuehn v FWW Spezial-Gebaeudereinigung GmbH & Co. KG* ECLI:EU:C:1989:328, para 16; Case C-102/88 *M. L. Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* ECLI:EU:C:1989:639; Case 139/85 *Kempf v Staatssecretaris van Justitie* ECLI:EU:C:1986:223, paras 11-12; Case C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen* ECLI:EU:C:1992:87, para 14; and Case C-14/04 *Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* ECLI:EU:C:2005:728, para 46.

[22] Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* ECLI:EU:C:2008:425.

[23] Case C-196/87 *Steymann v Staatsecretaris van Justitie* ECLI:EU:C:1988:475, paras 11-12; and Case C-14/09 *Hava Genc v Land Berlin* ECLI:EU:C:2010:57.

[24] Case 58/81 *Levin v Straatssecretaris van Justitie* ECLI:EU:C:1982:105, paras 16 and 17.

[25] Case 139/85 *Kempf v Staatssecretaris van Justitie* ECLI:EU:C:1986:223.

[26] Ibid, para 16.

[27] Article 45 TFEU, paras (3)(a) and (b).

[28] Article 45 TFEU, para (3)(d).

Directive 2004/38[29] regulates the operation of social assistance and special non-contributory cash benefits (mixed payments) from a legislative standpoint.[30] It includes that the economically-active migrant worker possess a legislative right under Article 7(3) of Directive 2004/38 to social assistance for a potentially indefinite period of time[31] (subject to the undue burden criteria) where they have been employed/self-employed for a period of more than twelve months,[32] and for six months where they have been employed/self-employed for less than one year.[33] In the latter case, after the six month period has elapsed, that payment may be revoked by the State.[34] The twelve month window has been interpreted very narrowly in recent years by the CJEU, meaning that if an individual has worked for a period of eleven months or one day less than a full calendar year, they will lose their residual worker status after six months.[35]

2.2. Constitutional Safeguards

Due to the wide-ranging scope of each of the constitutional provisions put forward by the applicant's counsel, it is not possible within the scope of this article to deal with each in detail. Instead, much like the approach of the High Court, they will be addressed in a holistic manner.

In *Minister for Social, Community and Family Affairs v Scanlon,*[36] the Court held that any right to welfare payments is created solely through ordinary legislation.[37] The more recent case of *Meagher v Minister for Social Protection*,[38] argued that not only is the right limited to what is included within

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[29] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004) OJ L 229, 29.6.2004, p. 35–48.

[30] Although the Directive does not directly reference the term 'habitual residence' it is arguably a primary concern, as the legislation links residence with access to social assistance payments.

[31] *Tarola v Minister for Social Protection* IECA 208 (Hogan J), para 30 - 'In the case of Article 7(3)(b) the Union citizen in questions would seem to retain the status of "worker" indefinitely'.

[32] Directive 2004/38, Article 7(3)(b).

[33] Ibid, Article 7(3)(c).

[34] Ibid, Article 24(1).

[35] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* ECLI:EU:C:2015:597.

[36] [2001] 1 IR 64.

[37] Ibid - 'It is an entitlement created by statute… I cannot identify any constitutional right to retain the benefit... The right to receive benefits in the first place… derive from the statute and do not partake of the nature of a property right.'

[38] *Meagher v Minister for Social Protection* [2015] IESC 4.

the relevant primary legislation, but the provisions of all Acts of the Oireachtas concerning welfare payments should be interpreted strictly, in a similar manner to criminal statutes.[39] Thus, there is no right to social welfare payments within the Constitution from the perspective of the Superior Courts that could be directly invoked by the applicant in this instance.

This is not to say that there is not the potential for such rights to be enforced. A report of the Constitutional Review Group (1996) had suggested that other constitutional provisions *could* give rise to a right to welfare payments as: '…it is obviously important that no one should be allowed to fall below a minimum level of subsistence so as to suffer from a lack of food, shelter or clothing. If this should ever happen, despite the social welfare system, the Constitution appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity.'[40] This is primarily referring to the unenumerated rights contained within Article 40.3.1 and the jurisprudence of the Walsh Court mentioned above, and is in some way supported by Kenny J in *Murtagh Properties Ltd. v. Cleary*[41] who equally believed that the non-justiciability of Article 45 'does not involve the conclusion that the courts may not take it into consideration when deciding whether a claimed constitutional right exists.'[42]

This inevitably means that any constitutional argument surrounding social welfare payments is difficult to make, as the perspective of the Superior Courts is that this is largely an area of social policy that is not judiciable. The recent decision in *Agha (a minor) & ors v Minister for Social Protection & ors and Osinuga (a minor) & anor v Minister for Social Protection & ors*,[43] where Hogan J found that the immigration status of a parent could not deprive an Irish citizen to a child benefit payment where the parent claiming it on their behalf lacked the required immigration permission to do so, is however an example of how the more general constitutional right to non-discrimination may be utilised to enforce social rights and a right to welfare payments indirectly. This is then limited by the fact that Hogan J makes clear that

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[39] Ibid, para 35.

