THE COURT OF APPEAL
CIVIL

NO REDACTION NEEDED **UNAPPROVED**

Court of Appeal Record Number: 2021/86

Donnelly J. **Neutral Citation Number [2022] IECA 227**

Ní Raifeartaigh J.

Binchy J.

BETWEEN/

IOAN RAZNEAS IOAN RAZNEAS, ANISOARA ANGHEL, MARIAN RAZNEAS (a minor suing by his Mother and next friend ANISOARA ANGHEL), and ANTONIA RAZNEAS (a minor suing by her mother and next friend ANISOARA ANGHEL

APPLICANTS

- AND -

CHIEF APPEALS OFFICER, MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

- AND -

NOTICE PARTIES THE HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 14th day of October, 2022

Nature of the Case

1. This judgment concerns the payment of Jobseeker's Allowance to an EU citizen from another Member State. The case traverses much of the same territory as *Munteanu v. Minister for Social Protection, Ireland and the Attorney General*, in which judgments were delivered by the High Court (O'Malley J.) [2017] IEHC 161 and this Court (Peart J.) [2019] IECA 236, followed by a Supreme Court Determination refusing leave to appeal. The same issue was also addressed by the High Court (McDermott J.) in *Macovei v. Minister for Social Protection* [2017] IEHC 593, which applied the decision in *Munteanu*.

2. The appellant made an unsuccessful application for Jobseeker's Allowance (**hereinafter 'JSA'**) and her subsequent appeal to an Appeals Officer was disallowed. She brought judicial review proceedings in respect of the latter decision and the reliefs were refused by the High Court (see judgment of O' Regan J., [2020] IEHC 654). This is an appeal in respect of that decision. For the avoidance of doubt, it should be said that the first appellant's claim in respect of disability allowance, which was dealt with in the High Court decision, has not been pursued on appeal.

General Factual Context

3. The first and second appellants are Romanian nationals who have lived in Ireland since 2016. The first appellant has had significant health problems and is a double amputee, having undergone the first amputation in France and the second after his arrival in Ireland. This rendered him unfit for work. The second appellant is his wife and they have two young children, who are the third and fourth appellants. The second appellant spent a period of

time doing some work with the Mendicity Institution during a particular period, of which further details will be given below. She completed a Jobseeker's form on the 17 July 2018 and a habitual residence form on the 27 July 2018. Her application was refused and her appeal against the allowance refusal was unsuccessful. Judicial Review proceedings were brought in respect of the appeal decision.

The reliefs sought

4. The following reliefs are the most pertinent of those sought by the appellants:

(1) *Certiorari* in relation to the decisions disallowing the appeal in respect of the refusal of the second appellant's JSA;

(2) *Certiorari* in relation to the decisions disallowing the appeal in respect of the first appellant's Disability allowance;

(3) Various declarations that certain provisions, including Section 246(5) of the Social Welfare Consolidation Act 2005 (as inserted by Section 15 of the Social Welfare and Pensions (No. 2) Act 2009) are contrary to EU law;

(4) Declarations that certain sections of the Social Welfare Consolidations Act 2005 are unconstitutional [s.246 (5), (6) and (7)];

(5) A determination that the second appellant was a "worker" within the meaning of EU law;

(6) Declaration that *inter alia* s.246(5) of the Social Welfare Consolidation Act 2005 (as amended) is incompatible with the European Convention on Human Rights Act 2003 (s. 5);

(7) That the court make a preliminary reference to the Court of Justice of the European Union on certain points of law.

5. Most of the appellant's emphasis was upon the EU law points rather than those stemming from the Constitution or the European Convention on Human Rights.

Summary of the Evidence

6. The second appellant swore an affidavit in which she set out the family's difficult circumstances. Following the first appellant's amputation surgery, she realised that although she had always been the homemaker within the family, it was now necessary for her to consider seeking employment. This presented a number of challenges as she did not have good English, had no formal education and also had childcare responsibilities. She said that Ms. Wendy Moynan, a social worker at Tallaght Hospital where the first appellant had his surgery, assisted her in her search for employment. She was referred by Ms. Moynan to the Mendicity Institution and said it was agreed "*that I would do a month in the workshop on an unpaid basis as a means to ensure that I had the capacity and commitment to move onto the Community Employment Scheme, which would have been on a paid basis".* She described her work in the workshop, saying that she was there for a month or so in April 2018 and was required to be there four days per week. She was doing copper craft, making decorative flowers and so on. She attended as required and very much enjoyed both the work and the social aspect of being in the workshop. She was not paid for her work during the period but was provided with meals each day. She was disappointed at the end of the work trial period to be informed that the Institution would not transfer her to the community employment scheme (**hereinafter 'CE scheme')** as she did not fit the profile of individuals who normally take part. She described her unsuccessful efforts to seek employment, including with a laundry service and a cleaning company. She then described her application for JSA, the refusal of the allowance, and her unsuccessful appeal in respect of that refusal.

7. She also described how the relationship with her brother-in-law, with whom they had been living, became extremely strained and how they were required to leave his house. They were then effectively homeless, which made it even more difficult to take up employment.

8. She said that they did not wish to return to Romania because it was a life of poverty and privation and the children had no opportunities for education and were treated as second-class citizens. She said that the treatment and encouragement that the third appellant received in Ireland would never happen in Romania and that having her children educated was one of the most positive aspects of their choice to move to Ireland. She said she understood that it was not acceptable to move from one Member State to another solely for the purpose of obtaining social assistance, but averred that they had moved to seek employment and that she had endeavoured to obtain employment. She submitted that she was therefore a jobseeker who should be treated equally with Irish nationals in this regard, albeit for a period of six months only.

9. An affidavit was sworn on behalf of the appellants by Ms. Moynan, the above-named social work team leader at Tallaght University Hospital, who had encountered the family after the amputation surgery undergone by the first appellant. She was aware of the difficult family circumstances and their lack of housing or income and sought to assist them in circumstances where the first appellant would no longer be able to undertake work. She worked with the second appellant to encourage and assist her to find employment in the State. She said that in her search for employment opportunities for the second appellant, she came across an organisation called the Mendicity Institution, who had what she described as "*an employment and integration service that aims to facilitate a path into employment and community for migrants who are homeless, vulnerable and socially marginalised*". She said

that when she contacted them, she was told that they were in the process of "*transitioning*" their workshops into a CE scheme. She was told that the second appellant would be put on a waiting list and then nominated by the Institution for a place on a CE scheme, but in advance of this, she was requested to do unpaid work for one month to demonstrate commitment and reliability for the scheme. She confirmed that the appellant did attend as required in April 2018, but having completed the "*voluntary work*", the Institution advised that she "*did not meet the criteria to be nominated for the Community Employment scheme*". Ms. Moynan described further efforts made by the second appellant to obtain employment but explained that her lack of English and the lack of stability in her accommodation situation made it difficult for her to enter the workforce.

10. One of the exhibits before the Court was a letter dated the 30 May 2018 from the Mendicity Institution. The letter was from a Chris Andrews to a Mr. O'Malley confirming that the second applicant was "*engaging with Mendicity Institution on a voluntary unpaid level since the 4th April 2018…*". He confirmed that she "*attends 4 days a week here and participates in a variety of different voluntary activities*" and that she was very pleasant to fellow "*service users"* and was "*very willing to engage in any tasks that are set and is very skilled at any tasks she undertakes*".

11. An affidavit was sworn on behalf of the respondents by Catriona O'Connor, Assistant Principal and Manager of the "Tallaght Intreo Centre" in the Department of Employment Affairs and Social Protection. She explained the basic difference between social assistance payments (means-tested) and social insurance payments (based on contributions having been paid). She said that JSA was "*intended to ensure a minimum means of subsistence for its recipient where his or her means are insufficient, and the payments are funded by the public*

authorities without any contribution being made by the recipient". She described it as the *"primary social assistance payment made by the State for those unable to provide for their own basic living costs in the age range 18-65".* She said that it was funded from taxation and not dependent on contributions made by the beneficiary and was means-tested.

