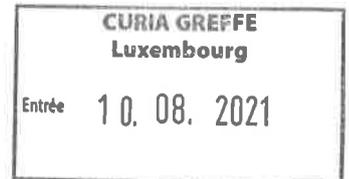


**THE COURT OF APPEAL**

Court of Appeal Record Number: 2020/152
High Court Record Number: 2019/748 JR

Donnelly J.
Ní Raifeartaigh J.
Binchy J.

IN THE MATTER OF THE CONSTITUTION
IN THE MATTER OF THE EUROPEAN CONVENTION ON
HUMAN RIGHTS ACT 2003

BETWEEN/

GV

APPLICANT

-AND-

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

RESPONDENTS

REQUEST FOR A PRELIMINARY RULING

ARTICLE 267 TFEU

To:
The Registrar,
Court of Justice of the European Union
L-2925 Luxembourg

The Court of Appeal of Ireland (Ms. Justice Donnelly, Ms. Justice Ní Raifeartaigh and Mr. Justice Binchy) hereby refers the questions set out below to the Court of Justice of the European Union (“the Court” or “CJEU”) for preliminary ruling in accordance with Article 267 TFEU.

THE QUESTIONS REFERRED

1. The Court of Appeal hereby refers the following questions to the Court:
 - (i) Is the derived right of residence of a direct relative in the ascending line of a Union citizen worker pursuant to Article 7(2) of Directive 2004/38/EC conditional on the continued dependency of that relative on the worker?
 - (ii) Does Directive 2004/38/EC preclude a host Member State from limiting access to a social assistance payment benefit by a family member of a Union citizen worker who enjoys a derived right of residence on the basis of her dependency on that worker, where access to such payment would mean she is no longer dependent on the worker?
 - (iii) Does Directive 2004/38/EC preclude a host Member State from limiting access to a social assistance payment benefit by a family member of a Union citizen worker who enjoys a derived right of residence on the basis of her dependency on that worker, on the grounds that payment of the benefit will result in the family member concerned becoming an unreasonable burden on the social assistance system of the State?

The Right of Residence under Directive 2004/38/EC

2. Directive 2004/38/EC lays down the conditions that govern the exercise of the right of free movement and residence by Union citizens and their family members. The right of residence contained in Directive 2004/38/EC is framed by reference to certain conditions being fulfilled.
3. Article 3 of the Directive establishes its “*beneficiaries*”, which includes Union citizens who move to or reside in a Member State and their family members. Article 2(2) defines a “*family member*” as:
 - (a) The spouse;

- (b) The partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
 - (c) The direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
 - (d) The dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).
4. The applicant in the main proceedings (the respondent in the appeal), GV, is a family member within Article 2(2)(d), i.e. she falls within the definition of a dependent direct relative in the ascending line.
5. Chapter III of the Directive establishes the scope of the right of residence that may be exercised by those who qualify under the terms of the Directive. Article 6 grants a right of residence for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
6. Article 7 provides for residence for a period longer than three months and can be invoked where Union citizens:
- (a) are workers or self-employed persons in the host Member State; or
 - (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
 - (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
 - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they 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 satisfies the conditions referred to in points (a), (b) or (c).

7. Article 14 of Directive 2004/38/EC provides for the continuation of the right of residence:

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

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

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

8. Directive 2004/38/EC does not directly regulate access to the social security systems of Member States. It permits Member States to restrict access to their social security systems and to exclude those persons who do not have a right to residence from being able to benefit from access to their social security systems. Recital 10 states:

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

9. Furthermore, Recital (21) states:

(21) 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.

10. Also relevant in this context is Article 24 of the Citizenship Directive, which provides:

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

The European Communities (Free Movement of Persons) Regulations 2015

11. The obligations arising from Directive 2004/38/EC have been transposed into Irish law by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015) (*“the 2015 Regulations”*).

12. Article 3(5)(b) of the 2015 Regulations defines a *“qualifying family member”* as:

(i) the Union citizen’s spouse or civil partner,

- (ii) a direct descendant of the Union citizen, or the Union citizen's spouse or civil partner and is –
 - (I) under the age of 21, or
 - (II) a dependent of the Union citizen, or of his or her spouse or civil partner, or
- (iii) a dependent direct relative in the ascending line of the Union citizen, or of his or her spouse or civil partner.