[40] Constitutional Review Group (Report, 1996), 12(6) <http://archive.constitution.ie/reports/crg.pdf> accessed 12/04/2021.

[41] [1972] IR 330.

[42] Ibid.

[43] *Agha (a minor) & ors -v- Minister for Social Protection & ors, Osinuga (a minor) & anor -v- Minister for Social Protection & ors* [2018] IECA 155.

> ‘Child benefit is paid for by the taxpayers of the State and the Oireachtas as general guardians of the Exchequer could quite reasonably require that this money is only paid to persons resident within the State, thus ensuring that transfer payments made by the State’s taxpayers are paid only to inhabitants of the State, thereby contributing to the overall welfare of the State.’[44]

In this way, the requirement of ‘protecting’ the welfare state and imposing certain requirements upon non-nationals is easily reconciled with the Irish Constitution in a more general sense.

Thus, any constitutional argument is inherently limited by the approach that has historically been adopted by the Superior Courts in this area. This is because any such discrimination must occur against a protected category of persons (e.g. race, religion, gender), and lack a legitimate rationale for doing so.

2.3. Social Welfare and the ECHR

The final question asked of the Court, was the extent to which the requirement for establishing residency or a right to reside in order to access payments might constitute a violation of the European Convention on Human Rights (ECHR).

By way of introduction, the Convention is applicable to all emanations of the State, and this would include the DSP, the Social Welfare Appeals Office (SWAO), the relevant Minister, and any legislation, policies or decisions they make. They should also be cognisant of the obligations set forward within the Convention and the ECHR Act,[45] and of the jurisprudence of the European Court of Human Rights[46] - an obligation which equally applies to the Courts in rendering judgments. Where all national remedies have been exhausted, a case may be brought directly to the European Court itself.

With regard to social assistance payments, Article 14 of the Convention, and Article 1 of the First Protocol are the most significant. Article 14 outlines that ‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

Discrimination within this context cannot reasonably cover all forms of the same, as this would, in the Strasbourg Court’s estimation, lead to potentially unfair results.[47] If this were the case, measures

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[44] Ibid.

[45] ECHR Act 2003, Section 2(1).

[46] ECHR Act 2003, Section 4.

[47] *Belgian Linguistic* app no 1474/62 et al (ECtHR, 23 July 1968), para 10.

which positively discriminate and actively seek to redress current structural imbalances may also be unlawful and would allow for a very limited universalist system to be utilised by each of the signatory States. In order to bridge this gap, the Court has established a clear set of criteria which will allow for something to be classified as discriminatory under the Convention: individuals in comparable circumstances must be treated differently based on other characteristics they hold that would distinguish them; and there is no reasonable basis for this difference in treatment as it does not pursue a legitimate objective and is disproportionate in its impact.[48] In determining if the discrimination is justified, and would therefore fall within the State's margin of appreciation, the Court will examine the particular social and economic context in that State at that point in time[49] - however, the requirement that there are objective reasons underlying the difference in treatment remains regardless of the social circumstances within that State.[50] Finally, Article 14 is only applicable in respect of Convention rights, and to apply Article 14, another right must also have been violated. As Slingenberg notes, there is no explicit right to social security contained within the Convention itself, although it has been considered to overlap with Articles 2, 3, 8 of the same.[51] Article 1 of the First Protocol refers to conditions where a welfare payment under national legislation is granted *as a right.* In such circumstances, those who satisfy the relevant preconditions should not be barred from doing so.[52]

Dembour has noted that, in spite of the pronouncements made in the *Gaygusuz* case in particular, the body of case law on the issue of access to welfare payments remains underdeveloped and is not suited to dealing with more complex issues of discrimination.[53] *Gaygusuz* and the cases that followed it have established that the belief that social rights are rooted in nationality,[54] as well as that the existence of a robust welfare system requires it being 'closed off' to some extent, are always difficult to justify. Where the ECtHR has proven less effective, is in dealing with *indirect discrimi-*

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[48] *Andrejeva v* Latvia app no 55707/00 (ECtHR, 18 February 2009), para 81; *Stec and others v United* Kingdom (ECtHR, 12 April 2006), para 51; and Burden *v United Kingdom* app no 13378/05 (ECtHR, 29 April 2008), para 60.