12. Ms. O'Connor said that it was not accurate to describe the Mendicity Institution workshops as part of a CE scheme nor to say that they were "*transitioning*" into a CE scheme. Community groups who wished to apply for funding under the CE scheme were subject to approval, and there were a number of requirements and conditions for participation. The Institution was not an approved CE sponsor and did not operate or employ persons on CE schemes. She also pointed out that it was a precondition for eligibility to a CE scheme that the person be over the age of 21 and in receipt of certain specific payments for 12 months or more. She said that the second appellant was not eligible for a CE scheme. Ms. O'Connor also dealt to some degree in her affidavit with matters which are the subject of the legal argument in this case and I will not deal with those here.

13. An affidavit was sworn by Siobhán Logan, Appeals Officer, who was the decision-maker in respect of the decisions impugned in the proceedings. She described how written submissions were filed on behalf of the appellants and an oral hearing held on the 15 February 2019, followed by her written decision refusing the appeal, communicated by letter dated the 1 March 2019. She pointed out that the argument advanced on behalf of the second appellant at this stage was that she had worker status as a result of her work with the Mendicity Institution. She dealt to some degree with matters which are the subject of the legal argument in this case and again, I will not deal with those here.

14. A further affidavit was sworn on behalf of the appellants by Ms. Sinead Lucey, a solicitor with the Free Legal Advice Centres, in connection with the conflict of evidence which had arisen in relation to whether work in the workshop of the Mendicity Institution could be undertaken as part of a CE scheme. She said that she contacted the Institution directly and asked for clarification and was told that it was not authorised to run a CE scheme itself but had an arrangement with an organisation called Casadh. This was an adult education organisation and the Institution had a complement of 15 places on the CE scheme run by that organisation. She also said that work in the workshop of the Institution was distinct from the Employment and Integration service provided by it; and that the second appellant was working in the workshop and not involved in the latter service. She said that the work produced in the workshop was offered for sale to the public, such that those who work in the workshop were doing work of monetary value which generated an income for the organisation.

15. An affidavit was sworn by Mr. Noel Hand, Principal Officer and Division Management in the Department of Employment Affairs and Social Protection, in reply to the affidavit of Ms. Lucey. He pointed out that the information was hearsay in nature and he disputed its accuracy. He said that the Casadh scheme was a drug rehabilitation scheme which is available to persons over the age of 18 who are in recovery and who have been referred for a rehabilitation place. The Institution had in the past recommended candidates to it for their involvement in the scheme. However, the Department had no relationship with the Institution itself in relation to CE and the Institution was not an approved CE sponsor and did not employ persons on CE schemes. Any decision regarding the suitability of a person for a CE scheme rested with the Department and an approved CE sponsor and was

subject to the applicant eligibility requirements. He said the second appellant was not on a CE scheme when voluntarily attending at the Mendicity Institution workshop.

The decision of the High Court

16. At paragraph 2 of her judgment, the trial judge defined the issues in the following terms:

a) The legally correct characterisation of the JSA under EU law;

b) Whether or not the second appellant was a "worker" within the meaning of EU law;

c) The constitutionality of the relevant provisions of the Social Welfare Consolidation Act 2005; and,

d) The compatibility of the relevant provisions of the 2005 Act with the European Convention on Human Rights.

17. In relation to the first or "characterisation" issue, O'Regan J. referred to the decision of the High Court and the Court of Appeal in *Munteanu*, and the decision of the High Court in *Macovei.* She observed that in *Munteanu* the High Court engaged in a comprehensive analysis of precisely the same issue and came to the conclusion that the JSA was to be characterised as social assistance rather than a financial benefit intended to assist a person entering the labour market. It followed therefore (for reasons that will be explained later) that the "right to reside" condition of habitual residence (and therefore of the JSA) was legitimate and in accordance with EU law. This decision was upheld on appeal by the Court of Appeal, which also held that there was no necessity for a preliminary reference to the CJEU.

18. In relation to the question of whether the second appellant was a "worker", she referred to a number of CJEU authorities including the decisions in *Levin, Steymann* and *Bettray.* She referred to the evidence of Ms. Moynan and also of Ms. O'Connor and held that the Appeals Officer was correct to reach the conclusion that the second appellant was not a "worker". She also rejected the challenges to the provisions of the 2005 Act on the basis of the Constitution and the European Convention.

The Legal Framework

Directive 2004/38 EC (the "Residence Directive")

19. The relevant provisions of this Directive set out the rights of entry and residence in respect of EU citizens. Article 6 provides a right of residence for up to three months in another Member State for Union citizens and family members accompanying or joining a Union citizen. Article 7 provides that Union citizens have a right to reside in another Member State for longer than three months if they are (a) *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) are enrolled at an establishment for the purpose of study and have comprehensive sickness insurance cover and 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; or (d) are family members accompanying or joining a Union citizen who satisfied the conditions in (a), (b) or (c).

20. Article 14(1) provides that Union citizens and their family members shall have the right of residence provided for in Article 6 (the 'up-to-three months' right) as long as they do not become "an unreasonable burden on the social assistance system of the host Member State". Article 14(2) provides that 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 therein.

21. Article 14(4) provides a derogation from paragraphs (1) and (2) to the effect that no expulsion measure may be adopted against Union citizens or their family members if they (a) are workers or self-employed persons; or (b) have entered the territory of the host Member State in order to seek employment, in which case they and their family members cannot be expelled for as long as they can provide evidence that they are continuing to seek employment and have a genuine chance of finding employment.

22. Article 24(1) sets out the principle of equal treatment for EU citizens:

> "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."

23. Importantly for present purposes, Article 24(2) provides for a derogation in respect of *social assistance*:

> "… 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." (Emphasis added)

24. The contents of Recital 21 may also be noted. It provides:

> "However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons."

25. Thus, a key concept is that of "social assistance"; if a measure is characterised as social assistance, the derogation in Article 24(2) of the Directive applies and the Member State is under no obligation to provide it either for the first three months of residence in the State or for the longer period referred to in Article 14(4)(b), i.e. where persons have entered the territory of the host Member State in order to seek employment, for as long as they can provide evidence that they are continuing to seek employment and have a genuine chance of finding employment.

26. This Directive is given effect to in this jurisdiction by SI 548/2015, the European Communities (Free Movement of Persons) Regulations 2015.

Regulation 883/2004 (the "Coordination Regulation")

27. Regulation 883/2004 on the coordination of social security systems deals with this topic within the context of the EU framework of free movement of persons with a view to improving standard of living and conditions of employment. Importantly, the measure does not go so far as to establish a common scheme of social security, i.e. it does not harmonise those systems as such, but it provides for a system of coordination instead.

28. The basic principle is set out in Article 7 which provides:

> "Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated."

29. Matters covered by the Regulation (set out in Article 3) include sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family benefits.

30. However, Article 70(3) provides that the general principle set out in Article 7 shall not apply to the benefits referred to in Article 70(2) and Article 70(4) provides that such benefits

"*shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation*" and "*at the expense of the institution of the place of residence*". Thus, it becomes essential for present purposes to set out Article 70(2), which in turn includes a reference to Annex X.

31. Article 70 paragraphs (1) and (2) provide as follows: -

"This Article shall apply to *special non-contributory cash benefits* which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

For the purposes of this Chapter, 'special non-contributory cash benefits' means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and *which guarantee the persons concerned a minimum subsistence income* having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) *where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the*

beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) *are listed in Annex X.*

(Emphasis added).

32. Annex X, insofar as it refers to Ireland, lists the following: JSA, State pension (non-contributory), Widow's and Widower's (non-contributory) pension, Disability allowance, Mobility allowance and Blind pension.

