THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 335

Appeal No.: 2019/307

Baker J.
Whelan J.
McCarthy J.

BETWEEN/

HANY HEMIDA

APPLICANT/
RESPONDENT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/
APPELLANT

JUDGMENT of Ms Justice Baker delivered on the 18th day of December, 2019

1. This is an appeal from the order of Barrett J. made on 31 May 2019 following delivery of a written judgment on 22 May 2019, *Hemida v. Minister for Justice and Equality* [2019] IEHC 363, by which he granted an order of certiorari quashing the decision of the Minister for Justice and Equality ("the Minister") of 5 October 2018 revoking the residence card of Mr Hemida ("the respondent").

2. The decision of the Minister was made pursuant to the powers contained in the European Communities (Free Movement of Persons) Regulations 2015 ("the 2015 Regulations") and Directive 2004/38/EC On the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, O.J. L158/77 30.4.2004 ("the Citizens Directive").

Background facts

3. The respondent is an Egyptian national who lives and works in Ireland. On 18 June 2013, he was granted permission to remain in the State for a period of five years pursuant to the European Communities (Free Movement of Persons) (No.2) Regulations 2006 ("the 2006 Regulations"), which were repealed by the 2015 Regulations. That permission was based on his marriage to a Union citizen, a national of Slovenia, whom I shall call "Ms C". The couple have no children, although Ms C has two children of another relationship. The couple married on 7 December 2012 and are now separated, but not divorced.

4. The fact that the couple are separated and not divorced means that the respondent must be treated as still married to his estranged wife, as stated by the Court of Justice in *Ogieriakhi v. Minister for Justice and Equality (Case C-244/13)* ECLI:EU:C:2014:2068, in which the Court stated that:

> "[T]he marital relationship cannot be regarded as dissolved as long as it has not been terminated by the competent authority, and that is not the case where the spouses merely live separately, even if they intend to divorce at a later date", at para. 37.

5. On 15 March 2017, the respondent notified the Minister that he and his wife had separated, but not when this happened. Thereafter, enquires were made by the Minister. By letter dated 14 May 2018, the Minister communicated to the respondent of his decision to revoke his permission to remain in the State, and following a review pursuant to the statutory provisions, and having received representations and engaged with the respondent, the Minister, by letter of 5 October 2018, notified the respondent that it was intended to upheld the 14 May decision to revoke his permission to be in the State.

6. The respondent has no primary right to reside in the State and his right derives from and rests on his estranged wife and her status as a person residing in the State in exercise of EU Treaty rights under the 2015 Regulations. In those circumstances, the rights of the respondent to continue to reside in the State involve an examination of the rights of his estranged wife to so do.

7. Regulation 6(3)(c) of the 2015 Regulations provide that where a Union citizen who previously worked, whether in employment or as a self-employed person in the State, ceases to be in employment or self-employment, he or she may continue to reside in the State in certain circumstances. For present purposes, the material condition is that he or she be in duly recorded involuntary employment after having been employed for more than one year and has registered as a job-seeker with the relevant office of the Department of Social Protection.

8. Ms C worked for six months in Ireland in 2013 and has since then been in receipt of social welfare payments. The evidence before the decision maker accordingly was that Ms C had not worked in the State, whether as a self-employed or employed person, for more than one year. She is at present, and has been for some time, in receipt of jobseeker's allowance from the Department of Social Protection.

9. On those facts Ms C could not have been said to be resident in the State in exercise of her Union citizen rights in accordance with r. 6 of the 2015 Regulations.

The High Court judgment

10. The trial judge found that the decision could not stand on account of a failure to reason or, as he put it at para. 2, "reason through" the fact that the respondent's estranged wife was and continued to be in receipt of social welfare payments and that the decision of the Minister was "unreasonable, even irrational" in that it failed to reconcile the fact that another department of State had concluded that Ms C did enjoy a primary right of residence in Ireland as she was and continued to be in receipt of social welfare payments, or explain why the Minister had come to a contrary view.