[49] *Rasmussen v. Denmark* app no 8777/79 (ECtHR, 28 November 1984).

[50] *Krajnc v Slovenia* app no 38775/14 (ECtHR, 31 October 2017).

[51] Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Bloomsbury 2016), 192.

[52] *Andrejeva v Latvia* app no 55707/00 (ECtHR, 18 February 2009), para 77; *Stec and others v United Kingdom* app no 65731/01 and 65900/01 (ECtHR, 12 April 2006), para 54.

[53] Marie-Bénédicte Dembour, '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12(4) Human Rights Law Review 689.

[54] See, for example, App no 17371/90 (ECtHR, 16 September 1996), para 45 - 'the difference in treatment [between the applicant and Austrian nationals] was based on the idea that the State had special responsibility for its own nationals and must take care of them and provide for their essential needs'.

nation - where the effect of a welfare policy will disproportionately burden a migrant but is not automatically discriminatory on the grounds of nationality.[55] Thus far, the Court has viewed immigration status as always constituting a sufficient justification.[56] More common requirements however, such as the Habitual Residence Condition, have yet to be considered by the Strasbourg Court, and this means that at present, the scope of protections granted by the Convention apply to a relatively discrete set of measures. If the Court's statement in *Ponomaryovi* that 'a State may have legitimate reasons for curtailing the use of resource-hungry public services, such as welfare programmes… by short-term and illegal immigrants, who, as a rule, do not contribute to their funding'[57] is to be believed, then it is possible that indirect measures, such as a Habitual Residence Condition, would be upheld as reasonable - even where these may have a disproportionate impact on migrants.

3. Facts of the Case

The primary applicant appealed against a decision issued by the DSP refusing them a grant of JA.[58] She had undertaken work on behalf of the Mendicity Institution in 2018, an organisation that provides services to the unhoused or homeless. This was manual labour and included the making of decorative flowers and copper crafts which would later be sold by the Institution to fund their charitable work with the unhoused. This work often formed part of a Community Employment (CE) Scheme. Although the pay was financially unremunerated, the applicant argued that she had agreed with the Institution that she would provide this for a period of one month, after which time she would be moved onto the CE Scheme, at which time she would be compensated financially for her labour.[59] The lack of financial compensation is key to the case, as, although there was no direct payment being provided to the applicant, she was provided with meals during the four days a week that she was required to attend.

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[55] Marie-Bénédicte Dembour, '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12(4) Human Rights Law Review 689, 716 citing Bernard Baron von Maydell, 'Discrimination in domestic social security law of the Member States of the European Union' in Stefan Van den Bogaert (ed.), *Social Security, Non-Discrimination and Property. The Consequences of the Gaygusuz Judgement of the European Court of Human Rights* (Maklu 1997), 96.
See also, R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents) UKSC 2019/0135, albeit outside of an immigration context.

[56] See *Ponomaryovi v Bulgaria* app no 5335/05, (ECtHR, 21 June 2011); and *Bah v United Kingdom* app no 56328/07 (ECtHR, 27 September 2011).

[57] *Ponomaryovi v Bulgaria* app no 5335/05, (ECtHR, 21 June 2011), para 54.

[58] *Razneas* (n6), para 1.

[59] Ibid, para 21.

Unfortunately for the applicant, at the end of the month-long period, she was told that she did not fit the standard profile of those brought onto the CE Scheme, and that her work for them would cease. As proof of her month working for them, she provided a letter of reference from the Institution dated the 30th May 2018 as part of her application for the JA and to establish her worker status. However, this letter did not reflect the verbal agreement that the applicant would transition over to the CE Scheme, and instead put forward that this was voluntary work.[60] A social worker who had been attempting to help the applicant since 2017 to find employment or training, asserted in support of the applicant that she would be nominated to the CE Scheme after the one month of voluntary work.[61] A fact that appears not to have been known by the applicant nor her social worker, is that despite claiming she would be at least waitlisted for the CE Scheme, the Institution was not eligible to be considered as a sponsor on this scheme - they had inquired to take part in the Scheme, but had never made a formal application to be recognised as such.[62]

