

Trinity College Dublin, Ireland

From the Selected Works of Mel Cousins

2017

Irish High Court upholds the right to reside test - Munteanu v Minister for Social Protection

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Irish High Court upholds the right to reside test - *Munteanu v Minister for Social Protection*¹

In *Munteanu*, the Irish High Court (O'Malley J. now a member of the Supreme Court) rejected a challenge to the legality of the right to reside test in Irish social welfare law. The Court correctly held that the test was not incompatible with EU law. The ruling is clearly correct in the light of the judgements of the CJEU in *Dano* and subsequent rulings. This note outlines briefly the issues at question and the judgement. Section 1 sets out the facts and the law and section 2 the Court's approach. Section 3 concludes.

The facts and the law

1.1 The facts

The claimant was a Romanian national who came to live in Ireland in or about 2008. In August 2014, she claimed child benefit in respect of her children and in September she claimed the means-tested jobseeker's allowance (JSA). Both payments are subject to the habitual residence condition (HRC). According to the evidence before the Court, her only economic activity involved selling the *Big Issues* magazine and selling flowers. She told the officials investigating her claim that she had last sold the *Big Issues* in August 2013 but the ruling does not indicate the extent of this activity or whether it might have been considered to have constituted genuine and effective employment. Even assuming (for the purposes of argument) that it did, so as to entitle Ms. Munteanu to a right of residence, and even assuming that she had been so employed for more than one year, this right would have expired after 12 months, i.e. by August 2014. The claims for benefit were rejected on the basis that she did not have a right to reside and was, therefore, not habitually resident in Ireland. In November 2014, by which time she had sought legal advice, Ms. Munteanu also claimed the supplementary welfare allowance (SWA) a residual means-tested benefit. This was refused for the same reason.

1.2 The law

The national right to reside

Prior to 1 May 2004, there was no long-term 'residence' requirement in most areas of Irish social welfare law. However, in 2004, the Oireachtas introduced a new habitual residence condition in relation to all means-tested allowances and child benefit. Social insurance benefits remain payable without any such restrictions.² In 2009 the Oireachtas made it a requirement that, in order to be habitually resident, a person must have a right to reside (RtR) in Ireland. S. 246 (5) of the Social Welfare (Consolidation) Act, 2005 (the Act) now states that 'a person who does not have a right to reside in the State shall not, for the purposes of [the] Act, be regarded as being habitually resident in the State.' S. 246(6) goes

¹ [2017] IEHC 161.

² O'Malley J is thus incorrect to say that the HRC 'underpins entitlement to nearly all social welfare payments'.² White J also appears to be under this misapprehension: *Agha v Minister for Social Protection* [2017] IEHC 6 at [49].

on to list various categories of persons – including Irish citizens, a person who has a right to enter and reside in the State under various EU laws, and refugees in respect of whom a declaration of refugee status is in force – who are to be taken to have a right to reside in the State.³

EU law⁴

As noted above, there have been a number of important recent decisions of the CJEU which are summarised here. The relevant legislation is outlined as it was considered by the CJEU.

*Dano*⁵

This case involved a national of a Member State who moved to another Member State without seeking employment there. Ms. Dano and her young son – both Romanian nationals – came to Germany in November 2010.⁶ Ms. Dano did not work in Germany (or apparently in Romania) and lived with and was supported by her sister. Indeed there was no evidence that she had looked for work. Ms. Dano claimed a subsistence benefit under the German Social Code (SGB). This forms part of the benefits for jobseekers and is listed as a special non-contributory benefit (SNCB) under Regulation 883/2004 on the coordination of social security systems. However, as the CJEU had ruled in *Brey*,⁷ SNCBs are generally categorised as ‘social assistance’ within the meaning of Directive 2004/38.⁸ This benefit was refused on the basis that she was a non-employed foreign national who had come to Germany to seek employment and/or to seek benefits. The issue was referred to the CJEU by the national court which asked whether EU law, in particular Article 4 of Regulation 883/2004 on ‘equality of treatment’, the general principle of non-discrimination resulting from Article 18 TFEU and the general right of residence resulting from Article 20 TFEU precluded the relevant provisions of German law.

