Casebase Number: G0099

Title of Payment: Jobseekers Allowance/ Supplementary Welfare Allowance

Community Law and Mediation Northside

Northside Civic Centre

Bunratty Road

Coolock

Dublin 17

Date of Final Decision**: April 2018**

Title of Payment: Job Seeker's Allowance; Supplementary Welfare Allowance; Rent Supplement

Date of Final Decision: April 2018

Keywords: Jobseekers Allowance; Supplementary Welfare Allowance; Rent Supplement; Judicial Review; right to reside; habitual residence condition;

Organisation who represented the Claimant: Community Law and Mediation Northside (CLM)

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This report is set out as follows:

1 Case Summary

This case concerns the judicial review of a decision by a Deciding Officer (**DO**) on 28 August 2009 whereby the Appellant was refused Jobseekers Allowance (**JA**) on the basis that he was a Romanian Citizen who failed to fulfil the requirements for JA. The DO held that the Appellant was not permitted to claim JA as he did not have a work permit for twelve consecutive months since 1 January 2006 and was therefore not available for full time work. This decision also had the effect of preventing the Appellant from receiving Supplementary Welfare Allowance (**SWA**) and Rent Supplement (**RS**).

The Appellant is a Romanian citizen who resided and worked in Ireland since 2004. When the Appellant first came to the State he was not aware of a requirement to have a work permit in order to work. Between September 2006 and April 2007 the Appellant worked as an insured employee and tax and PRSI was paid to the Revenue Commissioners by his employers.

From May 2007 to November 2008 he worked in a self-employed capacity paying all the requisite VAT, Income Tax and PRSI to the Revenue Commissioners. He was joined by his spouse and four children in February 2007. The Appellant lost his employment due to the economic downturn in November 2008. The Appellant's fifth child was born in Ireland in July 2009.

Jobseekers' Allowance

The Appellant applied for JA in November 2008 due to the economic downturn and his loss of business.

On 28th August 2009 a DO refused the Appellant's application for JA stating:

> "As a Romanian Citizen you are not permitted to claim Jobseekers in Ireland unless you had a work permit for twelve consecutive months since 1/1/06 and are therefore not available for fulltime work. The legislation covering this decision is section 65(5)(a)(ii) of the consolidation act."

The Appellant requested a review of this decision by another Deciding Officer. The DO agreed with the decision to refuse the Appellant's application for JA. The Appellant appealed this decision to the Social Welfare Appeals Office in November 2009.

An Appeals Officer by way of a summary decision upheld the decision of the DO, by way of letter dated May 2010. In his decision the Appeals Officer (**AO**) stated that:

> "The Decision of the Local Office is confirmed. Appellant has no work permit."

The Appellant attended CLM in June 2010. CLM came on record for the Appellant and requested his file under the Freedom of Information Acts. CLM on behalf of the Appellant sought a review of the AO decision under Section 318 of the Social Welfare (Consolidation) Act 2005 (the 2005 Act) to the Chief Appeals Officer by way of a submission in July 2010. This review was pending before the Chief Appeals Officer on the date of application for leave to apply for judicial review which was made by CLM on behalf of the Appellant in October 2010.

Supplementary Welfare Allowance and Rent Supplement

The Appellant applied for SWA a basic payment and RS in December 2008. These payments were granted and paid until June 2010. In June 2010 the Appellant received a notice of intention to withdraw support by letter, in which the Appellant was informed by the Health Services Executive (HSE) that:

> "The superintendent community welfare officer has deemed that you do not meet the habitual residence conditions for the reasons listed below.
>
> -You do not currently have a valid work permit
>
> -You did not have a valid work permit for any employment you had prior to January 2007
>
> -You financially maintained yourself through self-employment for a period of less than two years."

The payments of SWA and RS ceased on 30 June 2010. CLM on behalf of the Appellant appealed this decision on 18 June 2010 and sought a review through the internal appeals process provided by the HSE who then had responsibility for all appeals concerning SWA payments. This appeal was refused and notified to the Appellant in late October 2010.

At the time, the HSE were responsible for administering SWA and RS payments. The HSE were also responsible for overseeing the appeals process in respect of these payments.[1]

CLM were instructed to seek leave to apply for judicial review in the High Court prior to the determination of these appeals.

[1] Note that the application process and payment of SWA and RS are no longer administered by the HSE and are now administered by the Department of Employment Affairs and Social Protection. The Social Welfare Appeals Office has responsibility for all appeals regarding these payments other than Exceptional Needs or Urgent Needs payments.