In refusing the grant of JA in June of 2019, a deciding officer within the DSP underlined the voluntary nature of this arrangement, and on that basis, argued that the applicant did not possess a right to reside as she was not a worker for the purposes of EU law, and had no legislative entitlement to the Allowance.[63] The DSP argued that this kind of voluntary service was simply not eligible for being considered as a worker. It also highlighted that the applicant did not provide any other evidence of having worked in Ireland in order to demonstrate that she might be capable of establishing worker status and by extension, a right to reside capable of satisfying one of the primary pre-conditions necessary for accessing the Allowance.[64] Upon appeal, this decision was upheld, and it was also argued that the failure to even establish a kind of *quid pro quo* that the applicant would gain worker status by transitioning to the CE Scheme or to provide evidence capable of establishing this was also fatal to the applicant's case.[65]

On this basis, the applicant's counsel made a wide ranging set of arguments that engages with several areas of national and supranational law, namely: that the JA should, in fact, be classified as so-

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[60] Ibid, para 22.

[61] Ibid, paras 24 and 25.

[62] Ibid, para 28.

[63] Ibid, para 26.

[64] Ibid, para 4.

[65] Ibid, para 5.

cial security for the purposes of EU law and not as a special non-contributory cash benefit; that the applicant should be considered a worker for the purposes of EU law to allow them to access the Allowance; that it is unconstitutional to require her to establish a right to reside in order to access the Allowance; and that even if the right to reside requirement is not unconstitutional, it is contrary to the European Convention on Human Rights as implemented in Ireland.[66]

4. The Judgment of the Court

The first question before the Court in this instance, was whether Jobseeker's Allowance as a payment was social security or a special non-contributory cash benefit for the purposes of EU law. The applicant's counsel, argued that it was the former, and sought a preliminary reference to be made to the CJEU under Article 267 TFEU to resolve this matter.[67]

Ultimately, the High Court in *Razneas*, following previous case law,[68] makes clear that this particular payment is a special non-contributory cash benefit, and for that reason can be subject to a residency requirement. Reference is also made to the *Dano*[69] judgment to support this. In this respect, the High Court dispensed with this issue quickly. It suffices to say that whilst the Social Welfare (Consolidation) Act 2005 does include JA within the overall heading of social assistance,[70] it does not contain language that suggests JA is a meant for subsistence purposes, or as one of its overriding features. This function is arguably served by the Supplementary Welfare Allowance.[71] In this respect, JA *could* be considered to conform with most, if not all, of the features of social security for the purposes of EU law, with a more expansive right of access. Due, however, to the fact that Annex X of Regulation 883/04 includes it as social assistance, the matter is arguably acte clair. An Irish Superior Court would arguably have the ability to interpret this political settlement in a way that recategorises JA as a social security payment with broader rights of access, but is no way required too. The Court's categorisation relies more heavily on how it is likely 'mixed' rather than its inclusion in Annex X, but this a more minor point.

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66 European Convention on Human Rights Act 2003.

67 *Razneas* (n6), paras 2 and 14.

68 *Munteanu v. Minister for Social Protection* [2017] IEHC 161; *Macovei v. Minister for Social Protection* [2017] IEHC 593.

69 Case C-333/13 *Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358.

70 Social Welfare (Consolidation) Act 2005, Part 3, Chapter 2.

71 Ibid, Chapter 9.

However, an important question consequently becomes *why* counsel for the applicant emphasised the classification of JA under Irish law and why they sought a preliminary reference be sent to the CJEU in order to clarify this point. If the applicant was a worker or had worker status, the way in which it is classed is largely irrelevant, as the ensuing worker status would grant access to it. It could arguably be the case that the more unqualified right to access social security would be more advantageous to the applicant, as the Allowance is not a family payment within the scope of *Commission v UK*.[72] In that respect, a verification of residency and worker status would have sufficed and may have more strongly benefited the applicant than having to apply the habitual residence condition in full.[73] However, even a period of one month working for the Institution would have entitled her to up to six months of access to the Allowance and given that the applicant appears to have resided in Ireland since 2017, habitual residence may not have been that difficult to establish. This might be conceived of as an attempt to reclassify the Allowance as social security and make it easier to access for EU citizens engaged in more marginal forms of employment. However, this has been seen in previous cases in this area, which have similarly failed.[74]

The second question, regarding whether the applicant constituted a worker for the purposes of EU law, was given more attention.