The CJEU reinterpreted the question as asking whether Article 18 TFEU, Article 20(2) TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation 883/2004 precluded national legislation under which nationals of other Member States who are not economically active are excluded from entitlement to a SNCB although those benefits are granted to nationals of

³ Conversely, s. 246(7) provides that various persons shall not be regarded as being habitually resident in the State for the purpose of the Act and s. 246(8) provides that, in a number of circumstances, persons are not be considered as habitually resident prior to certain dates. This did not arise on the facts of the case through see *Agha -v- Minister for Social Protection* [2017] IEHC 6.

⁴ The compatibility of the RtR with EU law had already been considered in *Genov & Gusa v. Minister for Social Protection* [2013] IEHC 340 a rather unconvincing judgment which, in any case, predates *Dano* and its progeny. O’Malley J. does not refer to the rationale of this decision.

⁵ C-333/13, EU:C:2014:2358. On this and subsequent cases see M. Cousins, “‘The baseless fabric of this vision’: EU citizenship, the right to reside and EU law”, 23 *Journal of Social Security Law* (2016) 104 and N. nic Suibhne, “‘What I tell you three times is true’ Lawful Residence and Equal Treatment after *Dano*” 23 *Maastricht Journal* (2016) 908 and the references therein.

⁶ It appears that Ms. Dano had been there previously and her son was born in Germany.

⁷ Case C-140/12, *Brey*, EU:C:2013:565

⁸ Case C-140/12, *Brey*, EU:C:2013:565 at [63]. The issue as to whether the benefit at issue should be categorised as ‘social assistance’ or a ‘benefit intended to facilitate access to the labour market’ was also considered by the CJEU in *Alimanovic* (at [40]-[46]) see below.

the home Member State who are in the same situation. The CJEU pointed out that although Article 18(1) TFEU prohibits any discrimination on grounds of nationality within the scope of the Treaties, Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised ‘in accordance with the conditions and limits defined by the Treaties and by *the measures adopted thereunder*’.⁹ Article 21(1) TFEU also provides that the right of Union citizens to move and reside freely within the Member States is subject to compliance with the ‘limitations and conditions laid down in the Treaties and by *the measures adopted to give them effect*.’ Thus, the CJEU pointed out that the general principle of non-discrimination, laid down in Article 18 TFEU, is given specific expression in Article 24 of Directive 2004/38 and Article 4 of Regulation 883/2004. Accordingly, it focussed its interpretation on this secondary legislation rather than on the general Treaty provisions.

The CJEU noted that Article 24(1) of Directive 2004/38 provides that all Union citizens residing on the basis of the directive in the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.¹⁰ The CJEU concluded from this that, as concerns access to social benefits, a Union citizen could claim equal treatment with nationals of the host Member State *only* if her residence complied with the conditions of Directive 2004/38 and specifically with the requirement that she have ‘sufficient resources’ for herself and her family members.¹¹ The CJEU stated that

To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.¹²

The CJEU ruled that a Member State must be allowed to refuse to grant social benefits to economically inactive Union citizens (who do not have sufficient resources) who exercise their right to freedom of movement solely in order to obtain another Member State’s social assistance. It pointed out that

any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38.¹³

Ms. Dano did not have sufficient resources (according to the referring court) and, therefore, could not claim a right of residence under EU law. It followed that she could not invoke the principle of non-discrimination in Article 24(1) of Directive 2004/38.

Nor did Article 4 of Regulation 883/2004 preclude a refusal of benefits. That Regulation allowed SNCBs to be granted ‘in accordance with [national] legislation’ and the CJEU had consistently held that there was nothing in EU law to prevent the granting of social benefits

⁹ *Dano* at [60]. My emphasis.

¹⁰ Judgement at [68] et seq. The CJEU noted that Article 24(2) was not applicable on the facts of the case.

¹¹ Article 7(1)(b) of Directive 2004/38.

¹² At [74].

¹³ At [77].

to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State.¹⁴ The CJEU did not explicitly consider the proportionality of the German rule (or even refer to the concept of proportionality).

Alimanovic

Alimanovic – a case also heard by the Grand Chamber – is more directly relevant to *Munteanu* as it involved a person who had worked in the host Member State.¹⁵ Ms. Alimanovic and her three German born children were all Swedish nationals. They apparently left Germany in 1999 and returned in 2010. Ms Alimanovic and her oldest daughter subsequently worked in temporary jobs lasting less than a year. They received various social benefits, including the subsistence benefit under the German Social Code (SGB) (the same benefit at issue in *Dano*). This was terminated after 6 months apparently on the basis of Article 7(3)(c) of Directive 2004/38 (see below).