Interlocutory Proceedings

Due to the financial circumstances of the Appellant and his family, CLM initiated interlocutory proceedings in October 2010 seeking orders from the Court to compel the Minister for Social Protection and the Health Services Executive to reinstate the SWA and RS payments until the matter had been decided by way of judicial review proceedings or pending the exhaustion of the appeals process. This step was taken based on the fact that the Appellant's only source of income had been stopped. The Appellant, his spouse and six children had to rely on the charity of friends and charity organisations such as St. Vincent de Paul in order to survive and to ensure that they were not at risk of homelessness.

The Appellant's spouse had been awarded Child Benefit (CB) from May 2007. By letter from a DO she was advised that from November 2008 she no longer satisfied the habitual residency condition and was therefore no longer entitled to the payment Please see Casebase report **G0100** for a full report on the CB aspect of this case. In light of the fact that the reason for refusing the Appellant's spouse CB was inextricably linked to her husband's employment situation and his right of residence within the State, both sets of High Court proceedings (interlocutory and judicial review proceedings) were issued on behalf of the Appellant (the first named Applicant) and his spouse the (the second named Applicant).

In November 2010, Mr. Justice Charleton heard the interlocutory proceedings in the High Court over two days and refused the application. By way of an Order from the High Court dated the 16th November 2010 all orders seeking to re-instate the SWA payments as sought by the Appellants were refused. The matter then proceeded to a full judicial review hearing which was heard before Ms. Justice Dunne in March 2011.

Judicial Review Proceedings

The judicial review proceedings were heard before Ms. Justice Dunne in the High Court over three days in March 2011. In June 2011 Dunne J issued her judgment refusing to grant any reliefs. Dunne J ruled that the Appellant was only entitled to reside in Ireland as a self-employed person, and as he was no longer a self-employed person (since November 2008) he did not retain a right of residence within the State. She further held that he was not entitled to seek employment as a jobseeker as he did not have a work permit and therefore was not available for employment. Accordingly, Dunne J held that as the Appellant was not available for employment, a statutory requirement to receive JA, he was not entitled to receive JA or any other social welfare benefits.

The CB part of the claim was not considered by the Court. It was held that judicial review proceedings had not been instituted within the relevant time limit. Please see Casebase report **G0100** in regard to the CB aspect of the case.

CLM were instructed to appeal the decision of Dunne J to the Supreme Court and an appeal was lodged in July 2011.

Following the decision of the High Court, a factually similar case *Florea Gusa v. Minister for Social Protection, Ireland and the Attorney General* [2] was referred to the Court of Justice of the European Union (CJEU) by the Irish Court of Appeal in July 2016. The Court of Appeal sought a preliminary

[2] *Gusa v.Minister for Social Protection, Ireland and the Attorney General*, [2016] IECA 237.

ruling from the CJEU under Article 267 of the Treaty on the Functioning of the European Union (TFEU) on three questions concerning the interpretation of EU law by the Irish Courts. The request for a preliminary ruling concerned the interpretation of EU Directive 2004/38/EC regarding the right of citizens of the Union and their family members to move and reside freely within the territory of Member States.

Prior to the Appellant's case being heard in full before the Supreme Court, judgment was delivered by the CJEU in December 2017 in *Gusa v Minister for Social Protection* and referred back to the Court of Appeal. [3]

The CJEU held that Article 7(3)(b) of Directive 2004/38 could not be interpreted as applying only to persons who have worked as employed persons thereby excluding self – employed persons. Such an interpretation would run against the purpose of the provision; that is, a safeguard with respect to citizens right of residence. Further, it would have the effect of creating an unjustified difference in treatment between two categories of persons. [4]

The CJEU held:

> Article 7(3)(b) of Directive 2004/38 must be interpreted as meaning that a national of a Member State retains the status of self-employed person for the purposes of Article 7(1)(a) of that directive where, after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity, because of a duly recorded absence of work owing to reasons beyond his control, and has registered as a jobseeker with the relevant employment office of the latter Member State.[5]

The full judgment of the CJEU is available at:

http://curia.europa.eu/juris/document/document.jsf?text=&docid=198063&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=140935

On foot of this judgment, which is discussed further below, the Appellant's case before the Supreme Court was settled in April 2018 on the basis of a settlement agreement agreed between the parties.

2. Summary of the law as applies to a right of residence and habitual residence

In order to receive a social welfare payment a person must have a right of residence in the State. Further, with respect to certain payments (including JA, SWA and CB) a claimant must also satisfy

[3] Case C-442/16 *Gusa v. Minister for Social Protection, Ireland, and the Attorney General* ECLI:EU:C:2017:1004.

[4] Ibid., at paragraphs 41-43.