It must be recalled that in order for the applicant to access the Jobseeker's Allowance payment, they must demonstrate that they at least historically possessed the status of worker, or else EU law offers them no protections in this instance. The High Court emphasises a small number of key cases to make its argument in a more condensed manner. For example, it notes that *Levin* highlights the community character of the concept of a "worker" and how Member States may not attempt to define this independent of EU law.[75] This also means that national measures to verify worker status cannot impact upon its fundamental character, and that even more marginal forms of employment

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[72] Case C-308/14 ECLI:EU:C:2016:436.

[73] On this point, see Charles O'Sullivan, 'Europeanisation and the Irish Habitual Residence Condition' (2019) 26(2) Journal of Social Security Law 79; and Charles O'Sullivan & Muireann O'Dwyer, 'Case C-308/14 Commission v UK: The Market, Gender and the Retreat of the EU in the Field of Social Security' (2017) 7 King's Inn Law Review 201.

[74] See, for example, *Georgeta Voican v Chief Appeals Officer, Social Welfare Appeals Office, Minister for Employment Affairs & Social Protection, Ireland and the Attorney General* [2020] IEHC 258; *Genov and Gusa v. Minister for Social Protection* [2013] IEHC 340; *Gusa v Minister for Social Protection* [2016] IECA 237; Case C-442/16 *Gusa v Minister for Social Protection* ECLI:EU:C:2017:1004; *Solovastru v Minister for Social Protection* [2011] IEHC 532; *Solovastru v Minister for Social Protection* [2011] IEHC 532; *Hrisca v Minister for Social Protection* unreported, High Court, 16 February 2012; *Tarola v Minister for Social Protection* [2016] IEHC 206; and *Munteanu v Minister for Social Protection* [2017] IEHC 161 that have all touched upon the categorisation of benefits under EU law to varying degrees.

[75] Case C-53/81 *Levin v Staatssecretaris van Justitie* ECLI:EU:C:1982:105, cited in *Razneas*, para 15.

that are part-time and may require supplementation through other forms of financial assistance remain valid.[76] O'Regan J also points to *Steymann*,[77] where work which is within the community and may take the form of more indirect provision is also valid, so long as there is a degree of self-sufficiency on the part of the worker and they receive some form of *quid pro quo* 'pocket money' to address their additional expenses.[78] Finally, the court pointed to *Vatsouras*[79] and *Bettray*[80] to underline that each case must be assessed individually in order to establish if worker status exists, as the level may vary, but still cumulatively be capable of engaging it.[81] In this way, the Court is making clear that the applicant is not automatically precluded from being considered a worker simply because her work is shorter in duration, and the circumstances of her terms of service are more complex. The Court also pointed to the *Dano* judgment once more, by saying that the drafting of Directive 2004/38/EC was intended to limit access to welfare payments for economically-inactive persons, and that this will inherently lead to unequal treatment.[82]

In looking at the specifics of her engagement with the Institution, the High Court was ultimately of the opinion that it was not an error in law to consider this too marginal to engage with the status of worker under EU law.[83]

In respect of the Court's discussion of the threshold for what constitutes a worker under EU law, the High Court does not appear to consider that Ireland generally requires self-employed EU citizens to generate at least €5000 per annum for their activities,[84] or €96.15 per week in comparison to the €38 per week required to fall within the definition of a worker[85] - both of which are within the bounds of

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[76] *Razneas* (n6), para 15.

[77] Case C-196/87 *Steymann v Staatsecretaris van Justitie* ECLI:EU:C:1988:475.

[78] *Razneas* (n6), para 16.

[79] Joined Cases C-22/08 and C-23/08 *Vatsouras & Koupatantze* ECLI:EU:C:2009:344.

[80] Case 344/87 I. *Bettray v Staatssecretaris van Justitie* ECLI:EU:C:1989:226.

[81] *Razneas* (n6), paras 17 and 18.

[82] Ibid, para 19.

[83] Ibid, para 37.

[84] Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 (S.I. No. 312 of 1996), Article 92 as amended by Article 6 of the Social Welfare (Consolidated Contributions and Insurability) (Amendment) Regulations (S.I. No. 684 of 2010). See also, Social Welfare (Consolidation) Act 2005, Section 20(1)(a) and Schedule 1.

[85] Social Welfare (Consolidation) Act 2005, Section 12(2).

EU law.[86] Although this is likely because it would be hard for the applicant to satisfy them in a more literal sense due to the lack of direct financial compensation received by her.

