November, 2017

Habitual residence and the right to reside in Irish social welfare law: recent decisions

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Habitual residence and the right to reside in Irish social welfare law

The habitual residence condition (HRC) and the subsequent right to reside have received some detailed consideration by the Irish courts in 2017. In Munteanu, O’Malley J. rejected a challenge to the legality of the right to reside test in Irish social welfare law and held that the test was not incompatible with EU law.¹ In two more recent rulings, the High Court has again correctly rejected challenges, first to the application of the HRC to an EU national seeking employment in Ireland,² and second to a decision that an EU national claiming an old age pension did not have a right to reside in Ireland.³

The HRC and right to reside in Irish law

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.⁴ Section 246(4) of the Social Welfare (Consolidation) Act, 2005 (as amended) 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.

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 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 Griga -v- Chief Appeals Officer [2017] IEHC 602.
⁴ Social insurance benefits remain payable without any such requirements.
In *Macovei*, the applicant - a Romanian national who appears to have had no links to Ireland - applied for jobseeker’s allowance (JSA) 26 days after his arrival in the state to seek work. It appears to have been accepted that he was genuinely seeking work and that he had a right to reside in Ireland as a jobseeker. However, his claim for JSA was refused on the basis that he was not habitually resident in the State.\(^5\) This decision appears to have been correct but the applicant argued, first, that the HRC should not be applied to him and that he was entitled to JSA 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.\(^6\) The basis of this argument is not clear from the judgement. Insofar as it may be based on general Treaty provisions, there does not appear to be any case law directly in support of this proposition.

In *Vatsouras*, the Court of Justice (CJEU) 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.\(^7\) Such a benefit is not, therefore, considered to be ‘social assistance’ caught by Article 24(2) of Directive 2004/38. The CJEU said that a Member State may, however, legitimately confine such an allowance 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 (hereafter a ‘labour market benefit’). 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. This decision requires equal treatment in relation to entitlement to such as labour market benefit: it does not create automatic entitlement to such a benefit for anyone with a ‘real link’ with the Irish labour market.

Second, counsel argued that the purpose of JSA was to facilitate access to the labour market. It was argued that a distinction must be drawn between such benefits and those constituting social assistance. While Ireland is not obliged to confer an entitlement to social assistance upon an EU national during the first three months of residence in Ireland,\(^8\) as noted above the CJEU in *Vatsouras* ruled that benefits

\(^5\) The reasons for the decision are set out at [1] of the judgement.

\(^6\) The arguments advanced by the applicant’s lawyers are summarised by the Court at [5]. Consistent with the superior courts’ utter inconsistency on the issue, the High Court makes no reference at all to whether judicial review is appropriate given that it appears no appeal had been lodged under the statutory appeals mechanism.

\(^7\) Cases C-22/08 and C-23/08 *Vatsouras and Koupantatze* EU:C:2009:344.

\(^8\) Article 24(2) of Directive 2004/38/EC.
intended to facilitate access to the labour market did not fall within the scope of social assistance for these purposes.\(^9\)

Third, and presumably in the alternative, if the HRC could be applied, it was argued there is no minimum period for habitual residence or a period of prior employment required in order to establish an entitlement to JSA.\(^10\) The applicant also argued that the 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 claimed that the provision unlawfully discriminates between Irish and non-Irish EU nationals and is not proportionate or objectively justified.

Fourth, the applicant argued that 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.

Having reviewed the relevant law and case law, McDermott J. relied in particular on O’Malley J’s judgment in Munteneau. Unfortunately, while that ruling was in general correct as to the law and correct as to the outcome, McDermott J. relied on the one point in the ruling where O’Malley J. was arguably wrong, i.e. whether or not JSA was a benefit intended to facilitate access to the labour market.\(^11\) Her judgement is rather unclear on this point. She states:

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.\(^12\)

JSA is indeed a special non-contributory benefit (SNCB) under Regulation 883/2004 but, contrary to the view taken by O’Malley J., this has nothing to do with whether or not it is ‘social assistance’ or alternatively a ‘benefit intended to facilitate access to

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\(^9\) Cases C-22/08 and C-23/08 Vatsouras and Koupatantze EU:C:2009:344.