13. The entitlement to reside in Ireland is established by Article 6 of the 2015 Regulations with Article 6(3)(a) stating:

- (3) (a) 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,
- or
- (iv) subject to paragraph (4), is a family member of a Union citizen who satisfies one or more of the conditions referred to in clause (i), (ii) or (iii).

14. Article 11(1) of the 2015 Regulations provides for the retention of a right of residence in Ireland. It states:

11. (1) A person residing in the State under Regulation 6, 9 or 10 shall be entitled to continue to reside in the State for as long as he or she satisfies the relevant

provision of the regulation concerned and does not become an unreasonable burden on the social assistance system of the State.

FACTS GIVING RISE TO REFERENCE

15. The factual background to the dispute giving rise to the questions referred is as follows. GV is a national of Romania and the mother of AC, a Romanian citizen resident and working in Ireland. AC is also a naturalised Irish citizen.
16. GV has resided in Ireland on different occasions, including between 2009 – 2011, after which she returned to Romania. It appears from the information contained in her application for Disability Allowance that in the period 2011 – 2016, she moved between Ireland, Romania and Spain. The position of the Minister for Employment Affairs and Social Protection (*“the Minister”*) is that the information that GV has provided in relation to this period has varied from time to time.
17. GV states in her affidavit that she is separated from her husband for the past 15 years and during this period has been financially dependent on her daughter who periodically sent her money transfers. GV relies on evidence of Western Union transfers in 2007, 2008, 2011 and 2016 to support this assertion.
18. In 2017, GV returned to Ireland and has resided here since that time. GV states in an affidavit sworn in these proceedings that during 2017 she suffered degenerative changes in her arthritis. On 28 September 2017, i.e. shortly after her return to Ireland, GV made an application for Disability Allowance under the Social Welfare Consolidation Act 2005, as amended (*“the 2005 Act”*). GV asserts that she is lawfully resident in Ireland as the dependent parent of an EU citizen worker. It is the position of the Minister that GV is resident in Ireland as the dependent family member in the ascending line of an EU citizen worker and the lawful nature of that residence is dependent on her continuing to fulfil the conditions of her residency.
19. In November 2017, GV was allocated a Personal Public Service Number by the Minister. A Personal Public Service Number is a unique reference number allocated to persons resident in Ireland by which social welfare benefits are accessed.

20. The application for Disability Allowance was initially refused by decision of 27 February 2018. That decision was appealed and on 12 February 2019 the appeal was disallowed. On each of these occasions it was determined that GV did not have a right of residence in Ireland. Following an application made on behalf of GV by Crosscare, a non-governmental organisation, a review of the appeal decision was carried out. By decision of 2 July 2019, it was concluded that GV had a right to reside but was not entitled to receive social welfare assistance.

21. An application was subsequently made to the Chief Appeals Officer to revise the decision of the Appeals Officer. The decision in that review issued on 23 July 2019, in which it was concluded that GV was not entitled to Disability Allowance. The Chief Appeals Officer noted that the Appeals Officer was “*satisfied that [GV] was a dependent direct relative in the ascending line of a Union citizen who is a worker in Ireland*”. It was also noted that the Appeals Officer was satisfied that GV had “*established that the dependency existed prior to [GV] joining her daughter in Ireland*”. The Chief Appeals Officer set out the following conclusion in relation to GV’s right to reside:

“However, in accordance with the Directive 2004/38/EC and the Regulations of 2015 (S.I. 548 of 2015) giving further effect to the Directive, the right to reside is not unconditional. The Directive and the Regulations draw a distinction between economically active persons and those who are not.

Article 11 of S.I. 548 of 2015, dealing with the retention of rights of residence, provides:

A person residing in the State under Regulation 6, 9 or 10 shall be entitled to continue to reside in the State for as long as he or she satisfies the relevant provision of the regulation concerned and does not become an unreasonable burden on the social assistance system of the State.

While [GV] is residing in the State under Article 6 the right to reside is not unconditional and she may continue to reside for as long as she satisfies the

provisions of Article 6 and does not become an unreasonable burden on the social assistance system of the State.

I therefore do not consider that the Appeals Officer has erred in law on the grounds submitted by Ms. Hetherington on behalf of [GV] and in those circumstances I must decline to revise the decision of the Appeals Officer.”

The reference in the passage above to “*Article 6*” is a reference to regulation 6 of the 2015 Regulations referred to above, and not to Article 6 of the Directive. Regulation 6(3)(a) corresponds to and transposes Article 7 (1) of the Directive into Irish law.