More attention could also have been paid by the Court to the lack of capacity of the Institution to transition the applicant onto a CE Scheme, and to the lack of evidence of any form of *quid pro quo* arrangement. On the first point, the lack of certification as a sponsor for a CE Scheme seems less significant - the question should realistically be whether the one month qualitatively adds up to worker status. If, however, this transition is important, then the emphasis on a *quid pro quo* agreement is unusual, as the lack of registration with a CE Scheme should make this a moot point. Similarly, in emphasising the existence of an agreement, the applicant's social worker acknowledges that she was led to believe the applicant would in fact be listed for a transition to the CE Scheme, and that in itself is a form of evidence. It is possible that both points must be taken together, and both registration as a CE Scheme sponsor *and* an agreement must exist, but the order in which the Court deals with this point could be clearer. Similarly, no comment is made on the actions of the Institution in potentially suggesting that this voluntary work would lead to something more substantial after one month despite this being impossible.

The next argument made by the applicant's counsel engage with a series of constitutional provisions that they believe were violated by the requirement for non-nationals to meet a residency requirement in order to access welfare benefits of this kind.[87] These include: the equality provision in Article 40.1 of the Constitution; personal rights contained within Article 40.3.1; the vulnerability and special status of the applicants overall as part of minority communities; and the rights of the child in Article 42A. In all respects, counsel argued that the infringement of these rights was arbitrary and disproportionate.

The High Court acknowledged that in *Agha* Hogan J found statutory provisions to be unconstitutional, but also underlined that Hogan J also found there to be no constitutional prohibition against residency requirements in order to qualify for a social welfare payment.[88] O'Regan J ultimately made clear that the proportionality argument must be viewed in light of the presumption of constitutionality that applies the Social Welfare (Consolidation) Act 2005 of which the impugned provision is part, and that the applicant family had not been rendered destitute as a result of the refusal to

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[86] Derek Shortall, 'Social Welfare Rights of EU Citizens in Ireland' (2017) 20(1) Irish Journal of European Law 80, 88.

[87] Ibid, paras 38 and 39.

[88] Ibid, para 44.

grant them the Allowance.[89] For this reason, the applicants and their counsel failed to establish that the existence of a right to reside requirement violates any of their constitutional rights in a disproportionate or arbitrary manner.

With regard to the constitutional argument, it is notable that the counsel for the applicant invoked Articles 40.1, 40.3.1 and 42A amongst its arguments. However, whilst Article 45.1 of the Irish Constitution enshrines the State's obligation to ensure the 'welfare of the whole people' through the provision of an 'adequate means of livelihood,'[90] and similarly requires that the State 'safeguard with especial care the economic interests of the weaker sections of the community,'[91] it has become a constitutional convention that social rights might be enforced only in rare and exceptional circumstances.[92] Indeed, the case law of the Superior Courts relating to social rights, and in particular the right to education as contained within Article 42,[93] has demonstrated that Superior Court judges are slow to intervene where constitutional social rights are alleged to be violated. Although the applicant's counsel underlines Article 42A on the best interests of the child, it's difficult to understand how they viewed the educational context as any more persuasive. The High Court, in this instance, even highlights the *Sinnott* judgment on the right to education.[94] This makes the reference made in *Razneaz* to destitution interesting, as it infers that the obligation to provide an 'adequate means of livelihood' in Article 45.1 as potentially enforceable, despite this constitutional convention which suggests that it is not, and intervention by the Courts in such matters is to be limited. However, it is also interesting to note that whilst O'Regan J outlines that counsel for the applicants do not believe their destitution results from the refusal to grant them the JA, as if the cause of it is more material than the fact that they ultimately became destitute later.[95]

This potentially provides context regarding why counsel may have invoked an equality-based perspective on one of the constitutional grounds, as it sidesteps or circumvents the need for Article

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[89] Ibid, para 42.

[90] Bunreacht na hÉireann, Article 45.2.1. Although this does place an emphasis on this objective being achieved through employment.

[91] Bunreacht na hÉireann, Article 45.4.1.

[92] See, for example, Shivaun Quinlivan and Mary Keyes, 'Official Indifference And Persistent Procrastination: An Analysis Of *Sinnott'* (2002) *Judicial Studies Institute Journal* 163 <http://www.jsijournal.ie/html/Volume%202%20No.%202/2%5B2%5D_Quinlivan&Keys_An%20Analysis%20of%20Sinnott.pdf> accessed 10/10/2022.

