Establishing and Retaining a Right of Residence as a Worker under EU law - Tarola -v- Minister for Social Protection

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Establishing and Retaining a Right of Residence as a Worker under EU law - 
Tarola v Minister for Social Protection

This case involves the right to reside test (which forms part of the habitual residence condition (HRC)) under Irish social welfare law. The High Court ruled that, as the applicant had not worked for more than a year, he had not established a right of residence in Ireland under Directive 2004/38/EU as implemented by the European Communities (Free Movement of Persons)(No. 2) Regulations 2006 and thus was not entitled to jobseeker’s allowance. Unfortunately, the judgement provides very little background as to the relevant law or facts at issue. It also misreads the relevant law to such an extent that it must be considered to have been decided *per incuriam*. Interestingly, the case also raises a broader issue as to whether the approach adopted by the Department of Social Protection in such cases is correct. Under EU law, Union citizens who have entered Ireland in order to seek employment have a right to reside 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. Such persons would be entitled to benefits of a financial nature which facilitate access to the labour market which would appear to include jobseeker’s allowance. Therefore, in such cases, an unemployed person who is continuing to seek employment and has a genuine chance of being engaged arguably has a right to reside even if he has not worked in Ireland and/or for more than six months after short-term work has ceased.

The law

The relevant provisions of social welfare law (which are not mentioned at all in the judgement) are as follows. S. 141(9) (as amended) of the Social Welfare (Consolidation) Act, 2005 (the Act) provides that

A person shall not be entitled to jobseeker’s allowance ... unless he or she is habitually resident in the State.

The requirement to be habitual resident is set out in s. 246 of the Act (as amended). In particular, s. 246(4) provides that a deciding officer

... when determining whether a person is habitually resident in the State for the purposes 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

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2 S.I. No. 656 of 2006.
(e) the future intentions of the person concerned as they appear from all the circumstances.\(^3\)

S. 246(5) provides that a person who does not have a right to reside in the State shall not, for the purposes of the Act, be regarded as being habitually resident in the State. Thus even if a person is *de facto* habitually resident in the State, s/he will not satisfy the HRC unless s/he has a right to reside.

Article 7 of EU Directive 2004/38 (which concerns rights of residence for more than three months) provides in relevant part that

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
   (a) are workers or self-employed persons in the host Member State; or
   (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
   (c) … [concerns persons enrolled for a course of study, including vocational training]
   (d) … [concerns family members].
2. … [concerns family members]
3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
   (a) he/she is temporarily unable to work as the result of an illness or accident;
   (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
   (c) he/she 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 twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
   (d) … [concerns vocational training].

Thus, under Directive 2004/38, a person may have a right to reside as a worker or self-employed person (Art. 7(1)(a)) or if they have sufficient resources not to become a burden on the social assistance system (art. 7(1)(b)). Mr Tarola does not appear to have been a worker or a self-employed person at the time of his claim for jobseeker’s allowance\(^4\) and, one assumes, although there is no finding of fact on this point, he would not be considered

\(^3\) S. 246(4) inserted by s. 30 SW&PA 2007 and substituted by s.11(1)(d)(ii) SW&PA 2014.

\(^4\) Although he did take up self-employment shortly after his claim for jobseeker’s allowance.
to have sufficient resources. However, of potential relevance to this case, a person who is no longer a worker may retain that status subject to the provisions of Art. 7(3).

In addition, Art 14 provides

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

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

... .

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

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

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

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

Art 14(4)(b) reflects the fact that, in Antonissen, the Court of Justice ruled that

In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that as laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardize the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State.

Art 24 (which concerns equal treatment) provides that

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5 Reg 2(3) of S.I. 656 of 2006 provides that ‘a person shall be regarded as not having sufficient resources to support himself or herself and his or her dependants where he or she would qualify for assistance under Part 3 of the Social Welfare Consolidation Act 2005 (No. 26 of 2005) [which relates to social assistance] if a claim were made by or on behalf of the person.’

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.

As noted above, the Directive is implemented in Ireland by the European Communities (Free Movement of Persons)(No. 2) Regulations 2006. Art 7 of the Directive is implemented by Regulation 6. However, there does not appear to be any direct equivalent to Art 14(4). Art 24 finds its implementing provisions in Regulation 18.