33. Thus, on the face of it, JSA, being listed in Annex X, is a Section 70(2) special non-contributory cash benefit (**hereinafter 'SNCCB'**) and therefore the host Member State is under no obligation to provide it under the Regulation. However, the appellant argues that the Court must look to the substance of the payment in question and carry out an analysis of it in order to determine whether it does or does not consist of a SNCCB or form of social assistance, and that its inclusion in Annex X is not dispositive of the characterisation issue. This submission will be addressed in further detail below.

The Social Welfare Consolidation Act 2005

34. Part 3 of the 2005 Act is entitled "Social Assistance". Section 139 lists the social assistance payments available in the State including JSA, pre-retirement allowance, old age pension (non-contributory), blind pension, widow's and widower's (non-contributory) pension, carer's allowance, disability allowance and supplementary welfare allowance. Part 3 is then divided into chapters, each devoted to a specific payment. JSA is dealt with in

Chapter 2 of Part 3, while supplementary welfare allowance (**hereinafter 'SWA')** is dealt with in Chapter 9. This includes discrete payments such as rent supplements, allowances in kind, exceptional need payments, urgent need payments, and burial payments.

35. It is clear therefore that, as a matter of domestic law, the JSA is considered to be a form of social assistance. The JSA is a means-tested payment available to unemployed adults who prove in the prescribed manner that they are unemployed and that they are capable of, available for and genuinely seeking employment. A person must also be habitually resident in the State (Section 141(9) of the 2005 Act). Habitual residence is a question of fact determined with reference to the factors set out in Section 246(4) of the 2005 Act (inserted by Section 30 of the Social Welfare and Pensions Act 2007), including such matters as the length and continuity of residence in the State, the length and purpose of any absence from the State and the nature and pattern of the person's employment. However, and importantly, a person who does not have a right to reside in the State is not regarded as being habitually resident in the State (Section 246(5) of the 2005 Act as amended by Section 15 of the Social Welfare and Pensions (No. 2) Act 2009.) A person who has a right to enter and reside pursuant to SI 548/2015 is taken as having a right to reside for the purposes of the Act. As O'Malley J. succinctly put it:

> "The current regime is that any claimant for a social welfare payment must a) have a right to reside in the State and b) actually be habitually resident here. Irish citizens must satisfy the [habitual residence condition] but are automatically deemed to have a right to reside." (para. 1, judgment in *Munteanu).*

The first EU law issue: the classification of the JSA - social assistance or a payment intended to facilitate entry to the labour market?

Submissions

36. Counsel accepts that the High Court and Court of Appeal in *Munteanu* decided the characterisation point in a manner that is unfavourable to them in the present case. However, he submits that the reasoning of the High Court in *Munteanu* is "problematic" for a number of reasons: (1) the classification of a payment at national level should not be considered to be determinative; (2) the inclusion of a payment in Annex X of the Regulation should not be considered to be determinative; (3) there should be an examination of the constituent elements of a benefit, in particular its purposes and the conditions upon which it is granted, before a conclusion on characterisation is reached; and (4) the qualifying conditions for JSA strongly support the proposition that the predominant function is to facilitate access to the labour market; it is granted to claimants who are between 18 and pensionable age, unemployment must be proved, the claimant must be capable of work, available for employment, and genuinely seeking but unable to obtain employment. The submissions also make reference to the Court of Appeal decision in *Munteanu* (but do not explain specifically why they contend it is in error).

37. Counsel on behalf of the appellants cites *Dano v. Jobcenter Leipzig*, case C-333/13 for the proposition that if a payment is to facilitate entry to the labour market, it does not constitute social assistance. He points out that the question of characterisation of a particular financial payment should be approached by applying the "objective and predominant purpose" test, citing *Jobcenter Berlin Neukölln v. Alimanovic,* Case C-67/14. He contends that the JSA should be characterised as "a benefit of a financial nature intended to facilitate

access to the labour market", as it was in *Collins v. Secretary of State for Work and Pensions,* case C-138/02 [2004] ECR 1-2703, which concerned a similar benefit in the English system.

38. In relation to the refusal of the courts in *Munteanu* to accede to a request for a preliminary reference, counsel maintains that the Court is not barred from making a preliminary reference, notwithstanding the earlier decision: citing *M.M. v. Minister for Justice & Anor* [2013] IEHC 9 (Hogan J.) in this regard. He seeks to distinguish the facts of this case from the *Munteanu* case on the basis that the second appellant here *was* actively seeking employment, whereas it is clear from the *Munteanu* case that the applicant in that case was not. He submits that this Court declined a reference in that case because the absence of any evidence of active job-seeking would mean that any favourable decision on the characterisation point would not have availed the applicant in *Munteanu* in any event.

39. The respondents rely on *Munteanu* as having already and definitively decided the characterisation issue. Counsel on behalf of the respondents submits that the JSA is not a financial benefit intended to facilitate access to the labour market, but rather a form of social assistance, and therefore that it *does* fall within the derogation in Article 24(2) of the Residence Directive. The payment is intended to provide for a minimum subsistence payment. It is submitted that as the JSA comes within the meaning of social assistance under the Directive, it is permissible to make its payment dependent on establishing a lawful right of residence in the State, as affirmed in *Brey,* case C-140/12, and *Dano v. Jobcenter Leipzig*, case C-333/13.

40. The respondents also submitted that insofar as the second appellant contends that she has a right to reside as a jobseeker, this is misconceived. Under the Directive, long-term

jobseekers do not have a formal right to reside: rather, under Article 14(4)(b) they have a right not to be expelled, which is an important distinction. The respondents contend that the logical conclusion of the second appellant's submission is that a person who has no right to reside under Article 7 has a right to receive social assistance on the basis of an assertion that he or she is a jobseeker. This is an untenable proposition. Member States are entitled to make the grant of social assistance conditional on obtaining a lawful right of residence and Member States are not mandated to grant jobseekers social assistance rights.

41. At the conclusion of the appeal hearing, the Court requested further information on the distinction between the JSA and the SWA, having regard in particular to the respondent's submission that the JSA was concerned with providing basic subsistence to its recipients. A further submission was duly furnished by the respondents. They submit that both JSA and SWA have in common that they are statutory means-tested social assistance payments, but that JSA addresses the contingency that a person is unable to meet his or her basic needs because they are involuntarily unemployed, whereas SWA is a residual safety net form of social assistance. They attached an appendix to their supplemental submissions, wherein they state:

> "Jobseeker's Allowance is the primary social assistance payment made by the State for those unable to provide for their own basic living costs during working age and is payable where a person does not qualify for the contributory, social insurance-based Jobseeker's Benefit and meets the conditions of the scheme.
>
> SWA Acts as the safety net in the social welfare system. It is a weekly payment. Basic SWA may be paid to customers awaiting the outcome of a claim or an appeal

for a primary social welfare payment and to persons who do not qualify for another social welfare payment".

42. There is no age limit for SWA. The JSA is payable only to persons between the age of 18 and pension age (i.e. currently 66 years of age). Subject to certain conditions, a claimant may work up to 30 hours per week in insurable employment and still qualify for SWA. For JSA, a person must be unemployed for 4 out of 7 days per week.

43. The respondents illustrate the difference with some figures. As of September 2021, there were over 128,000 persons in receipt of JSA. In contrast, there were almost 11,000 recipients of SWA as of the same date, a fraction of the other number. The SWA is deployed for two broad purposes; (i) where a person is awaiting the outcome of a claim or an appeal for a primary social welfare payment; and (ii) where a person does not qualify for another social welfare payment. Out of the figure of approximately 11,000 recipients of SWA, the majority, 7,500 people, were awaiting the outcome of a decision on another primary claim. The SWA provides for their basic needs while the application is processed and is primarily a short-term payment to cover the intermediate period. In respect of the remaining, i.e. approximately 3,000, persons receiving SWA, these are persons who for whatever reason do not qualify for any other payment but do not have the means to provide for their needs.