11. The short but precise decision of Barrett J. centres on his conclusion that neither the respondent nor the judge himself could understand why the Department of Social Protection had acted as it did.

12. On the separate but linked question of whether the respondent could provide further documentation relating to the residence status of his estranged wife, Barrett J. took the

view that, as the respondent's evidence was that he did not have contact with his estranged wife, he could not reasonably be expected to provide any further documentation which was in control of the Department of Social Protection.

The appeal

13. The Minister appeals on fifteen pleaded grounds which may be grouped as follows:

a) that the trial judge failed to give appropriate consideration to the legal test set out in r. 6(3)(c) of the 2015 Regulations in that it is the Minister for Justice and not the Minister for Social Protection who makes the assessment for the purposes of revoking a residence card, and that the differing functions of the two Departments was not taken into account by the trial judge;

b) that the trial judge erred in fact and law in coming to the conclusion that the Minister for Social Protection must have determined that Ms C was lawfully resident in the State for the purposes of r. 6(3)(c) of the 2015 Regulations when on the evidence before the Minister and that before the High Court was that the Union citizen could not have been lawfully resident in the State in exercise of her EU Treaty rights;

c) that there was no evidence before the High Court that the Department of Social Protection had concluded that the Union citizen was exercising EU Treaty rights and the High Court had no information regarding the basis of the decision of the Department of Social Protection;

d) that the approach taken by the Department of Social Protection has no bearing on the power of the Minister pursuant to r. 6(3)(c) of the 2015 Regulations, and that any conflict must be resolved in favour of the decision of the Minister;

e) that the reasons given met the test in the authorities that the obligation is to give reasons which are rational, cogent and adequate to ensure transparency in the decision-making process, so that the receiving party consider whether to appeal or review as the case may be: The Supreme Court decision in *Connelly v. An Bord Pleanála* [2018] IESC 31.

The arguments

14. The respondent relies primarily on an argument that there must be consistency in decision making between different organs of State and the decision of the Minister was not coherent for that reason. It is argued that the decision maker had failed to reconcile the fact that one department of State had taken or had appeared to take the view that the respondent's estranged wife was lawfully resident in the State.

15. It is not argued that the Minister was obliged to follow the decision of the Department of Social Protection, and it is accepted that the Minister may depart from the decision or views of that Department, but rather that the reasons given for so departing must be coherent and consistent with the obligation and purpose of the giving of reasons in administrative decision making.

16. The respondent did not have access to the personal data of his wife or the results of the investigation said to have been carried out by the Minister in the Department of Social Protection before the decision was made. In that context, it is argued by the respondent that there is no basis on which he or the High Court, on a judicial review, could determine whether appropriate checks and investigations were carried out for the purposes of making the assessment.

17. The Minister responds that the evidence before him that the Union citizen was in receipt of social welfare payments was uncontroverted, and that the Minister was not constrained in his decision by any view, or apparent view, taken by another government department regarding the status of Ms C, especially as the respondent had not offered contrary evidence.

18. It is argued that the Minister makes the assessment under immigration rules and that the decision of the Department of Social Protection does not need to be reconciled.

19. Other arguments will appear in the course of the judgment.

20. It is convenient to first set out the 2015 Regulations.

The 2015 Regulations

21. The 2015 Regulations came into force on 1 February 2016 and are not materially different from those of the 2006 Regulations.

22. Regulation 6(3)(a) of the 2015 Regulations confers on a Union citizen the right to reside in the State for a period of longer than three months, in certain circumstances, and provided the conditions are met. Regulation 6(3)(a), in its material parts, provides:

> "A Union citizen to whom Regulation 3(1)(a) applies may reside in the State for a period that is longer than 3 months if he or she—
>
> (i) is in employment or in self-employment in the State,
> (ii) has sufficient resources for himself or herself and his or her family members not to become an unreasonable burden on the social assistance system of the State, and has comprehensive sickness insurance in respect of himself or herself and his or her family members,
> (iii) is enrolled in an educational establishment accredited or financed by the State for the principal purpose of following a course of study there and has comprehensive sickness insurance in respect of himself or herself and his or her family members and, by means of a declaration or otherwise, satisfies the Minister that he or she has sufficient resources for himself or herself and his or her family members not to become an unreasonable burden on the social assistance system of the State".