\(^10\) This is indeed correct but the point was that Mr. Macovei was not habitually resident at all.

\(^11\) In the earlier case, the Minister for Social Protection had, perhaps surprisingly, argued that it was not.

\(^12\) Munteneau at [124]-[126].
the labour market’ for the purposes of Directive 2004/38. O’Malley J stated in
*Munteneau* 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*).\(^{13}\)

The first sentence is correct: the second is not. O’Malley J appears to say (correctly)
that, even if JSA is a labour market benefit, it is covered by Article 70 of Regulation
883 (which provides that such benefits shall be provided by and at the expense of
the institution of the place of residence) if it is an SNCB (which it is). But she goes on
to say that a SNCB ‘cannot be characterised’ as a labour market benefit which is
simply incorrect. In *Vatsouras*, for example, the German benefit at issue was an
SNCB under Regulation 883\(^{13}\) but the CJEU held that it was also a labour market
benefit for the purposes of Directive 2004/38.\(^{15}\)

In *Alimanovic* the CJEU considered whether the benefits at issue in that case
constituted ‘social assistance’ or measures intended to facilitate access to the labour
market.\(^{16}\) 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.\(^{17}\) Thus the CJEU held that, based on its
predominant function, the benefit at issue was not a labour market benefit. It did
not, however, state that an SNCB (under Regulation 883) could not be a labour
market benefit for the purposes of Directive 38/2004. In fact it is very strongly
arguable that JSA is a labour market benefit even though it is also an SNCB.\(^{18}\)

However, the correct answer to the claim is that, even assuming that JSA is a labour
market benefit and assuming that Mr. Macovei could establish a real link to the Irish
labour market, this only entitles him to equal treatment concerning entitlement to

\(^{13}\) At [117].


\(^{15}\) Mr. Vatsouras (a Greek national) had been resident in Germany for over a year and had worked for
some of the period. His benefit was terminated on the basis of a rule that excluded foreign nationals
whose right of residence arose solely out of the search for employment.

\(^{16}\) *Alimanovic* (C-67/14, EU:C:2015:597) at [40]-[46].

\(^{17}\) At [45]-[46].

\(^{18}\) 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 Northern Ireland has considered that the UK jobseekers allowance is
a benefit of a financial nature: *AEKM v Department for Communities (JSA)* [2016] NICom 80 at [51].
The HRC applies to both national and non-national jobseekers and the Irish courts have consistently ruled that the HRC is not discriminatory in breach of EU law - a position which is clearly correct in the light of the CJEU’s decisions in a series of cases including Dano and Alimanovic.19

On the alternative points raised, the court did not accept that the presumption in s. 246(1) was unlawfully discriminatory. It pointed out that presumption applies in the same way to all applicants, national and non-national. Furthermore, the presumption was rebuttable and was ‘simply an evidential rule’.20

The Court went on to say that

the deciding officer must take into account the other criteria set out in s. 246(4) ... . 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 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 (Case C-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.21

The Court also rejected the argument that the deciding officer was not entitled to take into account the applicant’s failure to secure employment before his arrival in the State.22 On this point, it is arguable that this was not very relevant to whether or not the claimant was habitually resident. However, since all or almost all the other factors in relation to habitual residence were against him, this would not have justified quashing the decision.

Griga

Griga, in contrast, involved the right to reside test. The claimant - a Latvian national - had come to Ireland to live with his daughter and son-in-law and had claimed a state

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19 C-333/13, EU:C:2014:2358 and C-67/14, EU:C:2015:597. For further discussions of these case see Cousins op. cit. fn 2. Though see to the contrary AG Wathelet’s opinion in Gusa (Case C-442/16) in which he argues that EU law precludes a law which excludes from eligibility for jobseeker’s allowance (if it is a labour market benefit) EU nationals who have a genuine link with the Irish employment market but do not have the opportunity to demonstrate it.

20 At [40].

21 At [41]. See also the reference to the DSP guidelines at [42].

22 At [47].
pension (non-contributory). The HRC and RtR apply to this form of pension and his claim was refused on the basis that he was not habitually resident in the state. Ultimately, on appeal, the Chief Appeals Officer upheld this decision on the basis that he did not have a RtR in Ireland.