[5] Ibid., at paragraph 46.

the DEASP that they are habitually resident in the State. An EU national and their dependants may rely directly on the provisions of EU law in order to assert their right of residence in the state. Further, an EU national who becomes involuntarily unemployed and is registered as a jobseeker may retain their right of residence under EU Law. These former workers may be entitled to certain classes of income support without the necessity of establishing habitual residence. The DEASP interpret this to mean entitled to SWA.

Treaty of the Functioning of the European Union (TFEU)

The Appellant's right of free movement and establishment in the State under the provisions of the Treaty of the Functioning of European Union TFEU had to be interpreted in the context of the accession treaty with Romania as particularly provided for under Annex VII of the Treaty of Accession.

Article 45 of TFEU provides:

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

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

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
    a. to accept offers of employment actually made;
    b. to move freely within the territory of Member States for this purpose;
    c. to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
    d. to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 49 of the TFEU provides:

> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54 under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Council Directive 2004/38/EC and implementing regulation European Communities (Freedom Movement of Persons) (No. 2) Regulations 2006.

The Appellant's right to free movement under the TFEU was implemented by way of Council Directive 2004/38/EC. The Appellant's eligibility to reside in the State pursuant to the right of freedom of movement and establishment was transposed into Irish law by S.I. no 656 of 2006, European Communities (Freedom Movement of Persons) (No. 2) Regulations 2006.

Regulation 6(2) of the 2006 Regulations provides:[6]

> (a) Subject to Regulation 20, a Union citizen may reside in the State for a period longer than 3 months if he or she -
>
> (i) is in employment or is self-employed in the State,
>
> (ii) has sufficient resources to support himself or herself, his or her spouse and any accompanying dependants, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants,
>
> (iii) is enrolled in an educational establishment in the State for the principal purpose of following a course of study there, including a vocational training course, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants, or
>
> (iv) subject to paragraph (3), is a family member accompanying or joining a Union citizen who satisfies one or more of the conditions referred to in clause (i), (ii) or (iii).
>
> (b) Subject to paragraph (3), a family member of a Union citizen who is not a national of a Member State shall be entitled to reside in the State for more than 3 months where the Minister is satisfied that the Union citizen concerned satisfies one or more of the conditions referred to in subparagraph (a)(i), (ii) or (iii).
>
> (c) Subject to Regulation 20, a person to whom subparagraph (a)(i) applies may remain in the State on cessation of the activity referred to in that subparagraph if –
>
> (i) he or she is temporarily unable to work as the result of an illness or accident,
>
> (ii) he or she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with a relevant office of the Department of Social and Family Affairs and FÁS,
>
> (iii) subject to subparagraph (d), he or 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 year and has registered as a job-seeker with a relevant office of the Department of Social and Family Affairs and FÁS, or
>
> (iv) except where he or she is involuntarily unemployed, he or she takes up vocational training related to the previous employment.

[6] These Regulations have been revoked in their entirety and have been replaced by S.I. no. 548 of 2015, European Communities (Free Movement of Persons) Regulations 2015.

(d) In a case to which subparagraph (c)(iii) applies, the right to remain referred to in paragraph (c) shall expire 6 months after the cessation of the activity concerned unless the person concerned enters into employment within that period.

Regulation 18 (2) of the 2006 Regulations provides;

(2) (a) A person to whom these Regulations apply, other than a worker, self employed person or a person who retains such status and members of his or her family, shall not be entitled to receive assistance under the Social Welfare Acts-

(i) for 3 months following his or her entry into the State, or

(ii)where the person entered the State for the purposes of seeking employment for such period exceeding 3 months, during which he or she is continuing to seek employment and has a genuine chance of being engaged.

National Law – the Social Welfare Consolidation Act 2005 (as amended) – (2005 Act).

Section 246 of the 2005 Act sets out the rules on habitual residence and rights of residence. Section 246(4) provides that:

> Notwithstanding the presumption in subsection (1), a deciding officer or the Executive, when determining whether a person is habitually resident in the State, shall take into consideration all the circumstances in the 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.

Section 246(5) of the 2005 Act provides:

> a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State.