23. The present case concerns r. 6(3)(c) and (d) of the 2015 Regulations:

"(c) Where a person to whom subparagraph (a)(i) applies ceases to be in the employment or self-employment concerned, that subparagraph shall be deemed to continue to apply to him or her, where:

(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 Protection,
(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 Protection, or
(iv) he or she takes up vocational training and, unless he or she is involuntarily unemployed, the training relates to his or her previous employment.

(d) In a case to which subparagraph (c)(iii) applies, subparagraph (a)(i) shall be deemed to apply to the person concerned for 6 months after the cessation of the employment concerned only, unless the person enters into employment or self-employment within that period."

24. The view taken by the Minister was that Ms C did not satisfy r. 3(c)(iii) of the 2015 Regulations, as she had not been in employment for more than one year prior to finding herself unemployed. The claim of the respondent to be permitted to remain in the State was based on the fact that his wife has been long-term in receipt of social welfare payments, including jobseeker's allowance within the State. Therefore, the Minister's analysis of his application was confined to those factors. It was not suggested or argued that Ms C might be lawfully resident in the State on any other basis.

25. On the facts submitted by the respondent to the Minister, Ms C was employed in the State for less than a year. No evidence was adduced that she suffered any illness or accident or that she left work to take up vocational training. On a reading of the 2015 Regulations at best, she could have remained in the State under r. 6(3)(c)(iii) for six months after the cessation of her employment unless she entered employment or self-employment within that period, under r. 6(3)(d), and there was no evidence that she did.

26. Therefore, on the evidence, it appears that by 2014 Ms C ceased to be entitled under r. 6(2)(d) of the 2015 Regulations to continue to reside in the State. That had the effect that the right of the respondent, which derives from and is dependent upon the right of his estranged wife, ceased thereafter.

27. The recent decision of the Court of Justice in *Neculai Tarola v. Minister for Social Protection (C-483/17)* ECLI:EU:C:2019:309, analysing the provisions of the Citizens Directive in light of the stated objective of protecting a Union citizen who had been employed or self-employed in the host Member State, confirmed the position that he or she retains the status of worker indefinitely if he or she is unable to work as the result of

illness or accident, or has become involuntarily unemployed, but only after being in employment in the host Member State for more than one year.

28. The question may be distilled to the question whether the fact that Ms C is in receipt of social welfare amounts to an acceptance of, or a positive decision by, the Department of Social Protection that Ms C is lawfully resident in the State and whether that fact is relevant to, or determinative of the decision made by the Minister for the purposes of the 2015 Regulations.

29. The trial judge concluded that, as a person must be habitually and lawfully resident in the State to lawfully receive jobseeker's allowance, and as Ms C was in receipt of social welfare payments, an organ of State must have taken the view that she was lawfully and habitually resident here and that that decision could not readily be reconciled with the view taken by the Minister under the 2015 Regulations.

30. Barrett J. correctly noted that the Minister making a decision under the 2015 Regulations was entitled to come to his own conclusions and could come to a contrary conclusion to that arrived at by the Department of Social Protection, but that the reasoning was flawed on account of the failure to reconcile the different approach of another department of state.

Abouheikal v. Minister for Justice & Equality

31. Both parties relied in argument on the recent decision of Humphreys J. *Abouheikal v. The Minister for Justice and Equality* [2019] IEHC 124, which I propose to analyse in some detail.

32. Humphreys J. was considering the position of Mr Abouheikal, also a citizen of Egypt, who had been married, was separated, but not divorced from his Union citizen spouse. Mr Abouheikal's spouse had worked for twenty-six weeks in the State and had been in receipt of State benefits thereafter. Judicial review of the decision of the Minister to refuse the non-Union citizen a right to continue to reside in the State was sought, *inter alia*, on the ground that there was an apparent inconsistency between the approach of two departments of State.