Facts

Despite the fact that decisions as to whether a person has established a right to reside in Ireland must be based on the facts of the case, the judgement is seriously deficient as to the facts involved. It appears that Mr. Tarola (a Romanian national) had been living in Ireland since 2007. Assuming this to be the case, it is difficult to see how any reasonable deciding officer could have concluded that Mr. Tarola was not actually ‘habitually resident’ in Ireland (I refer to this as the HRC simpliciter). However, as we have seen, in addition to ‘actual’ residence it is now necessary for a person to have a right to reside in order to be considered to be habitually resident under social welfare law.

Mr. Tarola worked on a number of occasions in Ireland for short periods of time. His most recent employment was for a period of two weeks in July 2014 and he had a period of self-employment for just over 2 weeks in November-December 2014. Unfortunately, no details of this employment are provided (hours of work, pay, etc.). He otherwise had been in intermittent employment but the employers did not pay any tax on his employment and ... he was also relying on charity and the support of family and, in particular on the Capuchin Day Centre over a period of seven years.

He had previously applied for various social welfare payments (and had been refused) and in November 2014 applied for jobseekers allowance. This was refused on the basis that as an EU/EEA national, his residency in the State was governed by EU law ... . Since he came to Ireland, he has not worked for more than a year and does not have sufficient independent resources to support himself and that the evidence produced

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7 At [6]-[7].

8 At [8].
does not substantiate his habitual residence in the State and led the respondent to conclude that his centre of interest was not Ireland.\(^9\)

If this is an accurate summary of the decision, it might be described as a ‘blunderbuss’ approach in that it covers a wide area but not that actually relevant to the applicant. The reference to not working for a year refers to Article 7(3)(b); the reference to ‘independent resources’ is to Article 7(1)(b); while the reference to a centre of interests refers to the HRC simpliciter.\(^10\) The decision does not, however, make any reference to the basis on which Mr Tarola might be considered to have a right of residence, i.e. the retention of a right to reside under Article 7(3)(c).\(^11\) Not does there appear to have been any consideration as to whether Mr. Tarola might have a right to reside as a jobseeker.

Subsequently, Mr Tarola’s solicitors sought a review of this decision but the review did not lead to any revision of the decision.\(^12\) Later, the solicitors expressly made the case that he had retained a right to reside as a worker for the purposes of S.I. 656 of 2006 for a period of six months after his employment in July 2014. Again, however, the Department did not accept this argument. The applicant sought judicial review of the decision.\(^13\)

The judgement

In short, EU law distinguishes between persons who have worked for over a year and who are registered as jobseekers (Art 7(3)(b)) who are entitled to remain in the state; and those who have worked for less than a year (Art 7(3)(c)) who are entitled to retain a right of residence ‘for no less than six months’.\(^14\) Therefore, the applicant’s legal team appeared to focus their arguments on showing that his employment in July 2014 was ‘genuine and effective’.\(^15\)

\(^9\) At [12].

\(^10\) As noted above, it is difficult to see how a persons who had (apparently) being living in Ireland for seven years could be considered not to have established a centre of interests here but again we know almost nothing about the facts of the case.

\(^11\) Given the complexity of EU law in this area, one might have considerable sympathy with deciding officers who are asked to make such decisions in what is fundamentally immigration law.

\(^12\) At [14].

\(^13\) The Department argued that he was out of time to challenge the original decision of November 2014. However, White J. accepted (at [29]) that there was a decision in March 2015 which was ‘justiciable and capable of challenge by way of judicial review’. In this case, as argued below, the original decision was wrong in law and should have been revised under s. 301(a)(i)(III) of the Act ‘by reason of some mistake having been made in relation to the law’. However, one might argue that the Department should be entitled to refuse to consider a revision of a decision where the grounds set out in s. 301 (new evidence, new facts or mistake of law or fact) do not exist and that where a request for a review is simply a colourable device to get round JR time limits that this refusal should not be subject to review.

\(^14\) Ireland has chosen to grant this right for the minimum period, i.e. 6 months: Regulation 6(2)(d) of S.I. 656 of 2006.