44. The respondents also provide information about the rates of payment for each. The maximum weekly personal rate of payment for basic SWA is currently €201 per week. The maximum weekly personal rate of payment for JSA is currently €203 per week. The same amount is fixed for disability allowance, blind pension, social insurance-based Jobseeker's benefit, one-parent family payment, farm assist, and widow's pension (non-contributory). They say that the reason for the same rate is because it is to provide for a person's basic

needs and the rate is not determined by reference to the costs of facilitating a person to access the labour market, such as covering training costs, as that is not the purpose of the payments. The Department does not consider that JSA can be characterised as labour market intervention because the payment is aimed at reducing the effects of poverty. A means assessment is a defining characteristic of such payments.

Authorities relevant to the first issue

45. In *Vatsouras and Koupatantze,* joined cases C-22/08 and C-23/08, the CJEU considered the situation of persons who have ceased to be employed in the host State but remain there seeking work in the context of Directive 2004/38. It held that in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it was not possible to exclude from the scope of the Treaty the right to freedom of movement benefits of a financial nature intended to facilitate access to employment. Benefits which are intended to facilitate access to the labour market do not constitute social assistance within the meaning of the derogation in Article 24(2) of the Directive. It was, however, legitimate for a Member State to grant such an allowance only after a real link had been established between the jobseeker and the labour market of the State. The existence of such a link could be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. The court also said that the objective of the benefit must be analysed according to its results and not according to its formal structure, and it was for the competent national authorities and national courts to assess the constituent elements of the benefit, in particular its purposes and the conditions subject to which it is granted.

46. In *Dano v. Jobcenter Leipzig*, case C-333/13, a decision of the Grand Chamber, the court discussed the relationship between the Directive and the Coordination Regulation. A

number of important points emerge. First, an EU citizen could claim equal treatment with the nationals of a host State only if his or her residence there complied with the conditions of the Directive. This followed from the reference in Article 24 to residence "on the basis of this Directive". Secondly, SNCCBs fall within the anti-discrimination principle but the derogation in Article 24(2) applies because SNCCBs fell within the category of "social assistance". There was therefore nothing to preclude a condition that an economically inactive person should have a right of residence before they are entitled to the allowance. It may be noted that Mrs. Dano had no intention of seeking work on the facts of that particular case. In its judgment, the court described social assistance in the following terms:-

> "That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during this period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State…" (para. 63)

47. In *Jobcenter Berlin Neukölln v. Alimanovic,* Case C-67/14, another decision of the Grand Chamber, the court considered the entitlements of persons whose right of residence arose solely from their status as jobseekers. The court noted that the referring court itself had characterised the benefits as SNCCBs within the meaning of Article 70(2) of the Regulation, stating that the benefits were intended to cover subsistence costs for persons who cannot cover these costs themselves and that they were not financed through contributions but through tax revenue. The benefits were also listed in Annex X to the Regulation and therefore meet the conditions in Article 70(2) thereof, even if they formed part of a scheme which also

provided benefits to facilitate the search for employment. The court said that the benefits were also covered by the concept of social assistance within the meaning of Article 24(2) of the Directive. The court said that however, in the present case –

> "[45.] … the predominant function of the benefits at issue in the main proceedings is in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity.
>
> [46.] It follows from these considerations that those benefits cannot 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".

48. The court answered the second question referred by stating that Article 24 of the Directive and Article 4 of the Regulation did not preclude legislation of a Member State under which nationals of other Member States who were jobseekers are excluded from entitlement to certain non-contributory cash benefits within the meaning of Article 70(2) of the Regulation, which also constitute social assistance within the meaning of Article 24(2) of the Directive, although those benefits are granted to nationals of the Member State concerned who were in the same situation.

49. It reiterated the point in *Dano* that, so far as it concerns access to social assistance, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence complies with the conditions of the Directive. To accept that persons who do not have a right of residence under the Directive may claim entitlement to social assistance 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*" (paragraph 50).

50. These decisions all preceded, and were carefully considered in, the judgments in *Munteanu v. Minister for Social Protection Ireland and the Attorney General.* This was the subject of a High Court judgment [2017] IEHC 161 (O'Malley J.) refusing the reliefs sought, a Court of Appeal judgment [2019] IECA 236 (Peart J.) dismissing the appeal, and a Supreme Court determination refusing an application for leave to appeal [2020] IESCDET 31. It was also held that there was no reference to the CJEU required because the issue was settled law.

51. The case involved a Romanian national living in Ireland since 2008 who had a partner and two children. She had been selling the Big Issue magazine and flowers, sometimes begging, and sometimes relying on charitable support. She ceased selling the magazine in August 2013. In September 2014, she applied for Supplementary Welfare Allowance, Jobseeker's Allowance and Child Benefit. All were refused on the grounds that she did not have a right to reside in the State as required by Section 246 of the Social Welfare Consolidation Act 2005 as amended and was therefore ineligible for such payments. The State maintained that although the measure was discriminatory insofar as it was automatically satisfied by Irish nationals, the measure was objectively justifiable to prevent persons from becoming an unreasonable burden on the State. It placed particular reliance upon *Dano.* The applicant contended that the test applied by the State was incompatible with

EU law and that the correct test concerned the nature and objective of each of the payments in question. It was argued on her behalf that, in substance, the JSA was not social assistance (in relation to which a habitual residence requirement could be imposed), but rather was a payment of a financial nature intended to facilitate access to the labour market. Therefore, the inclusion of JSA allowance in Annex X of the Regulation was not dispositive.

52. O'Malley J. comprehensively set out the relevant legal framework as already described in this judgment as well as some additional materials. Having discussed the caselaw of the CJEU, she summarised the principles arising from them as follows at paragraphs 107-121 of her judgment. This was in turn was set out in full in the Court of Appeal judgment in the same case. O'Malley J's summary is as follows: -

> "[107.] Article 24(1) [of the Directive] provides, subject to the Treaty and to secondary legislation, for equal treatment for citizens and their family members residing in a host State on the basis of the directive. In order to invoke the right to equal treatment, the residence of the person concerned must therefore be in accordance with the conditions of the directive (Dano).
>
> [108.] The right to reside for an initial three months is dependent only upon (a) the possession of valid papers and (b) not becoming an "*unreasonable burden*" on the social assistance system of the host State.
>
> [109.] The right to reside for a longer period is dependent upon (a) being a worker or self-employed (in which case no other condition applies), or (b) in the case of an economically inactive person, having sufficient resources not to become a burden on

the social assistance system and having comprehensive sickness insurance, or (c) being enrolled in specified forms of education and having comprehensive sickness insurance. These conditions are intended, inter alia, to prevent migrant citizens from becoming an unreasonable burden on the social assistance system. The right to reside is retained for as long as the conditions are met.

[110.] Where a person had the status of "*worker*", he or she will retain that status for at least six months in the circumstances described in Article 7(3) of the directive. During that period the person will continue to have a right of residence and may therefore invoke the equal treatment principle during that time (*Vatsouras* and *Koupatantze*).

[111.] Member States may not set a fixed figure to satisfy the requirement of *"sufficient resources"*, and may not determine an amount higher than that permitted by the criteria in Article 8 of the directive.

[112.] Under Article 14(4)(b), a migrant citizen is also protected against expulsion if he or she entered the State as a jobseeker and can provide evidence of a continuing search for employment and a genuine chance of being employed. However, under Article 24(2) Member States are permitted to derogate from the principle of equal treatment in respect of social assistance that might otherwise be payable to migrant citizens during their first three months of residence, or for a longer period if the continuing right of residence of the individual concerned derives from Article 14(4)(b).

[113.] A member State is entitled to refuse to grant social benefits to economically inactive Union citizens who exercise their freedom of movement in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence. Otherwise, persons who arrive in a Member State without sufficient resources to provide for themselves could automatically claim a benefit intended to cover the beneficiary's subsistence costs (Dano).