33. Humphreys J. noted that the Minister had material before him that the estranged wife of the applicant was not in employment for one year and did not re-enter employment within six months of the end of her previous employment and this evidence pointed to the fact that she had ceased to exercise her EU Treaty rights at the relevant time. Humphreys J. said that it would appear as a corollary that she may have been receiving payments to which she was not entitled:

> "Turning to the social welfare aspect, it is accepted that it would appear as a corollary of the Minister's position as to the wife's entitlements here, that the Department of Social Protection was making payments to which the wife was not entitled. One wonders if there is any way to avoid such situations in future, either by greater consultation with the Department of Justice and Equality or perhaps

preferably by the Department of Social Protection more systematically and correctly applying the requirements of the 2015 regulations", at para. 17.

34. The argument made before Humphreys J. was that the Minister had failed in not making a finding as to the exact legal status of the estranged wife of the applicant and he concluded as follows:

> "It was argued that the Minister did not make a finding as to the exact legal status of the wife, so he could not lawfully make a finding in respect of the derived right. However, I would uphold the Minister's position that he is not obliged to articulate a concluded view of her status. His position is that he is not aware of lawful status but there may be other factors he is not aware of, nor is he obliged to seek to remove her even if she is there unlawfully. The Minister's broad discretion in immigration terms means he is allowed to tolerate ambiguous situations if he is so minded", at para. 18.

35. Humphreys J. refused judicial review as the conditions for exercising EU Treaty rights had not been met and the decision was therefore not unlawful.

36. Barrett J. distinguished that decision as the Department of Social Protection was perceived by Humphreys J. as having acted erroneously, but Barrett J. concluded that he himself was not able to adjudge whether the Department of Social Protection had acted correctly and was not prepared to accept that there was a presumption in favour of the correctness of one or another Department.

37. I accept the argument of counsel for the respondent that the decision of Humphreys J. in *Abouheikal v. The Minister for Justice and Equality* can be distinguished on the facts because of the wife of Mr Abouheikal was not claiming social welfare payments at the date of the decision. However, the real point of difference is the extent of the alleged inconsistencies between the approach taken by one Minister of Government and that taken by another, precisely the point which is central in the present case and which was not central to the decision of Humphreys J.

Reasons

38. I turn now to consider whether Barrett J. was correct that the reasons given by the Minister do not stand up to scrutiny and are not sufficient to meet the test from the authorities that they be clear and based on the evidence before the decision maker and be matters of which the respondent was aware.

39. The conclusion of Barrett J. that he could not adjudge whether the Department of Social Protection had acted correctly does not fall for consideration. The decision of that body is not under challenge, and even if one assumes that the Department of Social Protection did act correctly in continuing to pay jobseeker's allowance to Ms C, the evidence presented by the respondent would suggest otherwise, and it was for him to adduce the evidence from his estranged wife from whom it seems he separated only in February 2017.

40. The respondent does submit that his relationship with his estranged wife is poor and she has not afforded him any assistance in his application. Be that as it may, he offered no explanation for apparently not asking her consent to the release to him of certain information from the Department of Social Protection. She may have refused, she may have had good reason to refuse, but the onus lay on the respondent to establish the facts on which the Minister could come to a determination.

41. In that regard, I note that the initial correspondence of 8 November 2017 from the Minister to the respondent sought up to date evidence of his right to reside in the State including evidence of Ms C's activities in the State. That letter was sent seven months after he notified the Minister of the fact that he and Ms C had informally separated and that she had left their home a month before. The respondent provided one receipt from the Department of Social Protection dated 3 October 2017 showing that Ms C was in receipt of jobseeker's allowance but no more. He was, on his own evidence, living with her in the period from the date of their marriage on 7 September 2012 until they separated four and a half years later in February 2017. He must, in those circumstances, be assumed to be aware of her work history, of whether she returned to employment within the statutory period provided in r. 6(3)(d) of the 2015 Regulations or whether, after she ceased to be in employment, she took up vocational training. One must assume that the evidence he provided to the Minister was correct, and it inexorably pointed to the fact that Ms C had worked for less than twelve months in the State and did not take up employment thereafter.