DISABILITY ALLOWANCE – RELEVANT LEGISLATIVE FRAMEWORK

22. Disability Allowance is established by Chapter 10 of Part 3 of the 2005 Act and is paid to a person who meets the criteria established by section 210 of the 2005 Act namely:

- (a) The person has attained the age of 16 years but has not attained pensionable age.
- (b) The person is, by reason of a specified disability, substantially restricted in undertaking employment of a kind which, if the person was not suffering from that disability, would be suited to that person’s age, experience and qualifications, whether or not the person is availing of a service for the training of disabled persons under section 68 of the Health Act, 1970.
- (c) The person’s weekly means, subject to subsection (2), do not exceed the amount of disability allowance (including any increase of that allowance) which would be payable to the person under Chapter 10 if that person had no means.

23. Disability Allowance is a social assistance payment that is paid without an individual having to have made any social insurance contributions. It is a payment which is funded from general taxation and, for domestic purposes, is classified as an allowance payment.¹ Disability Allowance is classified as a special non-contributory cash benefit

¹ The social welfare system in Ireland comprises universal payments (e.g. child benefit), benefits (which are linked to the payment of Pay Related Social Insurance contributions and funded by the Social Insurance Fund) and allowances (which are not linked to the payment of any PRSI contributions and which are funded from general taxation).

for the purpose of Regulation (EC) 883/2004. It is listed in Annex X to Regulation 883/2004. The purpose of the payment is to protect against poverty (see *Petecel v. The Minister for Social Protection* [2020] IESC 41 at §29). A total of €1.6 bn was expended by the Irish State in respect of the payment of Disability Allowance in 2018.

24. To qualify for the payment of Disability Allowance a person is required to meet eligibility criteria, including medical criteria and a means test. The medical criteria require that the person be, by reason of a specified disability, substantially restricted in undertaking employment of a kind which, if the person was not suffering from that disability, would be suited to that person's age, experience and qualifications, whether or not the person is availing of a service for the training of disabled persons under section 68 of the Health Act, 1970. The means test includes a calculation of all the means in accordance with the rules contained in Schedule 3 to the 2005 Act. This includes a calculation of all the income and capital available to an individual. The calculation of income includes any income which a person receives from a family member. Disability Allowance is a payment which is made to individuals for as long as they continue to meet the eligibility criteria.
25. Section 210(9) of the 2005 Act precludes the payment of Disability Allowance to a person unless that person is habitually resident in the State. Habitual Residence is defined by section 246(1) of the 2005 Act. Section 246(5) of the 2005 Act precludes a person from being habitually resident in the State (for the purposes of the Act) if they do not have a right to reside in Ireland. The decision impugned by GV rested on whether she had a right of residence in Ireland and whether or not she would, by virtue of losing her dependent status, be an unreasonable burden on the social assistance system of the State.

THE PROCEEDINGS TO DATE

26. By Order of the High Court of 21 October 2019 GV was granted leave to apply for Judicial Review of the decision of the Chief Appeals Officer of 23 July 2019. The proceedings were heard before Mr. Justice Simons, who delivered judgment on 29 May 2020. The High Court granted an order of *certiorari* quashing the decision of the Chief Appeals Officer and, in addition, made a Declaration that the words "...and does not become

an unreasonable burden on the social assistance system of the State” contained in regulation 11(1) of the European Communities (Free Movement of Persons) Regulations 2015 (S.I 548 of 2015) are inconsistent with Council Directive 2004/38/EC in so far as they apply to persons exercising a right of residence under Article 6(3)(a)(iv) of the 2015 Regulations where that person is a family member of a Union citizen who satisfies the conditions referred to in Article 6(3)(a)(i) of the 2015 Regulations.

27. In summary, the High Court determined that GV met the definition of family member under Article 2(2)(d) of the Directive and that she satisfied the dependency requirement prescribed by Article 2(2)(d), because, in the view of the judge of the High Court, once dependency is established (by the family member of the Union citizen concerned) in the country of origin, at the time the family member applies to join the Union citizen in the host Member State, there is no requirement for the family member to remain dependent on the Union citizen in order to have a right to reside in the host Member State. The judge therefore concluded that GV had a right of residence in the State and that there was no requirement “*under Article 7(1)(a) or 7(1)(b) for self-sufficiency in the case of a worker and dependent family member.*” He concluded that the Chief Appeals Officer had fallen into error and held (at paras. 85 and 86):

“85. Both the Chief Appeals Officer’s reasoning, and the provisions of regulation 11 upon which she relied, are inconsistent with the requirements of the Citizenship Directive. The EU legislature has ordained that it is not an unreasonable burden for a Member State to allow the dependent family members of a migrant worker a right to equal treatment in respect of social assistance. The requirement for self-sufficiency does not apply to dependent family members of a migrant worker who are lawfully resident in the State for a period of more than three months.