As interpreted by the CJEU, the referring court asked whether Article 24 of Directive 2004/38 and Article 4 of Regulation 883/2004 precluded national legislation under which nationals of other Member States who are job-seekers in the host Member State are excluded from entitlement to certain SNCBs, which also constitute ‘social assistance’ within the meaning of Directive 2004/38, although those benefits are granted to nationals of the Member State concerned in the same situation.

The CJEU recalled that, following *Dano*, a Union citizen could claim equal treatment as regards access to social assistance under Article 24(1) of Directive 2004/38 only if her residence in the host Member State complies with the conditions of Directive 2004/38.¹⁶ Therefore, the CJEU first examined whether Ms. Alimanovic had a right to reside under EU law in Germany. The CJEU pointed out that only two provisions of Directive 2004/38 might grant Ms Alimanovic and her daughter a right of residence, i.e. Article 7(3)(c)¹⁷ and Article 14(4)(b)¹⁸. It accepted that they did have such a right under Article 7(3)(c) but this was only for 6 months and they were no longer enjoyed that status when they were refused entitlement to the benefits at issue. The referring court accepted that the Alimanovics could rely on Article 14(4)(b) to establish a right of residence even after the expiry of the six month period. However, Article 24(2) of Directive 2004/38 specifically provides that the host Member State may refuse to grant any social assistance to a Union citizen whose right of residence is based solely Article 14(4)(b).¹⁹ Therefore, there was no (longer a) right of

¹⁴ At [83] and see Case C-140/12, *Brey*, EU:C:2013:565 at [44].

¹⁵ *Alimanovic* (C-67/14, EU:C:2015:597).

¹⁶ At [49].

¹⁷ Article 7(3)(c) of Directive 2004/38 provides that if the worker is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a jobseeker with the relevant employment office, he retains the status of worker for no less than six months.

¹⁸ Article 14(4)(b) provides that Union citizens who have entered the territory of the host Member State in order to seek employment 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.

¹⁹ At [52]-[58]. Article 24 provides

residence under Article 7 and the Member State was entitled to refuse social assistance where the right was based solely on Article 14.

Perhaps recognising that this might seem a disproportionate response given the Alimanovics' previous work record, the CJEU did, in this case, refer to proportionality. However, rather than applying an individualised test of proportionality, the CJEU stated that

Directive 2004/38, establishing a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity.

By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the criterion referred to both in [the relevant national law], and in Article 7(3)(c) of Directive 2004/38, namely a period of six months after the cessation of employment during which the right to social assistance is retained, is consequently such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality.²⁰

The CJEU noted that it had previously held in *Brey*²¹ that Directive 2004/38 requires a Member State to take account of the individual situation of the person before it adopted an expulsion measure or found that the person was placing an unreasonable burden on its social assistance system, it held that 'no such individual assessment is necessary in circumstances such as those at issue in the main proceedings'.²² As regards the assessment of whether a claim constituted an unreasonable burden, the CJEU considered that the assistance awarded to a single applicant could scarcely be described as an 'unreasonable burden' for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member State under an unreasonable burden, 'the accumulation of all the individual claims which would be submitted to it would be bound to do so'.²³ The CJEU appears to be saying that in applying the individualised assessment of burden (required by *Brey*), the authorities may take into

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. 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), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

²⁰ At [60]-[61].

²¹ In *Brey*, C-140/12, EU:C:2013:565, at [64], [69] and [78]. More accurately the Directive establishes this requirement.

²² At [59].

²³ At [62].

account not just the individual's claim but the 'accumulation of claims' which would be made. Accordingly the CJEU ruled that the nation legislation was not contrary to EU law.

García-Nieto

Finally, *García-Nieto* involved a person who had come to the host Member State to seek employment.²⁴ Ms García-Nieto and Mr Peña Cuevas had lived together as a couple with their children (all Spanish nationals) for a number of years in Spain and formed an economic unit, without being married or having entered into a civil partnership. In 2012, Ms García-Nieto came to Germany with her daughter and shortly afterwards took up employment. Mr Peña Cuevas and his son then joined them. In July 2012 (about a month after the latter arrival), the Peña-García family applied for subsistence benefits under the Social Code. These benefits were initially refused to Mr Peña Cuevas and his son on the basis that, at the time of the application, they had resided in Germany for less than three months and that Mr Peña Cuevas did not have the status of a worker or self-employed person. Benefits were granted with effect from October 2012, presumably on the basis that the initial 3 months residence period had expired.