42. The reasoning is clear, and the respondent was informed of the exact number of contributions made by his estranged wife and when these were made, of the social welfare claims and payments made to her in respect of her two children and her dependent partner, and the nature of those payments. The respondent was also told that his estranged wife had not worked in the State since 2013. The conclusion which the Minister drew from this evidence was that she had not been resident in the State "in conformity with the Regulations since 2013", with the result that the derived right had ceased. The reasoning of the Minister cannot be faulted on account of absence of detail and absence of explanation.

43. I conclude the appeal must succeed on that ground, but it overlaps to a large extent with the argument that the decision was irrational or failed to accord with reason.

Discussion on reasonableness/irrationality

44. The Union citizen family member must be exercising rights as a Union citizen and either be economically active or lawfully in receipt of social welfare payments in order that the non-EU family member be entitled to rely on r. 6. The fact that Ms C was and continues to be in receipt of social welfare payments, while it might be evidence which supports the application of the respondent is not determinative of the decision of the Minister under the 2015 Regulations.

45. The Minister was entitled to, and did in fact, make his decision under the Regulations of 2015, and the evidence before him. The reasons the Department of Social Protection

continues to pay jobseeker's allowance to Ms C are not clear, but in my view, they do not need to be. The Minister making the decision under the 2015 Regulations is not bound by any determination of the Department of Social Protection, and that is so even if it can be shown, as it has not been shown, that the Minister for Social Protection has made a recent and active decision to continue to pay jobseeker's allowance to Ms C. There was no evidence that the Department of Social Protection had made a conclusion or a determination as to Ms C's entitlements, and it may well be that inertia has led to the continued receipt by her of payments.

46. It cannot be said, as is pleaded at para. (iii) of the statement of grounds, that the Minister failed to have regard to the fact that Ms C was in receipt of jobseeker's allowance, but rather it is the case that that fact was in evidence before the Minister but was considered by him not to amount to a determination that she was lawfully in the State.

47. In this argument some consideration is to be given to the contention made by the respondent that the Minister failed to produce the records from Department of Social Protection to support his findings.

The social protection records

48. The decision of the Minister sets out in some detail the evidence gleaned from the search in the records of the Department of Social Protection and explains in detail why the Minster decided that the evidence from that Department, even taken at its height, pointed to the fact that Ms C had not worked in the State in the manner required by the 2015 Regulations so that she, and anyone claiming through her, continued to have the right to reside here.

49. It is argued that the evidence taken from the files in the Department of Social Protection ought to have been put before the High Court, so they could be properly scrutinised. It is said that the Minister ought to have explained by reference to the decision of the Department of Social Protection why that Department had taken the view it did regarding the various welfare payments made, and which continue to be made to Ms C.

50. The Minister did not file an affidavit in the High Court, but the statement of opposition pleads, at para. 5, that he had conducted a "thorough search" within the Department of Social Protection and that this has shown that the Union citizen has not made employment related contributions since 2015, that she has been in receipt of various social welfare payments since 5 September 2015, and that the evidence gleaned shows that she has not been exercising EU Treaty rights within the meaning of r. 6(3)(a) of the 2015 Regulations. An affidavit of verification is required by o. 84 r. 22(4) of the Rules of the Superior Courts and accordingly, the fact of that search is not in evidence.

51. Had the Minister's statement of opposition disclosed the opposite fact, namely that investigations had disclosed that Ms C had, in fact, been working within the State and had on the evidence available from a search in the files been shown to be exercising or purporting to exercise her rights as an Union citizen, and had the respondent required sight of even redacted copies of those documents, the position might have been different

as the evidence on which the Minister based his decision might have been useful or indeed central to his application for a review of a refusal. However, on the face of the pleadings, the Minister's pleaded case is that Ms C may not have been exercising her rights as an Union citizen, and further disclosure is unlikely to have assisted the respondent in any way.