[93] *F.N. v. Minister of Education* [1995] 1 I.R. 409; *D.G. v. Eastern Health Board* [1997] 3 I.R. 511, 517; *D.B. v. Minister for Justice* [1999] 1 I.L.R.M. 93; and *Sinnott v Minister for Education.* [2001] 2 IR 545.

[94] *Sinnott v Minister for Education.* [2001] 2 IR 545.

[95] Ibid.

45.1 to be readily enforceable before the Courts. However, the acceptance that the protection of the welfare state and its financial resources allows for limitations or pre-conditions to be placed upon migrants means that this too was unlikely to succeed, as the argument that a Habitual Residence Condition is unconstitutional relies on this being quite patently unjustifiable, which the High Court was unlikely to find based on *Agha*.

Finally, in respect of the ECHR, the High Court held that the State enjoys a margin of appreciation in this area, and that immigration and resource based arguments are reasonable justifications for restrictions to be placed upon migrants.[96] O'Regan J also notes that the presumption of constitutionality remains applicable to the Social Welfare (Consolidation) Act 2005, as well as arguing that the ECHR Act 2003 does not apply to the Oireachtas.[97] It was for these reasons that the argument based upon the Convention was quickly rejected.

The ECHR argument was inherently weak. In fact, it was evident that reference to *Agha* from a constitutional standpoint, would have proven stronger given the sub-constitutional status of the ECHR Act 2003 that implements the Convention nationally and the equal support within EU law was always going to be inherently limiting. Even if the Strasbourg Court was more effective on these kinds of measures, this argument would still arguably need to be reconciled with constitutional law in a hierarchical sense.

It is, however, interesting that the High Court stressed that the Oireachtas as a legislative body is not bound by the Convention. This is an interesting interpretation to take and one that is difficult to justify given that the Convention binds the State in a general manner. Therefore, an attempt to exclude the actions of the legislative branch would create huge barriers regarding the effectiveness of the Convention within the Irish legal order. However, it does not alter that the Convention was very unlikely at first instance to offer any recourse to the applicant based upon the limited scope of it with regards to these kinds of measures, and that discrimination in an immigration context would need to be far more explicit.

6. Comment

[96] Ibid, para 48.

[97] Ibid, para 48(a).

Overall, the arguments made on behalf of the applicant are many and varied, engaging with various legal orders and within the hierarchy of the Irish legal system. That many of these ultimately failed to gain traction with the High Court is in many respects unsurprising. O'Regan J would have not only had to depart from the jurisprudence of the Irish Superior Courts, but also from the minimum standard required by EU law and that of the Convention. Both of these would have been difficult to justify and somewhat unlikely. It would also have opened any decision based on a contrary interpretation to immediate appeal with the strong potential that it would have been overturned.

What is more important to state, is the limits of the law surrounding access to the welfare state for migrants who are in marginal employment, or who are economically-inactive. Indeed, where once EU law arguably sought to enfranchise such persons, by bringing them within the definition of workers and extending the right to non-discrimination to them, since the *Dano*[98] decision in 2014, the Court of Justice has been more concerned with restating the limits of EU law in this area. This was further confirmed in cases such as *Almanovic*,[99] and *Commission v UK*[100] which arguably went beyond mere restatement and began to retrench or row back on pre-existing precedent establishing greater levels of rights.[101] The impact of this, is that marginally economically-active or wholly economically-inactive persons tend to be relegated towards the fringes of the welfare system, as well as the ways in which EU law fails to address their needs. Scholars such as Thym and Nic Shuibhne have argued that there exists a hierarchy of Union citizens in terms of who is most capable of accessing the welfare state in a host country, and that this has become more pronounced over time, emphasising those who are more firmly embedded in the labour market and thus are paradoxically less likely to need state intervention to supplement or replace their incomes.[102]

Importantly, several decisions within the same time period as *Razneaz* are instructive with regard to how economically-inactive citizens should be treated for the purposes of EU social assistance law. This empahsis, has been on the need to meet residency requirements within the meaning of Direc-

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98 Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

99 Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* ECLI:EU:C:2015:597.

100 Case C-308/14 ECLI:EU:C:2016:436.

101 See Charles O'Sullivan, 'Social Assistance for Economically-Inactive Citizens within the EU's Market State Model' (2016) 19(1) *Irish Journal of European Law* 64-75; and Charles O'Sullivan, 'Case C-308/14 Commission v UK: The Market, Gender and the Retreat of the EU in the Field of Social Security' (2017) 7 *King's Inn Law Review* 201-219 for further comment on these.