[114.] A benefit is a social security benefit in so far as, firstly, it is granted to the recipients without an individual and discretionary assessment of personal needs, on the basis of objective criteria and a legally defined position, and secondly, relates to one of the risks listed in Article 3 of the regulation (*Hosse*, *Commission v. United Kingdom*). The concepts of a social security and a special non-contributory cash benefit are mutually exclusive (*Hosse*).

[115.] Neither the directive not the regulation preclude national legislation that makes entitlement to a social security benefit conditional upon the claimant having a lawful right to reside in the host State (*Brey, Dano, Commission v. United Kingdom*).

[116.] Benefits intended to facilitate access to employment are not to be regarded as "*social assistance*" within the meaning of the derogation. A citizen of the Union who is a jobseeker and can show a real link with the labour market of the host State may not be excluded from such benefits (*Vatsouras* and *Koupatantze*).

[117.] However, 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*).

[118.] The conditions of eligibility for benefits covered by Article 70 are to be determined solely by the legislation of the Member State concerned. Article 24(1) does not preclude national legislation that excludes from access to special non-contributory cash benefits nationals of other Member States who do not have a right of residence under the directive (*Hosse*, *Dano*).

[119.] Migrant Union citizens may claim access to social assistance schemes, to which recourse may be had by an individual who does not have sufficient resources to meet his own basic needs and the needs of his family, only if their residence complies with the conditions laid down by the directive (*Dano*, *Alimanovic*). The derogation in Article 24(2) permits a Member State to refuse access to such schemes to a person whose right to reside is based solely on a continuing search for employment.

[120.] 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*).

[121.] The requirement of a right to reside constitutes indirect discrimination. As such, it must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective. The grant of a benefit may have consequences for the overall level of assistance which may be accorded by the State (*Commission v. United Kingdom*). Regard may be had to the consequences of an accumulation of claims (*Alimanovic*)."

53. On the facts of the case before her, O'Malley J. concluded that the applicant was an economically inactive person who did not have a real link to the labour market; that the JSA was a SNCCB within the meaning of Articles 3 and 70 of the Regulation; that conditions for eligibility were solely a matter for national legislation; and that a statutory requirement of lawful residence in the State was not precluded by EU law (paras. 123-126 of her judgment). She also refused to make a reference to the CJEU pursuant to Article 267 TFEU.

54. The Court of Appeal (judgment delivered by Peart J.) upheld the conclusion of the High Court. Having quoted in full O'Malley J.'s analysis of the principles as set out at paragraphs 107-121 of her judgment, Peart J. later defined the key question as a consideration of the "*nature, purpose and conditions*" of the JSA payment, referring to passages from the judgments in *Vatsouras* and *Brey* as to how this analysis should be carried out. He noted (at para. 42) that the amount of the JSA was "*virtually identical*" to the Supplementary Welfare Allowance and said there was nothing to indicate "*that there is any*

element of the jobseekers' allowance payment that reflects any additional costs which one could reasonably associate with seeking employment, over and above what is required, as with Supplementary Welfare Allowance, for basic living and the maintenance of human dignity". It was "*in effect a basic minimal subsistence payment made to a qualifying unemployed person, as opposed to a payment to a person which is designed and intended to assist/enable the person to gain employment*". He also said the Court could have regard to the fact that the State has included the JSA within Annex X of the Coordination Regulation as being an SNCCB and therefore not subject to Article 7, even though this was not dispositive. There was nothing "*manifestly inconsistent*" with the nature of the JSA payment and its designation within Annex X, or indeed within Section 139 of the Act of 2005 as "*assistance*". Therefore, the trial judge had been correct to reach the conclusions she did. The Court also considered that an Article 267 reference was not necessary on the facts of the case.

55. The Supreme Court in its determination observed that the appellant's principal contention was that a reference to the CJEU was required and considered that no such reference was required in circumstances where the issue of the characterisation of the allowance must be carried out by the national court, and where both courts had conscientiously applied the legal test applied by the CJEU.

56. In *Macovei v. Minister for Social Protection* [2017] IEHC 593, (High Court, McDermott J., 21st July 2017) applied the decision in *Munteanu* to uphold the refusal of JSA on the basis that the applicant was not habitually resident in Ireland. The case also involved a Romanian national who applied for the allowance some 26 days after the applicant arrived in the jurisdiction.

Decision on the first issue

57. As O'Malley J. clearly indicated at paragraph 119 of her judgment, the derogation in Article 24(2) permits a Member State to refuse access to *social assistance* schemes to a person whose right to reside is based solely on a continuing search for employment (*Vatsouras, Dano)*. On the other hand, benefits intended to facilitate access to employment are not to be regarded as "social assistance" within the meaning of the derogation, and a Union citizen who is a jobseeker and who can show a real link with the labour market of the host State may not be excluded from such benefits (*Vatsouras and Koupatantze*). A benefit which meets the criteria for a SNCCB 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*). It is clear from this interlocking set of principles that the characterisation of a benefit as either (i) a form of social assistance/SNCCB; or (ii) a benefit intended to facilitate access to the labour market, is crucial. It is also clear that the objective of the benefit must be analysed according to its results and not according to its formal structure, and it that it is for the competent national authorities and national courts to assess the constituent elements of the benefit, in particular its purposes and the conditions subject to which it is granted (*Vatsouras)*.

58. Both the High Court and the Court of Appeal characterised the JSA as a form of social assistance. The respondents submit that this is correct and that there is no reason to depart from this conclusion. The second appellant has suggested that the reasoning in *Munteanu* was "problematic" and that (1) the classification of a payment at national level should not be considered to be determinative; (2) the inclusion of a payment in Annex X of the

Regulation should not be considered to be determinative; (3) there should be an examination of the constituent elements of a benefit, in particular its purposes and the conditions upon which it is granted, before a conclusion on characterisation is reached; and (4) the qualifying conditions for JSA strongly support the proposition that its predominant function is to facilitate access to the labour market. This submission implicitly suggests (i) that the High Court and this Court were unduly influenced by the inclusion of the payment in Annex X and/or classification in Irish social welfare legislation; (ii) that they did not apply the correct test (as set out by the CJEU in its caselaw) to the analysis of the benefit; and (iii) that they should have reached the conclusion that the predominant function of the JSA was to facilitate access to the labour market.

59. I see no reason to depart from the reasoning of both the High Court and Court of Appeal in *Munteanu*. Neither court was unduly influenced by the domestic classification of JSA as social assistance nor by its inclusion in Annex X. Its characterisation as social assistance was arrived at following a detailed analysis of the caselaw of the CJEU by the High Court which was then adopted by this Court, following which the Court defined the key question as a consideration of the "*nature, purpose and conditions*" of the JSA payment, referring to passages from the judgments in *Vatsouras* and *Brey* as to how this analysis should be carried out. Clearly the Court was applying the correct form of analysis of the characterisation issue.

60. In terms of the application of the legal test, the Court noted that the amount of the JSA was virtually identical to the SWA and said there was nothing to indicate that any element of the JSA payment reflected any additional costs which one could reasonably associate with seeking employment, over and above what was required for basic living and the maintenance

of human dignity. The court also said that it could have regard to the fact that the State had included the JSA within Annex X but explicitly stated that this was not dispositive.

61. The supplementary submissions filed by the State in the present appeal at the request of the Court confirm and, if anything, strengthen that conclusion. The JSA is the primary social assistance payment made by the State for those unable to provide for their own basic living costs during working age and is payable where a person does not qualify for the contributory social insurance-based jobseeker's benefit and meets the conditions of the scheme. The SWA acts as a residual safety net and is paid predominantly to persons awaiting the outcome of a claim (such as a claim for JSA) or an appeal for a primary social welfare payment. It is also paid to persons who do not qualify for another social welfare payment. It is paid from general taxation and is not based on contributions. The amount of the payment for the JSA and the SWA is almost identical; for this reason, the Court's earlier conclusion in *Munteanu* that there is no additional component in the JSA to facilitate entry into the labour market is incontrovertible.