52. There may be reasons derived from the personal privacy right of Ms C that would prevent such disclosure, but no argument is made by the respondent that the information is not correct and, in the absence of some evidence to suggest that further scrutiny was justified, I see no error in the approach of the Minister to the apparent inconsistencies between the two decisions of different Departments.

53. There may be cases where it would be necessary to put in redacted or other suitable form the information regarding the work or social welfare history of a Union citizen from whose rights an applicant claims derived rights, but in the present case the respondent on his pleaded case and his sworn affidavit evidence, resided with his estranged wife until 2017 and he was in those circumstances in a position to advance some assertion or evidence, however weighty, that might at least throw some doubt on the evidence gleaned by the Minister from the files in the Department of Social Protection. He could for example have asserted that Ms C had continued to work after 2013 and that while he and she lived together she had worked for longer than the asserted few months or had undertaken a course of vocational study after she ceased working.

54. Therefore, I consider that a proportionate response to the question of disclosure is that that the Minister was not required to disclose these documents obtained through the Department of Social Protection as nothing was to be gained from that disclosure.

Consistency in decision making

55. There remains the argument made by his counsel that the respondent has found himself with a decision that is incoherent when read alongside the decision of the Department of Social Protection. His counsel argues that there is a lack of coherence in the administrative decision making, and that some consistency at least ought to be found between the different decisions made by different Departments of Government regarding Ms C and her activities in the State in the relevant times.

56. Reliance is placed on the dicta of Clarke J. in *D.E. (an Infant) v. Minister for Justice and Equality* [2018] IESC 16, [2018] 3 IR 326, at para 28:

> "There may well be merit in the publication of criteria by reference to which general statutory discretions or adjudications are likely to be exercised or made. The more that a relevant discretion may come, in practice, to be exercised by a number of different persons or groups of persons the more important it will be, in the interests of consistency, that there be some guidance as to how the power concerned should be exercised in practical terms. While it will never be possible to achieve absolute consistency, achieving an even-handed approach to the exercise of a statutory power is undoubtedly consistent with good administration".

57. It is argued that the absence of such consistency in the present case means that the decision of the Minister is unsafe.

58. It is argued that there was a failure to address the issue of consistency "head on", to borrow the *dicta* of Belcher J. in *Dear v. Secretary for State for Communities and Local Government* [2015] EWHC 29 (Admin), at para. 32, and that any express departure from the decision of the Department of Social Protection had to be fully and coherently reasoned.

59. The fact that Ms C seems to have been in receipt of lone parent allowance during the time when she and the respondent were cohabiting as a married couple did not form part of the backdrop to the decision and a consideration of the case on that basis might arguably have been unduly prejudicial to the respondent, having regard to his assertion in correspondence that he was not aware of that fact.

60. The decision was made on a more narrow basis, namely that the evidence presented by the respondent confirmed by a search of the files in the Department of Social Protection, showed that Ms C could not have satisfied the test set out in the 2015 Regulations having regard to the short period of employment she has had in the State. The respondent did not raise any doubt about that evidence. I do not consider in those circumstances the Minister needed to reconcile the approach taken to what that might appear to be, but does not inevitably fall to be considered as, a contradictory decision of the Department of Social Protection.

Discussion on coherence

61. It cannot be stated, as is argued by counsel for the respondent, that the Minister failed to take into account the fact that Ms C is and has been in receipt of jobseeker's allowance. The Minister did take it into account, chose not to make a determination that the approach of the Department of Social Protection was incorrect, but made a separate determination that the test set out in the 2015 Regulations had not been satisfied on account of the uncontested facts regarding the length of time during which Ms C had worked in the State. The Minister did not have to decide if the continued payment to Ms C of jobseeker's allowance was correctly made, and that was not a decision for this Minister but for another Minister of Government. It goes without saying that to make that decision would have involved Ms C being invited to make submissions and would have been a matter with which the respondent would not be engaged.