The national court asked whether EU law precluded national legislation under which nationals of other Member States who are in a situation referred to in Article 6(1) of Directive 2004/38 (i.e. persons who move to another Member State for a period of up to three months) are excluded from entitlement to SNCBs which are categorised as 'social assistance' under Directive 2004/38. The CJEU repeated the point that a Union citizen could claim equal treatment only if his residence in the host Member State complied with the conditions of Directive 2004/38. Mr Peña Cuevas' right of residence was based on Article 6(1) of Directive 2004/38 and, as in *Alimanovic*, Article 24(2) of Directive 2004/38 allows the host state to refuse to grant social assistance in those circumstances.

Following *Alimanovic*, the CJEU stated that no individual assessment is necessary in circumstances such as those at issue in these proceedings.²⁵ It reiterated that Directive 2004/38 itself takes into consideration factors involving the individual situation of each applicant for social assistance. It went on to say that if such an assessment was not necessary in the case of a citizen seeking employment who no longer had the status of 'worker' (i.e. the Alimanovics), the same would apply *a fortiori* to 'first-time' jobseekers such as Mr Peña Cuevas. Again the CJEU upheld the German law.

Commission v UK

The *Commission v UK* case raised the issue of whether the *Dano* line of cases should be extended beyond SNCBs under Regulation 883/2004 which are also categorised as 'social assistance' within the meaning of Directive 2004/38 to apply to social security benefits under Regulation 883 (in this case child benefit and child tax credit).²⁶ This would represent a rather fundamental change in the approach to the system of co-ordination of social security benefits with Regulation 883 now being read in the light of Directive 2004/38. In

²⁴ *García-Nieto* (C-299/14, EU:C:2016:114).

²⁵ At [46]-[49].

²⁶ Case C-308/14, EU:C:2016:436.

this case, the Commission claimed that, by imposing a condition for entitlement to certain social security benefits which UK nationals automatically meet, the United Kingdom has created a situation involving direct discrimination (or alternatively indirect discrimination) against nationals of other Member States in breach of Article 4 of Regulation 883/2004.

The CJEU, unsurprisingly, did not consider that the issue involved *direct* discrimination (albeit *sub silentio*).²⁷ However, the CJEU did accept that

a host Member State which, for the purpose of granting social benefits, such as the social benefits at issue, requires a national of another Member State to be residing in its territory lawfully commits indirect discrimination.²⁸

Therefore, national legislation which ‘is intrinsically liable to affect nationals of other Member States more than nationals of the host State’ and which consequently risks placing the former at a particular disadvantage must be regarded as indirectly discriminatory.²⁹ In this case, the CJEU ruled that the right to reside requirement was ‘more easily satisfied by United Kingdom nationals’.³⁰ Therefore,

In order to be justified, such indirect discrimination must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective.³¹

The CJEU concluded that there was a legitimate aim:

it is clear from the Court’s case-law that the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State ...³²

Rather than looking at whether the measure was appropriate and necessary, the CJEU then problematically claimed that

verification by the national authorities, in connection with the grant of the social benefits at issue, that the claimant is not unlawfully present in their territory must be regarded as a situation involving checks on the lawfulness of the residence of Union citizens, under the second subparagraph of Article 14(2) of Directive 2004/38, and must therefore comply with the requirements set out in the directive.³³

The CJEU went on to focus not on the right to reside requirement but on the procedures used by the UK authorities to verify that requirement and to mischaracterise these procedures as being non-systematic. The CJEU states

²⁷ Presumably applying *Bressol*, C-73/08, EU:C:2010:181.

²⁸ *Commission v UK* at [76].

²⁹ At [77].

³⁰ At [78].

³¹ At [79].

³² At [80].

³³ At [81].

It is apparent from the observations made by the United Kingdom ... that, for each of the social benefits at issue, the claimant must provide, on the claim form, a set of data which reveal whether or not there is a right to reside in the United Kingdom, those data being checked subsequently by the authorities responsible for granting the benefit concerned. It is only in specific cases that claimants are required to prove that they in fact enjoy a right to reside lawfully in United Kingdom territory, as declared by them in the claim form.