62. The reality appears to be that the JSA is not a payment intended to assist with the seeking of jobs, but is a subsistence payment for those who are as a matter of fact in the position of seeking jobs. The word "jobseeker" in the title of the benefit is a description of the category of person to which it applies and not an indication that the payment is for the purpose of facilitating entry to the labour market.

63. Insofar as the appellants rely upon *Collins v. Secretary of State for Work and Pensions,* case C-138/02 [2004] ECR 1-2703 for the proposition that the correct characterisation of a jobseeker's allowance is that it is a measure intended to facilitate entry into the workforce, it is important to note that the *Collins* decision was handed down one month before the

Directive and the Regulation came into force and therefore that it not only predates cases such as *Vatsouras, Dano* and *Alimanovic,* but that it was also decided within a slightly different legal framework. It is true that what was in issue was the English equivalent of JSA and that the court in *Collins* appeared to view this particular benefit as a payment intended to facilitate access to the labour market. However, the issues which actually fell for decision by the court were whether the applicant had worker status (to which the answer was 'no'), and whether a residence requirement as a precondition to receiving the benefit was legitimate (to which the answer was 'yes' because it was relevant to the existence of a real link to the labour market). No formal analysis of the nature of the jobseeker's benefit was conducted by the court, nor had the court yet indicated how such an analysis was to be carried out, as it did in the later CJEU cases concerning the Directive and the Regulation. In *Vatsouras,* the decision in *Collins* was cited for the propositions that (a) a measure intended to facilitate entry into the labour market is not social assistance; and (b) that the existence of a real link between the person and the labour market in a Member State can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. The decision in *Collins* was not cited at all in the Grand Chamber decisions of *Dano* and *Alimanovic.* I do not consider, therefore, that the court's characterisation of the benefit at issue in *Collins* as being an obstacle to the conclusions reached in *Munteanu,* where the test set out in the later cases was carefully considered and applied with reference to the JSA.

64. Having regard to the foregoing, I am of the view that the JSA is, as the Court held in *Munteanu*, a form of social assistance and not a measure intended to facilitate entry to the labour market. Accordingly, I would uphold the decision of the High Court (O'Regan J.) in this regard.

The Second EU law Issue: Whether the second appellant was a "worker"

65. The importance of deciding whether or not a person has worker status under EU law arises because where a person has this status and then loses employment, he or she will retain that status for at least six months in the circumstances described in Article 7(3) of the Directive. During that period the person will continue to have a right of residence and may therefore invoke the equal treatment principle during that time (*Vatsouras and Koupatantze*). In the present case, the second appellant submits that she was a worker for this purpose by reason of her work at the Mendicity Institution in April 2018.

Submissions

66. With regard to the concept of a worker, the appellants submit that the case law of the Court of Justice makes it clear that this has a Community-wide meaning and is a concept to be interpreted broadly. While it is for the national courts to establish and evaluate the facts of the case, the CJEU has provided guidance on the interpretation of the concept. They cite various authorities, including *Levin* and *Steymann,* discussed below. The appellants also cite *Garcia-Nieto*, case C-299/14, where the court repeated what it said in *Vatsouras* to the effect that if the individual established that they had for a reasonable period genuinely sought work in the host State, that would show a real link with the labour market such as would attract the protection of the equal treatment principle.

67. As to the application of the EU-wide concept of "worker" to the facts, the second appellant submits that she was in employment with the Mendicity Institution for four days per week for a month, that it was genuine and effective, and that she was provided with lunch in return for her services, with the promise and expectation of a paid position. The activity she undertook was economic and involved the making of handmade gifts which are sold by

the Institution, with the proceeds being reinvested in the workshop where she expected to take up employment. She submits that the Appeals Officer was incorrect in finding that her engagement should be likened to that of a service user. She was undergoing a trial period of voluntary employment and was on a waitlist for employment by the workshop on a CE scheme. The CE workshop was provided in partnership with another organisation, Casadh, who have a CE scheme. Criticism is made of the High Court's view that it was relevant that the Mendicity Institution did not have the ability to directly apply the CE scheme and secure future employment, because job security or future opportunity are not determinative factors in establishing whether a person is a worker for the purpose of EU law.

68. Counsel on behalf of the second appellant also refers to Section 23 of the Industrial Relations Act 1990, and its definition of a worker, which includes an apprentice. He submits that an apprentice is essentially a person who serves another for the purpose of learning, and that the second appellant's arrangement with the Mendicity Institution was similar; and that "*the provision of an employable skill is a form of remuneration*".

69. The respondents dispute that the second appellant was a worker. In particular they point out the contents of the letter of the 30 May 2018 from the Mendicity Institution, which confirmed that the second appellant was engaging with them on a voluntary unpaid basis and that she attended four days a week and participated in a variety of different voluntary activities. Being voluntary, they submit, there was no contract or other legal obligation that required her either to attend or to provide work or services to the Mendicity Institution. It suggests that the second appellant was not under the direction of control of the Mendicity Institution in the way that an employee would be, pursuant to a binding contractual obligation to do so in return for remuneration. It is clear that her engagement was on an

unpaid basis and that it does not approach or equate to employment. The Institution is not an approved CE scheme and does not operate or employ persons on CE schemes.

70. The respondents make a number of criticisms of the appellant's citation of the Industrial Relations Act, including that the term 'worker' for the purposes of EU law is to be given an EU law meaning and cannot turn on a statutory definition from the national legislation in any one Member State. They also submitted that the second appellant's activities could not be characterised as an apprenticeship on any understanding of the term.

71. The respondents distinguish the facts of *Levin* on the basis that the applicant in that case was working 30 hours a week as a chambermaid and it was clear that she was an employed person who was being paid for her services. The argument there by the Dutch and Danish governments had been that the level of wage received was relevant, but the court rejected the notion that worker status could be defined by the kind of employment or level of wages received. Central to the finding of worker status was the payment of wages and a genuine employment. The entire judgment was premised on genuine part-time employment having been established.

72. The respondents submit that in *Vatsoura*s, the court said that the essential feature of an employment relationship was that for a certain period of time a person perform services for and under the direction of another person in return for which he receives remuneration. The second appellant was not providing a service to the Institution; if anything, they were providing a service to her. She was not within the direction or control of the Institution. Her attendance was at all times voluntary and she could attend or not as she saw fit.

73. They cite *Lawrie-Blum v. Land Baden- Württemberg,* Case 66/85 concerning a trainee teacher who was under the direction and control of the institution to which he was attached throughout the period of his training placement. He had to teach pupils and was supplying services with an economic value and the payment he received could be regarded as remuneration in respect of his services. They also cite *J.M. Raulin v. Minister van Onderwijs en Wetenschappen ,* Case C-357/89 ECR 1-1027, which deals with questions related to the limited nature or duration or irregularity of the work in question. The question was whether a person was a worker in cases where he was on call for a period of eight months but had only been called on during that period to work for 60 hours, all of which are contained within a single period of three weeks. Although he was employed and paid, this was not necessarily sufficient to confer worker status. The Court of Justice said that the national court may, when assessing the effective and genuine nature of the activity in question, take account of the "*irregular nature and limited duration of the services actually performed under an on-call contract*". The fact that the person worked only a very limited number of hours may be an indication that the activities were clearly "*marginal and ancillary".*

74. Concerning *Steymann,* the respondents submit that while the case supports the proposition that remuneration may be in a form other than wages, the court did not find that the applicant was an employed person or worker but rather that he was engaged in the provision of services for remuneration. They also submit that the decision is difficult to reconcile with other decisions such as *Vatsouras* and *Lawrie-Blum*. They also rely on *Bettray*, discussed below.