Section 246(6) sets out a list of persons who shall be taken to have a right to reside in the State for the purposes of section 246(5). This includes section 246(6)(b) which states that:

> a person who has a right to enter and reside in the State under the European Communities (Free Movement of Persons) (no. 2) Regulations 2006 (S.I. No. 656 of 2006), the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977) or the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997);

Section 246(8) of the 2005 Act[7] of the 2005 Act provides:

> (8) For the purpose of this Act, where a person –
>
> (a) is given a declaration that he or she is a refugee under section 17 of the Act of 1996,
>
> (b) is granted permission to enter and remain in the State under section 18(3)(a) or 18(4)(a) of the Act of 1996,
>
> (c) is granted permission to remain in the State under Regulation 4(4) of the Regulations of 2006,
>
> (d) is granted permission to enter and reside in the State under Regulations 16(3)(a) or 16(4)(a) of the Regulations of 2006, or
>
> (e) is granted permission to remain in the State under and in accordance with the Immigration Act 2004,
>
> he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration referred to in paragraph (a) was given or the permission referred to in paragraph (b), (c), (d) or (e) was granted.

Section 141 (9) provides that a person shall not be entitled to unemployment assistance under this section unless he or she is habitually resident in the State at the date of the making of the application for unemployment assistance.[8]

The Department of Social Protection's *Operational Guidelines, Jobseekers Allowance, Guidelines for Processing Claims* (9th June 2010)[9] states that:

> Bulgarian and Romanian Nationals who are self-employed do not require a work permit. Persons who are engaging in self-employment here will be required to pay PRSI Class S contributions but will have limited cover for Maternity Benefit, State and Widow(er)'s Pensions and Bereavement Grant. In the event of cessation of the self-employment, his/her main recourse for income support would be the means tested Jobseeker's Allowance scheme.

With respect to SWA, section 192 of the 2005 Act states that:

[7] Section 246(8) of the 2005 Act was further amended by section 18 of the Social Welfare Act 2016. The law as stated is that which applied at the time the case was decided.

[8] It is important to note that this section has been amended by the Social Welfare and Pensions Act 2014 to the following:
"A person shall not be entitled to jobseeker's allowance under this section unless he or she is habitually resident in the State."

[9] These Guidelines have been updated and the most recent version were published on DEASP's website www.welfare.ie website on 13 August 2018: http://www.welfare.ie/en/Pages/Jobseekers-Allowance.aspx

A person shall not be entitled to an allowance (other than an allowance under sections 201 and 202) under this Chapter unless he or she is habitually resident in the State at the date of the making of the application for the allowance."[10]

Section 198(4)(a) sets out exclusions whereby a person will not be eligible for rent supplement and includes, amongst others, the exclusion at Section 198(4)(a)(i):

a person will not be entitled to a payment referred to in subsection (3) where – (i) the person is not lawfully in the State. "

3. Key issues in the case

Whether the Appellant, a Romanian citizen, was entitled to receive JA and SWA payments pursuant to the relevant provisions of the 2005 Act and the various provisions under European Law on the basis that he was self-employed in Ireland for more than a year and had registered as a jobseeker following cessation of his business.

Whether the Appellant a self-employed worker was covered under the term "involuntary unemployment" for the purposes of Article 7 (3) (b) of Directive 2004/38 and Article 6 (2) of Regulation S.I. No 656 of 2006, European Communities (Freedom Movement of Persons) (No. 2) Regulations 2006.

Whether the Appellant was habitually resident in the State for the purposes of receiving JA and SWA payments including RS pursuant to the 2005 Act.

Key arguments made on behalf of the Appellant:

- It was submitted that the Appellant had a right under Article 49 of the TFEU to participate in the labour market in the capacity of self-employed person.

- It was argued that the Appellant, who is a Romanian citizen, was entitled to seek work in this State. It was stated that the Appellant does not require a work permit prior to seeking work, as the work permit is specific to the position of employment. Upon being offered a specific position, a person fills out a work permit application, which is also filled out by the employer.

- It was submitted that the Appellant satisfied the criteria of "involuntary unemployment " for the purposes of Article 7 (3) (b) of Directive 2004/38 and Article 6 (2) of Regulation S.I. No 656 of 2006, European Communities (Freedom Movement of Persons) (No. 2) Regulations 2006 on the basis that this provision applies to formerly employed and self-employed workers. Further, the Appellant complied with all conditions set out in Regulation 6 (2)(c)(ii) of S.I. No 656 of 2006; namely, he had been employed for more than one year and had registered as a jobseeker with the relevant employment office namely FÁS.

[10] This section has been amended by the Social Welfare and Pensions Act 2014 to the following:
"A person shall not be entitled to an allowance (other than an allowance under sections 201 and 202) under this Chapter unless he or she is habitually resident in the State."

- It was submitted that on the basis that the Appellant satisfied the relevant provisions of Regulation 6 (2) of S.I No 656 of 2006 that he retained a right of residence within the State. This grounded the Appellant's right to apply for social welfare benefits once his business ceased (after being in business for more than one year) and he registered himself as a jobseeker with the relevant employment agency.