It is thus evident from the information available to the Court that ... the checking of compliance with the conditions laid down by Directive 2004/38 for existence of a right of residence is not carried out systematically and consequently is not contrary to the requirements of Article 14(2) of the directive. It is only in the event of doubt that the United Kingdom authorities effect the verification necessary to determine whether the claimant satisfies the conditions laid down by Directive 2004/38, in particular those set out in Article 7, and, therefore, whether he has a right to reside lawfully in United Kingdom territory, for the purposes of the directive.³⁴

The CJEU concluded that the right to reside requirement did not amount to discrimination prohibited under Article 4 of Regulation 883/2004.

2. The High Court's approach

Having set out the law and submissions, O'Malley J. then set out her conclusions. She first noted that counsel for the applicant has submitted that the issue before the Court was the lawfulness of the test applied, and that the Court was not being asked to make findings of fact. O'Malley J pointed out, first, that it was for the applicant to make the factual case for herself in her claims for the various payments; and second, that an applicant for judicial review who says that the wrong test was applied is under an obligation to demonstrate, by reference to the facts, that a different test could have produced a more beneficial result.³⁵ She concluded from the evidence – such as it was – that the Department was correct in describing Ms. Munteanu (at the time of her claims) as an economically inactive person who has not shown a real link to the Irish labour market.³⁶

In terms of the benefits applied for, O'Malley J ruled that JSA is a special non-contributory cash benefit within the meaning of Articles 3 and 70 of Regulation 883. SWA, in contrast, is not covered by the Regulation. Finally, Child Benefit is a social security benefit within the meaning of the Regulation. However, in all cases, the Court concluded that a statutory requirement of residence in the State is not precluded by EU law.³⁷ It is clear that such a conclusion is required by the interpretation of the CJEU in its recent cases.

³⁴ At [83]-[84]. For a criticism of this approach see Cousins op cit. fn 5.

³⁵ At [122].

³⁶ At [123].

³⁷ At [124]-[129].

3. Discussion

3.1 The RtR and EU law

The Court is clearly correct that the RtR (which forms part of the HRC) is, in general, compatible with EU law in a case such as this in the light of the CJEU's approach in *Dano* and subsequent cases. There was little evidence that Ms. Munteanu had worked in Ireland. In addition, the case appears to have proceeded on the basis that the facts were of minor importance – a stance of which O'Malley J was understandably somewhat critical.³⁸

Unfortunately, this case is typical of several social welfare cases on related issues where it is difficult (if not impossible) to decide what the correct legal analysis should be because the facts are unclear. This is, however, a result, of the courts allowing judicial review proceedings to be brought without clear findings by the decision-makers below. Given that different EU provisions apply in different factual circumstances, it should clearly be essential that the basic facts should be established *before* a case is brought to court.

3.2 Is JSA a benefit of a financial nature intended to facilitate access to the labour market?

In *Vatsouras*, the Court of Justice held that job-seekers enjoy a right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market.³⁹ Such a benefit is not considered to be 'social assistance' caught by Article 24(2) of Directive 2004/38. A Member State may, however, legitimately grant such an allowance only to job-seekers who have a real link with the labour market of that State. The existence of such a link can be established by evidence that the person concerned has, for a reasonable period, genuinely sought work in the Member State in question. It follows that citizens of the Union who have established real links with the labour market of another Member State can enjoy a benefit of a financial nature which is, independently of its status under national law, intended to facilitate access to the labour market. It is for the competent national authorities and, where appropriate, the national courts to establish the existence of a real link with the labour market and also to assess the predominant function of the benefit in question.

It was argued in *Munteanu* that JSA was such a benefit, presumably on the basis that Ms. Munteanu could establish a link with the Irish labour market and was, therefore, entitled to equal access to JSA. O'Malley J stated that

a benefit which meets the criteria for a special non-contributory cash benefit is covered by Article 70 even if it forms part of a scheme that provides benefits to facilitate the search for work (*Alimanovic*). Article 70 benefits are covered by the concept of "social assistance", and cannot be characterised as benefits of a financial nature intended to facilitate access to the labour market (*Alimanovic*).⁴⁰

The first sentence is correct: the second is not. In *Alimanovic* the CJEU considered whether the benefits at issue in that case constituted 'social assistance' or measures intended to

³⁸ At [122].

³⁹ Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* EU:C:2009:344.