75. The respondents also oppose the suggestion that the case should be referred to the Court of Justice on the "worker status" point, observing that the Supreme Court made a determination rejecting an appeal in *Munteanu* and declined to refer the matter, saying that

the principles were set out clearly in *Vatsouras.* They said that it was for the national courts to apply the test that has been clearly laid down by the CJEU.

Authorities relevant to the second issue

76. In *Levin,* the applicant was a British subject and wife of a national of a non-member country who applied for a residence permit in the Netherlands. She was refused on the grounds that her employment did not provide sufficient means for her support, equal at least to the minimum legal wage prevailing in the Netherlands. The CJEU held that the provisions of Community law relating to freedom of movement for workers also cover a national of a Member State who pursues, in another Member State, an activity as an employed person which yields an income level lower than that which is considered to be the minimum required for subsistence, whether that person supplements the income from this activity with other income so as to arrive at that minimum, or is satisfied with a means of support lower than the minimum, provided that he or she pursues an activity as an employed person which is "*effective and genuine*" and not "*marginal and ancillary".* The motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter state provided that he pursues or wishes to pursue such an effective and genuine activity. The case therefore supports the proposition that the fact that the level of income is below what is considered to be the minimum level of income in that Member State is not determinative of whether the person is classified as a 'worker'. The case also sets out a distinction between "*effective and genuine*" work and "*marginal and ancillary*" work which is frequently cited in subsequent cases.

77. In *Steymann,* a German national settled in the Netherlands and became a member of a religious community known as the Bhagwan Community. He performed plumbing work on

their premises and general household duties, and also took part in their commercial activities which included running a disco, a bar and a launderette. The Community provided for the material needs of its members irrespective of the nature and extent of their activities. He was refused a residence permit by the Dutch authorities on the basis that he was not pursuing an activity as an employed person. On a reference to the Court of Justice, the court said that participation in a community based on religion or another form of philosophy falls within the field of application of Community law only insofar as it could be regarded as an economic activity. The court said that from the documents before it, it appeared that the work carried out was a relatively important role in the way of life of the Community, and in turn, the Community provided for the material needs of its member. It concluded that it was impossible to rule out *a priori* that work carried out by members of the Community might constitute economic activity within the meaning of Article 2 of the Treaty. It reiterated what it had said in *Levin* that the work must be "genuine and effective" and not such as to be regarded as purely "marginal and ancillary". The works in question constituted economic activities insofar as the services which the Community provided to its members may be regarded as the indirect *quid pro quo* for genuine and effective work.

78. In *Bettray,* the court held that a national of a Member State employed in another Member State under a scheme in which the activities carried out are merely a means of rehabilitation or integration cannot on that basis alone be regarded as a worker for the purposes of Community law. The applicant was a German national who applied for a residence permit in the Netherlands, giving as a reason for his stay a period of residence with his fiancée and later marriage and a stay in a rehabilitation centre for drug addicts. Because of his drug addiction he was employed for an indefinite period under a system set up by social employment law. This area of law was a body of rules intended to provide work for

the purpose of maintaining, restoring or improving the capacity for work of persons who are unable to work under normal conditions. The court said:

> "[11.] It should be pointed out first of all that according to now established case-law the term 'worker' in Article 48 of the Treaty has a Community meaning and, inasmuch as it defines the scope of one of the fundamental freedoms of the Community, must be interpreted broadly (see, in particular, the judgment of 3 July 1986 in Case 66/85 *Lawrie-Blum v Land Baden -Wuerttemberg* [1986] ECR 2121).
>
> [12.] According to the same judgment, *that concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned, and the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.*
>
> [13.] It is clear both from the terms in which the principle of freedom of movement for workers is expressed and the place occupied by the provisions concerning that principle in the structure of the Treaty that those provisions guarantee freedom of movement only for persons pursuing or wishing to pursue an economic activity and that, consequently, they cover only the pursuit of *an effective and genuine activity (*see the judgment of 23 March 1982 in Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035).

[14.] It appears from the order for reference that persons employed under the scheme set up by the Social Employment Law perform services under the direction of another person in return for which they receive remuneration. The essential feature of an employment relationship is therefore present.

[…]

[17.] However, work under the Social Employment Law *cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned* and the purpose of the paid employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life".

(Emphasis added).

79. In *Collins,* the applicant entered the UK, in which he had worked 17 years earlier, with the intention of seeking paid employment there, and applied for jobseeker's allowance approximately one week after his arrival. This was refused but questions were referred in due course to the Court of Justice as to whether he was a worker and concerning the legitimacy of the residence requirement in connection with the benefit. The applicant had contended that his position in the United Kingdom as a person genuinely seeking work gave him the status of a 'worker' for the purposes of Regulation No 1612/68, Article 7(2) of which conferred upon him the same social and tax advantages as national workers. (This Regulation

concerned the free movement of workers in force but is no longer in force). The court held that the applicant was not a worker.

80. Recapitulating what it had said in earlier cases, the court said that the concept of a worker has a specific Community meaning and must not be interpreted narrowly. It said that any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return which he receives remuneration. Even if Mr. Collins' work in 1980 and 1981 satisfied those conditions, no link could be established between activity and his search for another job more than 17 years later. In the absence of a sufficiently close connection with the United Kingdom employment market, his position must be compared with that of any national of a Member State looking for his first job in another Member State.

81. The court also said that Community law drew a distinction between Member State nationals who had not yet entered into an employment relationship in the host Member State where they are looking for work, and those who are already working in the State or have worked there but are no longer in an employment relationship but are seeking work. It held that a person in the circumstances of the appellant was not a worker for the purpose of Regulation 1612/68. The case makes clear that an EU national who arrives in a Member State and seeks work there is not, by virtue of that fact alone, a worker within the parameters of EU law.

82. The principles from the above authorities may be summarized as follows:

(i) The concept of a "worker" is broadly defined, but it must conform to objective criteria which distinguish the employment relationship with reference to the rights and duties of the persons concerned, and the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration;

(ii) The fact that the activity yields an income level lower than that which is considered the minimum required for subsistence is not determinative, provided the activity is as an employed person which is "*effective and genuine*" and not "*marginal and ancillary"*;

(iii) If the activity is solely a means to rehabilitate or re-integrate the person so as to recover his or her capacity to take up ordinary employment or to lead as normal as possible a life, he or she cannot be considered a "worker";

(iv) A person who enters a Member State looking for work, who has not yet worked in that State, does not constitute a "worker" simply by virtue of his or her job-seeking status;

(v) Participation in a community based on religion or another form of philosophy falls within the field of application of Community law only insofar as it could be regarded as an economic activity; in some circumstances, where the person provides services to the community in return for accommodation, food and other basics of life may confer the status of "worker" upon the individual who provides the services.

Decision on the second issue

83. There is no doubt about the genuineness of the second appellant's search for employment and one can only admire and have sympathy for her efforts to do so in 2018,

faced as she was with a number of significant obstacles; extremely difficult family circumstances, little education, no qualifications, and limited knowledge of the English language. Indeed, the court was informed that as of the date of the appeal hearing, the second appellant was in fact in employment. However, the key question for the Court is the purely legal one of whether the activity she undertook with the Mendicity Institution for one month in April 2018 conferred worker status upon her within the meaning of EU law. It is clear, of course, that by virtue of jobseeking alone, she did not acquire the status of worker (*Collins).*

84. Did the second appellant's work with the Mendicity Institution confer worker status upon her? I am of the view that it did not. Notwithstanding that she was carrying out work and producing goods that the Mendicity Institution was selling to the public, the essential features of an employment relationship were lacking. The court in *Bettray* referred to *"the rights and duties of the persons concerned"*, and the reality of the second appellant's relationship with the Mendicity Institution was that she had no rights or duties as such. She could, and did, attend daily, but it was on a voluntary basis. This is made clear by the letter from the Institution dated the 30 May 2018, which refers to activities being of a *voluntary* nature. The court in *Bettray* said: *"the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in the terms of which he receives remuneration.".* While the appellant was presumably carrying out the work "under the direction" of another person, the essential feature of remuneration was absent. I do not consider that the provision of lunch and the hope of a place on a CE scheme in the future could be considered remuneration in the EU law sense. Even taking into account the decision in *Steymann,* and even leaving aside whether (as the respondents submit) it sits comfortably within the CJEU jurisprudence as a whole, it seems to me that there is a distinction between that case and the present one. In

Steymann, it appears that in return for his services to the Community, the appellant was obtaining his full 'bed and board', as it were. All his material needs were furnished by the Community in return for his services. Here, the second appellant was obtaining a daily lunch only.