Regulation 6 of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015) provides that:

(a) A Union citizen ... may reside in the State for a period that is longer than 3 months if he or she—

(i) has sufficient resources for himself or herself and his or her family members not to become an unreasonable burden on the social assistance system of the State, and has comprehensive sickness insurance in respect of himself or herself and his or her family members....

The Chief Appeals Officer stated that

Mr. Griga is in receipt of a Romanian pension and there is no information on file as regards his reliance on social assistance before coming to Ireland. There is no evidence of Mr. Griga having a history of contributing to the financing of social assistance in Ireland. On balance therefore it is, in my view, not unreasonable to conclude that Mr. Griga does not have sufficient resources so as not to become an unreasonable burden on the social assistance system in Ireland and given that payment of State pension (non-contributory) could not be regarded in any way as temporary, any support provided by way of State pension (non-contributory) would, more than likely, be permanent.23

Mr. Griga challenged this decision.24 He accepted that the ‘unreasonable burden’ test must be applied to him but argued that it was illogical to suggest that a person who had received no payments could be an unreasonable burden on the social assistance system. He also argued that the Chief Appeals Officer was wrong in deciding that the SPNC was a permanent rather than temporary payment. Counsel argued that SPNC could have been awarded for a finite period of time and subsequently the Department could carry out an assessment as to whether the applicant had become an unreasonable burden on the social assistance system.25

The Court discussed the Brey case on which the applicant relied. In that case, the CJEU had said that an individual assessment of the applicant’s personal circumstances should be carried out to determine if granting the benefit would place an unreasonable burden on the national system. Brey was a case where EU law had

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23 Cited in Griga at [10]. The case shows the extent to which, in the absence of any structured system of residency classification for EU citizens, social welfare deciding and appeals officers are required to come to decisions on residency which have nothing (directly) to do with social welfare law.

24 By way of judicial review rather than by the specific right of appeal set out at s. 327 of the Act.

25 At [13]. Noonan J. is, however, arguably incorrect to suggest (at [14]) that ‘The logical consequence of this argument is that the unreasonable burden test must be applied to persons who do not have a right of residence.’ Rather the consequence would be that a person with insufficient resources would have a RtR until such time as he was decided to have become an unreasonable burden.
been incorrectly transposed (indeed incorrectly translated) into national law.\textsuperscript{26} The Advocate General’s conclusions dealt with this issue. The CJEU unwisely went beyond the Advocate General. The \textit{Brey} ruling as it relates to to individual assessment is illogical and frankly incorrect. It is inconsistent with the CJEU’s later approach in cases such as \textit{Alimanovic} and \textit{Commission v UK}.\textsuperscript{27} As is its wont, the CJEU has refused to admit that it was wrong leaving it unclear as to what \textit{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).

In \textit{Munteneau}, in a courageous attempt to make any sense of the CJEU’s approach to its ruling in \textit{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 (\textit{Brey, Dano}), but not if the national legislation complies with the directive and displays sufficient levels of legal certainty, transparency and proportionality (\textit{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 (\textit{Alimanovic, Commission v. United Kingdom}).\textsuperscript{28}

This is probably as clear a summary of the effect of the CJEU’s incoherent approach as can be achieved at present.

Be that as it may, the Chief Appeals Officer had considered the individual circumstances of the claimant and, as Noonan J. pointed out, the CJEU in \textit{Brey} had nowhere suggested that the test ‘could not be applied to persons who have not received any assistance’.\textsuperscript{29} The Court also agreed with the Chief Appeals Officer that in the normal way, a pension ‘would be expected to continue for the duration of the applicant’s life. In that sense, it is permanent.’\textsuperscript{30} Therefore, the application was dismissed.

Whatever about a case where a person might claim short-term or emergency support, it is difficult to see how a claim for state pension from a person with limited means, in a context where many other persons could make a similar claim, would \textit{not} be considered to impose an unreasonable burden on a Member State.

\footnotesize{\textsuperscript{26} 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.}

\footnotesize{\textsuperscript{27} Case C-308/14, EU:C:2016:436.}

\footnotesize{\textsuperscript{28} At [120].}

\footnotesize{\textsuperscript{29} Griga at [22] et seq. citing Brey at [78].}

\footnotesize{\textsuperscript{30} At [34].}