- It was submitted that the HSE, in breach of rights to fair procedures, constitutional and natural justice, failed to give the Appellant an opportunity to be heard prior to the decision being taken to withdraw his RS and SWA payments.

- It was further submitted that the HSE erred in law in holding that there is an obligation on the Appellant to have financially maintained himself through self-employment for a period of two years. The Appellant directed the Court to the Department of Social Protection's *Guidelines for Deciding Officers on the Determination of Habitual Residence which* states that:

> The applicant's employment record in Ireland and elsewhere and in particular the nature of any previous occupations and plans for the future are relevant. A person who has lived here for an appreciable period and is working lawfully in stable employment may be presumed to be habitually resident here unless there are particular circumstances to rebut this presumption. Where such a person's family has been given permission to reside with them and the person is in that employment for at least a month or in self-employment for at least 6 months, the person may normally be presumed to satisfy HRC. (However please see other comments in the Guidelines at paragraph 5.5 re self-employment.)

Paragraph 5.5 states:

> For the purpose of, self-employment can be recognised as a viable proposition only if
>
> a. the self-employment business has been registered with the Revenue Commissioners and proof of such registration is supplied
>
> b. the self-employment business is bona fide, legal self-employment of an ongoing nature.
>
> It must comply with any official requirements (in Ireland) with regard to registration / licensing/ insurance of the business and be financially viable.

- It was submitted that the Appellant's self-employment met the foregoing criteria and only ceased because of the economic downturn.

- It was submitted that the rules regarding habitual residence must be applied to all persons in the State without discrimination. It was further submitted that Irish persons who were previously self-employed were routinely granted SWA payments and any difference of

treatment as between the Appellant and others in this State would be deemed discrimination for the purposes of European law.

Key arguments made on behalf of the Respondents:

- It was submitted on behalf of the Respondents that the Appellant had failed to bring judicial review proceedings promptly and within the relevant time limits. It was submitted that due to the delay in issuing the judicial review proceedings that the Appellant's claim should be struck out in accordance with the Rules of the Superior Court.

- It was submitted that the Appellant had not exhausted the internal appeals procedure within the Social Welfare Appeals Office and therefore had an alternative remedy available which could have been utilised instead of initiating judicial review proceedings. The Respondent's argued that this could be taken into account in order to refuse the reliefs sought by the Appellant.

- It was contended that the Appellant had no entitlement to social welfare benefits on the basis that he did not meet the statutory requirement regarding habitual residence as provided for under the 2005 Act. In particular, it was submitted that the Appellant did not have a right to reside in the State as he did not satisfy the requirements regarding a right of residence as provided for under Article 6 of the European Communities (Free Movement of Persons) (no 2) Regulations 2006 S.I. 656 of 2006 and as provided for under Section 246 of the 2005 Act. In this regard it was contended that the Appellant did not satisfy the requirements regarding residency which was contingent upon the Appellant satisfying the Department and HSE that they came within the status of a worker which did not include the status of a self-employed worker. It was submitted by the Respondents that a citizen of one Member State has no right to reside long-term in another Member State for the sole purpose of drawing social welfare benefits.

- It was submitted by the Respondents that as the Appellant was the sole breadwinner for his family when his period of self-employment came to an end, he ceased to have a legal right to reside in the State in accordance with the relevant statutory provisions. Consequently, it was further submitted that as the Appellant did not have a right to reside in the State he did not satisfy the statutory requirement of being habitually resident in the State as provided for under the 2005 Act.

- It was submitted that the Appellant did not satisfy the eligibility criteria regarding JA as set out in section 141 of the 2005 Act which included the requirement that the Appellant be "available for employment". It was argued that before the Appellant can take up employment in the State, he is required to hold a work permit pursuant to the provisions of the Employment Permits Act 2003-2006. It was further submitted by the Respondents that as the Appellant could not legally accept any offers of paid employment made to him, he was not available for employment and therefore did not satisfy the statutory requirements to receive JA.