86. Whereas it is consistent with EU Law to impose a requirement for self-sufficiency in respect of other categories of EU citizens in accordance with Articles 7(1)(b) and 7(1)(c) of the Citizenship Directive, regulation 11 of the domestic regulations goes too far and is invalid insofar as it purports to extend such a requirement to a *dependent family member* of a migrant worker who is lawfully resident in the State. This aspect of regulation 11 must be disapplied as it is inconsistent with the provisions of the Citizenship Directive which have direct effect.”

28. The Chief Appeals Officer and the Minister appealed that decision to the Court of Appeal, which determined it was necessary to refer a question to the Court of Justice pursuant to Article 267 TFEU.

SUMMARY OF THE ARGUMENTS OF THE PARTIES

29. The Minister argues that the words in Article 11(1) of the 2015 Regulations “...and does not become an unreasonable burden on the social assistance system of the State” are compatible with the Directive as applied to persons such as GV, who arrive in the State and claim a derived right of residence on the basis that they are dependent family members in the ascending line of EU citizen workers exercising their free movement rights in the State. The Minister argues that the definition of family member contained in Article 2(2)(d) of Directive 2004/38/EC includes a requirement that the family member remain dependent on the Union citizen for so long as the derived right of residence is asserted, and that the derived right of residence is lost where dependency no longer exists. The Minister argues that, if GV were to be granted Disability Allowance, her claimed dependency on her daughter would no longer exist and, therefore, she would no longer enjoy a derived right of residence in accordance with Directive 2004/38/EC.

30. In support of that argument, the Minister notes that the purpose of the Directive is to establish a right of residence, subject to certain conditions and that any right to claim social assistance from a Member State is a consequence of being able to assert a right of residence (see Case C-333/13 *Dano v. Jobcenter Leipzig* (ECLI:EU:C:2014:2358) at §68 – 71). The Minister also argues that the Court has recognised that Member States are entitled to place restrictions on access to their social security systems and only those persons who comply with the conditions upon which the right of residence is based will be entitled to claim social security payments (see Cases C-333/13 *Dano v. Jobcenter Leipzig* at §73 – 75, C-140/12 *Brey* (ECLI:EU:C:2013:565), C-308/14 *Commission v. United Kingdom* (ECLI:EU:C:2016:436) and C-67/14 *Alimanovic* (ECLI:EU:C:2015:597)).

31. It is the position of the Minister that regulation 11(1) of the 2015 Regulations does not contain an absolute bar on the payment of social assistance but rather an assessment of whether grant of the social assistance at issue would, on the facts of the particular

case at issue, mean that the applicant in question becomes an “unreasonable burden on the social assistance system of the State”.

32. The High Court held that the question of dependency is finally determined at the time when a family member seeks to join the Union citizen worker in the host Member State, i.e. that dependency must be assessed only “in the country of origin and at the time when the family member applies to join the EU citizen on whom they are dependent”. The Minister argues that this finding does not flow from the manner in which the concept of dependency has been considered by this Court. The Minister notes that the existing decisions of the Courts focus on how dependency can be established (in particular, prior to arrival in the State) rather than the circumstances in which dependence is either broken after arrival in the State, or how it can be considered to continue to exist. In the Minister’s submission, where dependency ceases, the derived right of residence based upon that dependency also ceases. This can be seen, for instance, by the use of the present tense (“are” dependants) in Article 2(2) of the Directive. It is the Minister’s position that nothing in EU law precludes re-assessment of whether the claimed dependency, which forms the basis of the derived right to reside, continues to exist in the host State. On the contrary, Article 14(2) of the Directive confirms that the right to reside pursuant to Article 7 of the Directive continues to exist for so long as the family member continues to meet the conditions set out in the Directive.
33. In response to GV’s reliance on Case 316/85 *Lebon* (ECLI:EU:C:1987:302), the Minister notes that in that case, in the context of considering the rights contained in Regulation 1612/68, the Court held that assessment of dependency is a “factual situation, namely the provision of support by the worker, without there being any need to determine the reasons for recourse to the worker’s support” and that “the status of dependent family member does not presuppose the existence of a right to maintenance” (see also Case C-1/05 *Jia* (ECLI:EU:C:2007:1) at §36 – 37). In *Lebon* the Court also confirmed that an entitlement to social assistance may be lost where dependency is broken (see §14). In Case C-218/14 *Singh* (ECLI:EU:C:2015:476) it was confirmed that the right of residence of a family member to reside in a host Member State on the basis of Article 7(2) continues only as long as they meet the conditions laid down in that provision (see §57).