102 Daniel Thym, 'The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 *Common Market Law Review* 17, 20; Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending. The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889.

tive 2004/38/EC to greater extents. Thus, although they are not mentioned in the *Razneaz* judgment, they are illustrative of how the Court of Justice has attempted to resolve some of the central tensions in this area. In *A v Latvijas Republikas Veselības ministrija*,[103] an Italian national moved to Latvia to join his wife, and was denied access to comprehensive medical care in a similar manner to Latvian citizens. The CJEU ultimately found that whilst this would be social security for the purposes of EU law, he did not have an unfettered right to equal treatment as he did not have permanent residence, and was therefore not entitled to access medical care free of charge.

In *The Department for Communities in Northern Ireland*,[104] the applicant was a dual Croatian and Dutch citizen who resided in Northern Ireland with her partner who was a Dutch citizen. She later fled the relationship with her two young children, and was refused a grant of Universal Credit despite having no means to independently support herself. Although the CJEU held that Universal Credit is social assistance for the purposes of EU law and residency requirements could be applied on that basis, it also emphasised that Articles 1, 7 and 24 of the Charter of Fundamental Rights are engaged, and thus the respondent authorities are required to ensure that she and her children are provided with 'dignified conditions' to live in.[105] The degree to which this can be considered binding - especially since it allows for the refusal of a minimum income support - is somewhat questionable. However, this emphasis on the constitutional dimension of EU law and application or engagement of the Charter is significant, as it acts as a further floor below which vulnerable or marginal citizens should not fall in the event that other applicable EU laws cannot provide an adequate means of redress. It also signals how the CJEU may try to further address this growing emphasis on residency.

Finally, the judgment in Case C411/20 dealt with a failed application for the German family benefit by an economically-inactive citizen from another Member State. In this instance, the Court emphasised that residency requirements - arising after three months of residency in a host Member State but before long-term residency rights accrue after five years - for social assistance remains unquestioned. However, as this was a family benefit within the scope of Regulation 883/04 and within the first three months of residence, Directive 2004/38/EC was not applicable.

Ultimately, these more recent cases, although not included in the *Razneaz* case, underline how the CJEU is now attempting to 'thread the needle' on this issue, by emphasising residency as a key

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[103] Case C-535/19 ECLI:EU:C:2021:595.

[104] Case C-709/20 ECLI:EU:C:2021:602.

[105] Ibid, para 93.

component of assessing whether or not a mobile EU citizen has a right to access the welfare state of their host state, but without further ejecting marginally employed or economically-inactive citizens from the scope of EU law.

However, despite these attempts by the CJEU to add clarity on this issue, residency requirements will continue to place a disproportionate burden on EU citizens, whilst simultaneously being deemed to be to be consistent with EU law.[106] This is not alleviated within the more recent case law highlighted above, in which social assistance remains firmly tied to residency requirements. Indeed, the Free Legal Advice Centre (FLAC), a non-governmental organisation in Ireland focused on issues related to the welfare state and access to justice, has underlined that these kinds of measures were adopted as a direct response to EU enlargement into Eastern Europe.[107] This in turn means that even if these measures may not be discriminatory in a legal sense, and may even be justifiable from a legal standpoint, it does not mean they are not discriminatory in practice.

Thus, it may be the case that the outcome in *Razneaz* is emblematic of the ways in which EU rules governing access to the welfare state fail to address the needs of marginal or economically-inactive citizens resident in another Member State. Despite efforts made in more recent case law from the CJEU, this is unlikely to substantively address their needs. Similarly, as one in a long series of cases dealing with such issues relating to social assistance in particular, the *Razneaz* judgment underlines that these issues are embedded within EU law, which are likely to persist until such time as these are addressed at an EU legislative level.

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[106] Charles O'Sullivan, 'Europeanisation and the Irish Habitual Residence Condition' (2019) 26(2) Journal of Social Security Law 79-96.

[107] FLAC, 'Submission to the OHCHR on the occasion of Ireland's second review under the Universal Periodic Review mechanism: A submission by FLAC to the Office of the United Nations High Commissioner for Human Rights' (FLAC, 2012), and Free Legal Aid Advice Centre, 'FLAC Concerns in relation to the Application of the Habitual Residence Requirement' (2008) <www.flac.ie/download/doc/flac_submission_to_ihrc_re_hrc_30.07.08.doc> accessed 20/04/2021 - although FLAC has also highlighted that the Habitual Residence Requirement (HRC) was also adopted to limited access among asylum seekers, meaning that this had a dual purpose.