4 Decision of the High Court

Ms. Justice Dunne delivered her judgment in June 2011 and found in favour of the Respondents. She upheld the decisions of the DEASP in regard to the decision to refuse to award a JA payment and the HSE regarding SWA payments on the following grounds:

> "I think the wording of the regulation and indeed the Directive is quite clear. There is a clear distinction between the status of those who are workers in the sense of persons who are in employment as opposed to those who are self-employed. That status of "involuntary unemployment" is in my view only capable of being applied to a person in paid employment. I do not see how that term can be applicable to a person who is self-employed having regard to the provisions of Regulation 6 as a whole. Thus it is clear that the first named applicant is not entitled to reside here and therefore cannot be entitled to look for jobseekers' allowance.
>
> The issue in relation to supplementary welfare allowance and rent supplement was at all times dependent on the outcome of the situation in relation to jobseekers' allowance. That being so, I can only come to the conclusion that the first named applicant is not entitled to those allowances either and that there is no basis for challenging the decisions made by the respondents in respect of these allowances.
>
> Consequently, the position in this case is that the first named applicant was only entitled to reside in this jurisdiction as a self-employed person. He is no longer a self-employed person and he is therefore not entitled to a right of residence in the jurisdiction. He is bound by the transitional provisions contained in Annex 7 in relation to nationals of Romania. He is not entitled to seek employment as a jobseeker as he does not have a work permit."

The full judgment of Ms Justice Dunne is available at:
http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a9d59658c410618b802579fa0048ee33?OpenDocument

High Court's Reasoning and Conclusions:

- It was stated by Ms. Justice Dunne that here is a distinction between those who are in employment and those who are self-employed which is apparent throughout European Union law. The distinctions can be seen in such provisions as Article 45 of the Treaty on the functioning of the European Union which deals with the free movement of workers and Article 49 which deals with the right of establishment which is applicable to those who are self-employed.

- Ms. Justice Dunne held that the right of an EU citizen to reside in another Member State is not unrestricted. She further stated that it is governed by the 2004 Directive and in this country, that Directive has been implemented by the European Communities (Free Movement of Persons) (no 2) Regulations 2006 S.I. 656 of 2006. The Regulations lays down various conditions which are applicable to EU citizens who wish to reside in this State.

- Ms. Justice Dunne clarified that the provisions of Annex 7 to the Act of Accession provides for transitional provisions applicable to nationals of Romania and limits the full application of Article 45 and Article 49 to Romanian nationals.

- It was held by virtue of Annex 7, that Member States may apply existing rules regulating access to their labour market. In practical terms, Dunne Jreasoned that this means that a Romanian national can only work in this country in certain circumstances. Annex 7 does provide that if a worker from Romania has worked in this country lawfully for "an uninterrupted period of twelve months" then the rights in relation to freedom of movement will apply to them.

- Ms. Justice Dunne considered that Article 1 of Annex 7 expressly refers to the freedom of movement of workers and the freedom to provide services. Therefore she considered that the distinction between those who are in paid employment and those who are self-employed is maintained.

- It was stated that the effect of the transitional provisions is that for the Appellant to take up paid employment in this jurisdiction he would have had to comply with the existing requirements of national law. Accordingly, in order to take up paid employment, the Appellant in accordance with existing requirements of national law would have had to have a work permit as provided for in the Employment Permits Acts 2003 to 2006. It was further stated that prior to the accession of Romania as a member of the European Union on the 1st January, 2007, the first named applicant was unlawfully present in this country.

- Ms Justice Dunne confirmed that subsequently, he was engaged in paid employment but by virtue of the transitional provisions contained in Annex 7 he was, as a Romanian national, still bound by the existing national rules and therefore obliged to have a work permit in order to enter into employment. Accordingly, during the periods when he was so employed, he was not lawfully employed in this jurisdiction and therefore did not enjoy a right of residence here.

- Ms Justice Dunne stated that it is permissible for Romanian nationals to enter the State and work in a self-employed capacity and to remain here while doing so. Annex 7 does not have the same derogation in relation to the right of establishment of those who are in self-employment as is applicable to those in paid employment.

- It was further stated that the Appellant sought to rely on Regulation 6 to assert that he was in "involuntary unemployment". Ms. Justice Dunne reasoned that while the Appellant was engaged as a self-employed individual, he was entitled to a right to reside within the State.

- Dunne J accepted the reasoning of the Court of Appeal in the United Kingdom on the interpretation of Article 7, as per *R. (Tilianu) v. Secretary of State for Work and Pensions*[11]

[11] [2010] EWCA Civ 1397.

The Claimant is a citizen of Romania and is therefore subject to regulation 6(2) of the Accession (Immigration and Worker Authorisation) Regulations 2006. This regulation provides a derogation from Article 45 of the new Treaty for the Functioning of the European Union (TFEU) (formerly Article 39 of the EC Treaty). That derogation has the effect that EU Nationals from these countries, including Romania, cannot base a right of residence on their jobseeker status, that is while looking for work. Thus the right to reside arises while unemployed only if the person has retained the right to reside as an employed or self-employed person.