34. The Minister further notes that the Court has also held that to qualify as a dependant “*the existence of a situation of real dependence must be established*” (Case C-423/12 *Reyes* (ECLI:EU:C:2014:16) §20; Case C-1/05 *Jia* §20). The Minister notes that, in *Reyes*, the Court confirmed that in order to qualify under Article 2(2), it is a condition that dependency must exist prior to entry to a Member State (at §22) and found that such dependency could be demonstrated by showing the regular payment of a sum of money to the dependant. It was also held that the fact that a family member was in a position to find work did not affect the interpretation of the concept of dependency and that a Member State could not oblige a descendant family member to have tried to obtain work in their country of origin in order to be considered to be dependent nor did the fact that a descendant family member might obtain work in the Member State preclude their retaining the status of “*dependant*” (see §28 and §33). However, the Minister notes that *Reyes* concerned the question of entry to the State, i.e. the ex-ante assessment of dependency upon arrival in the State. It did not concern the question, as here, whether the status of dependence can be lost when the family member is resident in the host State.

35. GV submits that regulation 11(1) of the domestic implementing Regulations is unlawful and ultra vires the Citizenship Directive by imposing the “*unreasonable burden*” condition on EU citizens who are working in the State, and their qualifying family members such as a dependent direct relative in the ascending line, in circumstances where no such condition is contained in Article 7 of the Directive. GV’s daughter is an EU national who has resided and worked in the State for many years; she therefore has a right of residence in the State pursuant to Article 7(1)(a). GV, who is a dependent direct relative in the ascending line, therefore has a right of residence in the State pursuant to Article 7(1)(d). Where a family member, such as GV, is resident in a Member State under Article 7(1)(d) as a family member of an EU citizen resident under Article 7(1)(a), they are not subject to the “*unreasonable burden*” condition. GV submits that the conditions attaching to each category of Union citizen and their family members are set out exhaustively in Article 7, and that it is not open to Member States to impose additional conditions other than those provided for in the Article. The requirement for self-sufficiency is confined to economically inactive citizens and their family members; and to students and their family members. In respect of the latter, the

category of family members of a student who are entitled to residency is restricted under Article 7(4).

36. Furthermore, as the High Court judge noted at para. 21 of his judgment, “*the right of equal treatment applies not only to EU citizens, but also extends to family members who are third country nationals with the right of residence or permanent residence in the host State.*” Article 24(2) permits a derogation that the host Member State shall not be obliged to confer an entitlement to social assistance, but this derogation applies only during the first three months of residence (Article 6), or for EU citizens who are seeking employment (Article 14(4)(b)); neither of which applies in the instant case.

37. GV further submits that the Minister’s contention that reliance on social welfare assistance would mean that GV was no longer dependent on her daughter is not supported by the case law of the CJEU on the concept of dependency. As the CJEU held at para. 21 in *Reyes*:

“That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, *Jia*, paragraph 35).”

38. It was further held in *Reyes* at para. 22 that “*The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen*” and that the foregoing is met when: “[A] Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen” (at para. 24).

39. The CJEU in *Reyes* also addressed the issue of whether a family member could lose the status of dependant once present in the host Member State (in that case by the family member taking up employment), holding at para. 33 that “*Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that the fact that a relative – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a ‘dependant’.*”

40. As the High Court judge held at paras. 51-52 of his judgment in the instant case:

“51. The same logic applies where a *subsequent* loss of dependence is caused by the family member being granted social assistance in the host Member State. Provided that the requisite dependence has been established in the State of origin at the time the derived right of residence is sought, then the residency status is not affected by the grant of social assistance thereafter.

52. The contrary interpretation advanced on behalf of the respondents is not only inconsistent with the case law discussed above, it would also be inconsistent with Article 24 of the Citizenship Directive...”