85. As to the hope of a future place on a CE scheme by virtue of her work for the Institution, it seems to me that this aspect of the package, if one may call it that, points to the activity overall as amounting to what the court in *Bettray* described as "*a means of rehabilitation or reintegration for the person concerned"*. I accept that the court spoke of programmes which would enable those persons sooner or later to *recover* their capacity to take up ordinary employment or to lead as normal as possible a life, but it seems to me that the same logic applies whether one is "recovering" a capacity to take up employment or "developing" it for the first time. The evidence makes it clear that the work the second appellant did in the Mendicity Institution workshop was not itself part of a CE scheme, and at best might have provided a route into a CE scheme. It is not necessary to resolve the conflict of evidence as to the precise status of the relationship between the Mendicity Institution and Casadh. In my view, even if there were (taking the second appellant's case at its height) a hope of an entry to a CE scheme, this would not be enough to constitute remuneration (alone or in combination with the daily lunch).

86. Accordingly, I would uphold the decision of the trial judge in this regard. The concept of a "worker" in EU law is indeed a broad-ranging one, as shown by the authorities, but it is not sufficiently elastic so as to encompass the arrangement the second appellant had with the Mendicity Institution in April 2018.

Request for reference to the CJEU

87. The appellants request the Court to make a reference to the CJEU and seek to distinguish the *Munteanu* case (where both this Court and the Supreme Court declined to make any such reference) on the basis that the second appellant was actively seeking employment, whereas there was no such evidence in *Munteanu* and therefore any favourable decision from the CJEU would not have been of benefit to her. Counsel pointed out that both this Court and the Supreme Court in *Munteanu* had referred to the facts of the case before them in declining to make any reference to the CJEU.

88. I am of the view that a reference to the CJEU would not be appropriate as no point of EU law requires clarification. The first issue in this case concerns the classification of the JSA under EU law, and the jurisprudence of the CJEU makes it clear that (a) that the national courts are to conduct this task; and (b) how this task is to be conducted by the national courts. I do not see that this case raises any question of EU law that requires clarification.

89. Similarly, the second issue in the case is the question of whether the second appellant was a worker within the meaning of EU law. Again, the CJEU has provided clear guidance as to how this assessment is to be conducted and any reference would in effect amount to requesting the court to apply its own tests to the facts of this particular case.

90. For the avoidance of doubt, I do not see how the fact that the second appellant was actively seeking work (which I accept) makes any difference to the above. Even if it be a factual distinction between the two cases, it makes no difference to the central point, which is that EU law has clearly set out the criteria to be applied and there is nothing to be clarified by the CJEU: rather what arises is the application by the domestic court of the relevant principles to the particular benefit in national law.

The Constitutionality of Section 246(5) of the Social Welfare Consolidation Act 2005

91. In relation to their argument as to the constitutionality of the provisions of the 2005 Act, the appellants reference authorities such as *MacMathúna v. Ireland and the Attorney General* [1995] 1 I.R. 484 for the proposition that it could be a breach of the constitutional duty to the family where statutory provisions remove in its entirety any financial support for a family. They cite *Sinnott* for the proposition that protection of the family may require court intervention in certain extreme cases. They rely on equality under Article 40.1 citing a number of authorities, including *Donnelly v. Minister for Social Protection* [2021] IECA 155, a recent decision of this Court (delivered by Murray J.) in which the Court set out the relevant principles to be applied in the context of a discrimination claim in a social welfare case. The appellants concede that it is difficult to succeed in any constitutional challenge taken under Article 40.1 but argue that they are compelled to exhaust all constitutional arguments in order to be able to rely on the European Convention on Human Rights Act 2003 (*Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635.). They suggest in their written submissions that the comparator in this case is difficult to define, given the unique circumstances of the appellants in the case.

92. The respondents submit that it is not unconstitutional for the State to deny social assistance payments to applicants who do not have a right to reside in Ireland. They distinguish some of the cases referred to by the appellants, saying that there is no question of the removal of any support to which someone is entitled. They say that there is no basis for citing the guarantee of equality because the requirement of a right to reside as a precondition is a valid basis for differentiation between the different categories of person when it comes to the provision of social assistance.

93. The Court agrees with the respondents' submissions. There is no constitutional right for a national of another EU Member State to social assistance within this State. It is not a breach of the guarantee of equality to deny JSA to the second appellant because Irish citizens and persons with a right of residence within the State are not comparable to EU nationals who have no such right of residence. There is no question of removing a form of benefit to which the second appellant was "entitled". Nor is what is in issue a question of leaving the family destitute; indeed, the State authorities had gone to considerable trouble to assist the appellants in many ways, including with various kinds of financial and practical assistance. The appellants have failed to establish that the relevant provisions of the 2005 Act concerning the JSA in any way breach Article 40.1 of the Constitution.

The fourth issue: The ECHR argument

94. In relation to their argument in connection with the European Convention, the appellants rely on Section 3(1) of the European Convention on Human Rights Act 2003 ('the 2003 Act'), and the guarantees in relation to family life under Article 8 of the Convention, and the prohibition on discrimination in Article 14 of the Convention. The appellants in their written submissions refer in particular to their status as EU citizens and the fact that they are members of a vulnerable minority to whom the State is obliged to give special consideration: the first appellant is a double-amputee who is wheelchair-bound and permanently disabled; the third named appellant is in primary school; and the appellants live in emergency accommodation. In their written submissions, the appellants state that these provisions of the Social Welfare Consolidation Act 2005 make no allowance for people in situations similar to theirs, or for the individual circumstances of such people, and are therefore incompatible with the 2003 Act.

95. In relation to the Convention claim, the respondents point out that Section 3 applies to organs of State but that the legislation exempts the Oireachtas from the definition of organ of State. They point out in connection with Article 14 and discrimination, that there is objectively a reasonable justification and that the right to reside is a lawful and proportionate condition to accessing the social assistance payments provided by the State.

96. I am of the view that the appellants have failed to establish that the decision refusing JSA to the second appellant was in breach of Articles 8 or Article 8 in combination with Article 14 of the Convention. Insofar as there is differentiation between Irish citizens and persons with a right of residence within the State, on the one hand, and EU nationals who have no such right of residence, no basis has been shown to suggest that this constitutes discrimination prohibited by the Convention. Similarly, it has not been demonstrated that the denial of JSA to the second appellant in any way constitutes a breach of Article 8 within the meaning of the Convention jurisprudence; generic reliance upon the right to family life is not sufficient. It follows therefore that the appellant cannot succeed in their claim that Section 246(5) is incompatible with the State's obligations under the European Convention of Human Rights and its Protocols.

97. For the foregoing reasons, I would dismiss the appeal. As this judgment is being delivered electronically, Donnelly and Binchy J.J. have authorised me to indicate their agreement with this judgment.

98. As the respondents have been successful in opposing this appeal, my provisional view is that the respondents are entitled to the costs of the appeal. If the appellants wish to contend for a different order, they have liberty to apply to the Court of Appeal Office within 14 days for a brief hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, they may be liable for the additional costs of that hearing. In

default of receipt of such application within 14 days, an order in the terms proposed will be made.