\(^15\) In Solovastru v Minister for Social and Family Affairs, [2011] IEHC 532, Dunne J – following R (Tilianu) v Secretary of State for Work and Pensions [2010] EWCA Civ 1397 - held that a self-employed person could not rely on Reg 6(2)(c)(iii) of the European Communities (Free Movement of Persons) (No.2) Regulations 2006 to assert a right to reside in this country when his self-employment ceased, taking the view that this Reg (and Art. 7(3)(c)) only applied to employees. This ruling has been followed in Hrisca v Minister for Social Protection, unreported High Court, 16 February 2012 and Genov v. Minister for Social Protection, [2013] IEHC 340.
employment and ‘minor’ employment which is ‘marginal and ancillary’ and does not give rise to EU rights.\textsuperscript{16} Unfortunately we know nothing about the nature of the applicant’s employment. However, White J accepted that

relatively short periods of employment, casual employment, and part time employment would qualify an applicant for social assistance as a worker provided it is in pursuit of effective and genuine activity to the exclusion of activities on such a small scale to be regarded as purely marginal and ancillary.\textsuperscript{17}

Unfortunately, White J. misread the EU Directive as distinguishing between employment of over a year (Art 7(3)(b)) and fixed-term employment (7(3)(c)). He states that Reg 6(2)(c)(iii) (which implements Art 7(3)(c))

deals with persons who have been on fixed term contracts of employment and that portion of the wording in the section ‘or after having become involuntary unemployed during the first year’ is not a stand alone phrase or sentence but is qualified and refers back to ‘completing a fixed term employment contract of less than a year’.

As can be seen by reference to the text of the Directive and to Court of Justice cases such as Vatsouras (which was actually opened to the Court) or Alimanovic, this is simply wrong.\textsuperscript{18} Article 7(3)(c) (and, therefore Regulation 6 (2)(c)(iii)) refers to fixed-term employment or employment of less than one year (if it has ended in involuntary unemployment); and the phrase ‘or after having become involuntary unemployed during the first year’ is indeed stand-alone and does not refer to fixed-term employment.

It would appear that, assuming Mr. Tarola could not establish a right to reside on any other basis, his right to reside turned on whether his employment in July 2014 had been ‘genuine and effective’ so as to establish a right to reside for a period of 6 months which would have meant that he would have been entitled to jobseekers allowance (assuming the other statutory conditions were satisfied) until at least January 2015.\textsuperscript{19} If, contrary to the view taken by the Irish courts to date, Article 7(3)(c) also applies to self-employed workers, and if his self-employment in November 2014 was ‘genuine and effective’, this right would have extended further in time.

\textsuperscript{16} Case 53/81 Levin [1982] ECR 1035.
\textsuperscript{17} Tarola at [28].
\textsuperscript{19} I emphasise the speculative nature of these conclusions given the absence of clear findings of fact.
However, a further issue, not raised at all in the judgement, is that an unemployed person may rely on Article 14(4)(b) of the Directive\textsuperscript{20} to establish a right of residence even after the expiry of the period referred to in Article 7(3)(c) (as discussed in Alimanovic). As the Court of Justice pointed out in Alimanovic so far as access to social assistance is concerned, it must nevertheless be observed that, in such a case, the host Member State may rely on the derogation in Article 24(2) of that directive in order not to grant that citizen the social assistance sought.\textsuperscript{21}

However, the Court had previously ruled in Vatsouras that

Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38.\textsuperscript{22}

While there does not appear to have been any legal decision as to the status of jobseeker’s allowance in this regard, it would be difficult to argue that it is not a ‘benefit of a financial nature’ which ‘facilitates access to the labour market’.\textsuperscript{23} Therefore, in such cases, an unemployed person who is continuing to seek employment and has a genuine chance of being engaged arguably has a right to reside (and consequently a right to jobseeker’s allowance assuming other conditions are satisfied) even if he has not worked in Ireland and/or for more than six months after short-term work has ceased.

\textsuperscript{20} This 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.

\textsuperscript{21} C-67/14 Alimanovic [2015] ECR I-000 at [57].

\textsuperscript{22} Joined Cases C-22/08 and C-23/08 Vatsouras [2009] ECR I-4585 at [45].

\textsuperscript{23} See a recent UK case concerning the status of employment and support allowance (ESA): Alhashem v Secretary of State for Work and Pensions [2016] EWCA Civ 395. Despite the name, ESA is a disability payment and the English Court of Appeal ruled that it was a ‘social assistance’ payment for the purposes of the Directive.