41. GV respectfully disagrees with the contention on behalf of the Minister that the decisions of the CJEU in cases such as *Lebon*, *Jia* and *Reyes* primarily consider the question of how dependency can be established for the purpose of establishing an initial right of residence rather than the question of the circumstances in which dependence is either broken or how it can be considered to continue to exist. It was precisely this issue that was considered by the CJEU in *Lebon* and *Reyes*. As the Court noted at para. 20 of *Lebon*:

“[A] claim for the grant of the minimex submitted by a member of a migrant worker’s family who is dependent on the worker cannot affect the claimant’s status as a dependent member of the worker’s family. To decide otherwise would amount to accepting that the grant of the minimex could result in the claimant forfeiting the status of dependent member of the family and consequently justify either the withdrawal of the minimex itself or even the loss of the right of residence. Such a solution would in practice preclude a dependent member of a worker’s family from claiming the minimex and would, for that reason, undermine the equal treatment accorded to the migrant worker. The status of dependent member of a worker’s family should therefore be considered independently of the grant of the minimex.”

Furthermore, GV argues, there is a fundamental illogicality at the heart of the Minister’s submission that the key issue is the circumstances in which dependence is either broken or how it can be considered to continue to exist. If, as is submitted by

the respondent herein, in accordance with *Reyes* and the cases cited therein, the requirement to demonstrate dependency for the purposes of establishing status as a qualifying family member is focussed on establishing dependence in the country of origin, then the Minister's submission that it is also necessary to demonstrate continued dependence in the host Member State is entirely misconceived.

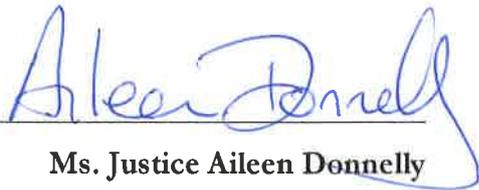
42. Finally, it is submitted on behalf of GV that the Minister's position would violate the right to equal treatment contained in Article 24 of the Citizenship Directive which provides for only three derogations, none of which are of any application in this case. This was confirmed by the Court in joined cases C-22/08 and C-23/08 *Vatsouras* (ECLI:EU:C:2009:344), C-75/11 *Commission v. Austria* (ECLI:EU:C:2012:605) and C-333/13 *Dano*. As the Court confirmed in Case C-46/12 *L.N.* (ECLI:EU:C:2013:97), as a derogation from the principle of equal treatment provided for in Article 18 TFEU, of which Article 24(1) of Directive 2004/38/EC is merely a specific expression, Article 24(2) must be interpreted narrowly and in accordance with the provisions of the Treaty, including those relating to citizenship of the Union and the free movement of workers. While the Court's decision in *Brey* noted that Member States may have a "margin for manoeuvre", it also stated that this must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38/EC.

STATEMENT OF THE REASONS PROMPTING THE REFERRING COURT TO MAKE THE PRELIMINARY REFERENCE

43. Although the authorities relied upon by the parties touch on the questions now referred, none of them address the precise questions posed by this reference, and it cannot be said that the matters raised by these proceedings are *acte claire*. The case of *Lebon*, relied upon by GV, dates back to 1987 and concerns Directive 1612/68. The issues raised are of systemic importance both as to the full extent of the rights of residence conferred upon dependent family members of Union citizens under Directive 2004/38/EC, and as to eligibility to access to the social welfare systems of host Member States by such family members. The questions raised involve the interpretation of Directive 2004/38/EC, as well as the existing jurisprudence of the Court of Justice, and the Court of Appeal considers that a decision on the questions referred is required in order to enable it to give judgment in the main proceedings.

Dated: 27 July 2021

Signed



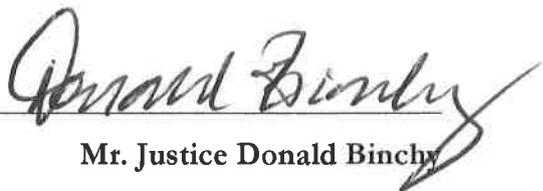
Ms. Justice Aileen Donnelly

Judge of the Court of Appeal of Ireland



Ms. Justice Úna Ní Raifeartaigh

Judge of the Court of Appeal of Ireland



Mr. Justice Donald Binchy

Judge of the Court of Appeal of Ireland