⁴⁰ At [117].

facilitate access to the labour market.⁴¹ The CJEU concluded that the benefits were SNCBs under Regulation 883/2004. The CJEU examined the function of the benefits and concluded that in *Alimanovic*, ‘the predominant function of the benefits at issue ... is in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity’ and, therefore, the benefits could ‘not be characterised as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State’ but must be regarded as ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38.⁴²

Thus the CJEU held that, based on its predominant function, the benefit at issue was not a benefit to facilitate the search for work even though it had previously ruled that benefits provided under the same law *were* such benefits (in *Vatsouras*). It did not, however, state that an SNCB (under Regulation 883) could not be a benefit to facilitate the search for work for the purposes of Directive 38/2004. In fact it is very strongly arguable that JSA is a benefit to facilitate the search for work even though it is also an SNCB.⁴³ This highlights again the importance of establishing facts in relation to the case at issue. In this case, as we have seen, O’Malley J had concluded that Ms. Munteanu had not shown a real link to the Irish labour market and, therefore, the classification of JSA would have been irrelevant. If, however, she had been able to show such a link, this might have become a more critical issue.

3.3 The status of *Brey*

In a courageous attempt to make any sense of the CJEU’s approach to its ruling in *Brey*, O’Malley J stated that

The Member State may be required to assess the individual situation of the person concerned before finding that his or her residence is placing an unreasonable burden on the social assistance system (*Brey, Dano*), but not if the national legislation complies with the directive and displays sufficient levels of legal certainty, transparency and proportionality (*Alimanovic*). Further, an individual assessment may not be required if the Member State can show that an accumulation of all the individual claims that would be submitted would result in an unreasonable burden (*Alimanovic, Commission v. United Kingdom*).⁴⁴

This is probably as clear a summary of the effect of the CJEU’s incoherent approach as can be achieved at present. *Brey* was a case where EU law had been incorrectly transposed

⁴¹ At [40]-[46].

⁴² At [45]-[46].

⁴³ For the relevant factors, see *Alhashem v Secretary of State for Work and Pensions* [2016] EWCA Civ 395 in which the English Court of Appeal considered the status of Employment and Support Allowance, holding that it should be classified as ‘social assistance’ in the light of the CJEU’s case law. A Social Security Commission in North Ireland has considered that the UK jobseekers allowance is a benefit of a financial nature: *AEKM-v-Department for Communities (JSA)* [2016] NCom 80 at [51].

⁴⁴ At [120]. The Court also ‘accept[ed] the argument made on behalf of the applicant that *Brey* has not been overruled by subsequent cases such as *Alimanovic* or *Commission v. United Kingdom*, and that some level of consideration of the personal circumstances of a claimant is clearly necessary.’ At [128].

(indeed incorrectly translated) into national law.⁴⁵ The Advocate General's conclusions dealt with this issue. The CJEU unwisely went beyond the Advocate General. This aspect of the *Brey* ruling (as to individual assessment) is illogical and frankly incorrect. It is inconsistent with the CJEU's later approach in cases such as *Alimanovic* and *Commission v UK*. As is its wont, the CJEU has refused to admit that it was wrong leaving it unclear as to what *Brey* now means. But the reality – as shown in subsequent cases - is that there is no need for an individual proportionality test (other than perhaps in exceptional cases).

3.4 Reference to CJEU

The Court noted that the Court of Appeal has referred certain questions to the CJEU in the case of *Gusa v. Minister for Social Protection*.⁴⁶ These included a question as to whether

a refusal of a jobseekers allowance (which is a non-contributory special benefit within the meaning the meaning Article 70 of Regulation 883/2004) by reason of a failure to establish a right to reside in the host Member State [is] compatible with EU law, and in particular Article 4 of Regulation 883/2004.

The case related to the status of a person who had been gainfully self-employed in the State for a number of years but lost his sources of work with the economic downturn. O'Malley J concluded that as the answer to the question posed in the reference would not determine the instant case there was no need to await the ruling of the CJEU.⁴⁷

⁴⁵ See M. Cousins 'Civis Europeus sum? Social assistance and the right to reside in EU law' 21 Journal of Social Security Law, (2014), 83–96

⁴⁶ [2016] IECA 237 (the appeal in what had been known as *Genov and Gusa*).

⁴⁷ At [132]. This answer to this part of the questions would appear rather clear.