- Ms Justice Dunne concluded that the wording of the Regulation and indeed the Directive is quite clear. She further stated that there is a clear distinction between the status of those who are workers in the sense of persons who are in employment as opposed to those who are self-employed. Accordingly the Court determined that the status of "involuntary unemployment" is only capable of being applied to a person in paid employment. Dunne J concluded therefore that it is clear that the Appellant is not entitled to reside here and therefore cannot be entitled to seek jobseekers allowance or other payments.

5. ***Gusa v Minister for Social Protection*** **– Reference to CJEU by Court of Appeal**

Following the decision of the High Court in the Appellant's judicial review proceedings, a factually similar case was referred to the Court of Justice of the European Union (CJEU) by the Irish Court of Appeal.

The facts of that case *Florea Gusa v Minister for Social Protection & O*thers [12] are as follows:

- Mr Gusa, a Romanian national, entered the State in October 2007. During the first year of his residence, he was supported by his adult children who also resided there. From October 2008 until October 2012, he worked as a self-employed plasterer and, on that basis, paid his taxes in Ireland, as well as pay related social insurance and other levies on his income.

- He ceased working in October 2012, claiming an absence of work caused by the economic downturn, and registered as a jobseeker with the Department of Social Protection. At this time the Appellant had very little income, as his children had left Ireland and were no longer supporting him financially.

- In November 2012, he applied for Jobseekers' Allowance.

- The Department of Social Protection refused the application by way of decision dated 22 November 2012 on the grounds that Mr Gusa had not demonstrated that he still had a right to reside in Ireland at that date. According to the decision, on cessation of his self-employment as a plasterer, Mr Gusa no longer satisfied the conditions in regard to a right of

[12] [2016] IECA 237.

residence laid down in Regulation 6(2) of the 2006 Regulations, which transposes Article 7 of Directive 2004/38 into Irish law.

- Following an unsuccessful appeal to the Social Welfare Appeals Office, Mr Gusa challenged the decision before the High Court in judicial review proceedings. The Appellant claimed that although he had ceased to work in a self-employed capacity, he had retained the status of a self-employed person and a right to reside in Ireland under Article 7 of Directive 2004/38. By way of judgment dated 11th July 2013, Mr. Justice Hedigan of the High Court dismissed the case and refused to grant the reliefs sought against the Department of Social Protection. On foot of a decision of the CJEU delivered on the 19th September 2013 in the case of *Pensionsversicherungsanstalt v Peter Brey* [13] an application was made to the High Court to vary the judgement already delivered by reason of the decision in *Brey.* That application was refused on the 17th October 2013.

- Mr Gusa appealed against that judgment to the Supreme Court, which transferred the appeal to the Court of Appeal.

In July 2016, the Court of Appeal referred three questions to the CJEU, pursuant to a request for preliminary ruling under Article 267 of the TFEU, namely:

- Does an EU citizen who (i) is a national of another Member State; (ii) has lawfully resided in and worked as a self-employed person in a host Member State for approximately four years; (iii) has ceased his work or economic activity by reason of absence of work and (iv) has registered as a jobseeker with the relevant employment office retain the status of self-employed person pursuant to Article 7(1)(a) whether pursuant to Article 7(3)(b) of Directive 2004/38 or otherwise?

- If not, does he retain the right to reside in the host Member State not having satisfied the criteria in Article 7(1)(b) or (c) of Directive 2004/38 or is he only protected from expulsion pursuant to Article 14(4)(b) of Directive 2004/38?

- If not, in relation to such a person is a refusal of a jobseeker's allowance (which is a non-contributory special benefit within the meaning of Article 70 of Regulation No 883/2004) by reason of a failure to establish a right to reside in the host Member State compatible with EU law, and in particular Article 4 of Regulation No 883/2004?'

[13] Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* ECLI:EU:C:2013:565.

6. Decision of the CJEU in *Gusa v Minister for Social Protection & Others* [14]

The CJEU delivered its judgment on 20th December 2017 and found in favour of Mr Gusa. The CJEU answered the first question in the affirmative by ruling that Mr. Gusa did retain a right of residence as a self –employed worker in the circumstances as set out above pursuant to Article 7 (3) (b) of the Directive 2004/38 and therefore determined that there was no need to answer the second and third questions. The Court stated:

> Under Article 7 (1) (a) of Directive 2004/38 all Union citizens who are workers or self employed persons in the host member State have a right of residence for a period of longer than three months on the territory of that Member State. Article 7 (3) of the directive provides that, for the purposes of Article 7 (1) (a) a Union citizen who is no longer a worker or self employed person is nevertheless to retain the status of worker or self-employed person in four cases.
>
> Those cases include that referred to in Article 7 (3) (b) of the Directive 2004/38 in which the EU citizen concerned "is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office".
>
> The referring court states in that regard that, in the present case it is not in dispute that Mr Gusa registered as a jobseeker with the relevant employment office for the purposes of Article 7 (3) (b) of Directive 2004/38. However, the referring court notes, in essence, that it could be inferred from the wording of point (b) that that provision applies only to persons who are in duly recorded involuntary unemployment after having worked as employed persons for more than one year and excludes those who, like Mr Gusa are in equivalent position after having worked as self employed persons for that period.
>
> However that interpretation cannot be inferred unequivocally from the wording of that provision. In particular contrary to the submissions of the respondents in the main proceedings and the United Kingdom Government, the expression "involuntary unemployment" may depending on the context in which it is used , refer to a situation of inactivity due to the involuntary loss of employment following, for example, a dismissal, as well as, more broadly to a situation in which the occupational activity whether on an employed or or self-employed basis , has ceased due to an absence of work for reasons beyond the control of the person concerned such as an economic recession.
>
> ……According to settled case-law of the Court the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions established in all the languages of the European Union. Where there is divergence between the various versions, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part.

[14] Case C-442/16 *Gusa v. Minister for Social Protection, Ireland, and the Attorney General* ECLI:EU:C:2017:1004.

…….To that end Article 7(1) of the directive distinguishes in particular the situation of economically active citizens from that of inactive citizens and students. That provision does not, however draw a distinction within the first category between citizens working as employed persons and those working as self-employed persons for the purposes of Article 7 (1) (a). That interpretation is supported by analysis of the objectives of that directive and, specifically, Article 7 (3) (b) thereof.

……To interpret Article 7 (3) (b) of that directive as covering only persons who have worked as employed persons for more than one year and excluding those who have worked as self-employed persons for that period would run counter to that purpose.

……Just as an employed worker may involuntarily lose his job following, for example his dismissal a person who has been self –employed may find himself obliged to stop working. That person might thus be in a vulnerable position comparable to that of an employed worker who has been dismissed. In those circumstances there would be no justification for that person being ineligible for the same protection, as regards retention of his right of residence, as that afforded to a person who has ceased to be employed.

Such a difference in treatment would be particularly unjustified in so far as it would lead to a person who has been self –employed for more than one year in the host Member State, and who has contributed to that Member State's social security and tax system by paying taxes, rates and other charges on his income, being treated in the same way as a first-time jobseeker in that Member State who has never carried on an economic activity in that State and has never contributed to that system.

It follows from all the foregoing that a person who has ceased to work in a self-employed capacity because of an absence of work owing to reasons beyond his control and after having carried on that activity for more than one year, is, like a person who has involuntarily lost his job after being employed for that period, eligible for the protection afforded by Article 7 (3) (b) of Directive 2004/38. As set out in that provision, that cessation of activity must be duly recorded.

Accordingly, the answer to the first question is that Article 7(3)(b) of Directive 2004/38 must be interpreted as meaning that a national of a Member State retains the status of self-employed person for the purposes of Article 7(1)(a) of that directive where, after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity, because of a duly recorded absence of work owing to reasons beyond his control, and has registered as a jobseeker with the relevant employment office of the latter Member State.

The full judgment of the CJEU is available at:

http://curia.europa.eu/juris/document/document.jsf?text=&docid=198063&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=140935

7. Conclusion

The decision of the CJEU in *Gusa*, clarified the position that an EU citizen who has worked in a Member State in a self-employed capacity for more than a year and has registered as a jobseeker with the relevant employment authorities is considered to be "in duly recorded involuntary unemployment" as per the provisions of Article 7 (3) (b) of Directive 2004/38 and therefore retains the status of worker and a corresponding right of residence in that Member State. On this point the decision of Ms. Justice Dunne of June 2011 in the Appellant's case was incorrect.

The reasoning of the CJEU in the *Gusa* case runs contrary to the reasoning of Ms. Justice Dunne in her categorisation of the Appellant as being in "involuntary unemployment" which she had determined could only apply to an employed person as opposed to a self-employed person.

On foot of the decision in *Gusa* decision, the appeal by the Appellant and his spouse which was pending before the Supreme Court was struck out in April 2018 and the case was settled by agreement between the Appellants and the Respondents.

For further information:

http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/unemployed_people/jobseekers_allowance.html

http://www.welfare.ie/en/Pages/jajbfaq.aspx

http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/supplementary_welfare_schemes/supplementary_welfare_allow.html

http://www.welfare.ie/en/Pages/Supplementary-Welfare-Allowance.aspx

http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/supplementary_welfare_schemes/rent_supplement.html

http://www.welfare.ie/en/Pages/SWA---Rent-Supplement.aspx

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