62. The position adopted by the respondent was to call upon the Minister to explain what is seen as being a discrepancy or inconsistency, but without being in a position himself to advance any evidence that would throw doubt on the evidence put before him from the investigation carried out by the Minister in the files of the Department of Social Protection.

63. It is true that, from one perspective, the decisions may have the appearance of being contradictory, but the decision of the Minister challenged in these proceedings is based on the evidence gleaned by the Minister and in respect of which the respondent has not

presented contrary evidence or even a contrary factual scenario. Again, had the respondent said that, to the best of his recollection, his estranged wife had worked for more than a year in the State, or that she had taken up vocational study, his argument that the decision of the Minister was not based on fact might have carried some weight. However, he did not to do this and in effect he sought to reverse the burden of proof merely on account on what he says is an ostensible contradiction between the approach of two different Departments of Government.

64. I conclude that the trial judge was incorrect and that the decision of the Minister was based on factual evidence which was not contradicted by the respondent, was made in the exercise of a discrete statutory process, was sufficiently and coherently reasoned, and was a reasonable conclusion in the light of the evidence.

65. The respondent did not dispute the factual basis on which the Minister made his decision, but rather sought to argue that the Minister could not make that decision because another arm of State might well have had reasons to continue to pay jobseeker's allowance to Ms C.

66. The respondent did not contradict any of the chronology or factual matters identified by the Minister, although he did say that he was unaware that his estranged wife appeared to be claiming one parent allowance while they were cohabiting.

67. To that extent, this judicial review is primarily about the weight of evidence before the trial judge.

68. While counsel for the respondent argues that the Citizens Directive must be applied with a degree of flexibility, in reliance on the decision of the Court of Justice in *Pensionsversicherungsanstalt v. Brey (C-140/12)* ECLI:EU:C:2013:565, I consider that this decision means that the Member States had a margin of appreciation in the manner in which the directive was incorporated and implemented in national law, but does not support an approach that the application of the provisions imports such a wide discretion as to lead in the present case to a finding against the weight of the evidence before the decision maker.

69. It is clear, and I accept this argument of counsel for the respondent, that Ms C could be lawfully resident in the State on several bases. But the respondent, on his own evidence, continued to reside with his estranged wife until early 2017 and he must know the basis on which she continued to reside here and whether she was studying, whether she was ill, whether she, in fact, worked so that the data obtained by the Minister from the Department of Social Protection files is incorrect.

70. The argument of counsel for the respondent seems to me to wrongly seek to reverse the burden of proof, and the burden remains on the respondent to show that the decision is invalid for one or other of the pleaded reasons. He cannot say that the decision is invalid merely on account of the fact that no evidence has been adduced to show that Ms C is lawfully residing in the State, when all of the evidence the Minister says he relied on

shows the contrary proposition. The burden lies on the respondent to present sufficient evidence, even without documentary proof, that matters are not as they appeared to the Minister.

Conclusion and summary

71. In essence, the difficulty that the respondent sought to identify in the decision of the Minister is the fact that the Minister for Social Protection has continued to provide his estranged wife with ongoing social welfare payments, and it is argued that this is inconsistent with the decision of the Minister. The decision that the estranged spouse of the respondent was not resident in the State and exercising her EU Treaty rights, and that the derived right of the respondent must fall on that account, was made in consideration of the distinct and different test set out in the 2015 Regulations.

72. I consider that the decision of the Minister is not flawed and that the trial judge was incorrect to conclude otherwise. The Minister made the decision on the uncontroverted evidence before him that Ms C had worked in the State for six months only and that evidence did not support a proposition that she was residing in the State in exercise of her Treaty rights. There was no error, therefore, and the continued making of social welfare payments to Ms C was not determinative of the residence application.

73. For these reasons, I consider that the appeal should be allowed.