THE HIGH COURT
JUDICIAL REVIEW

[2023] IEHC 40

[Record No. 2022/143 JR]

BETWEEN:

I.T.

APPLICANT

AND

MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT OF Ms. Justice Siobhán Phelan, delivered on the 1st day of February, 2023

INTRODUCTION

1. The issues raised in these proceedings turn on the proper interpretation and application of Regulation 6(3)(c) of European Communities (Free Movement of Persons) Regulations, 2015 (S.I. 548/2015) [hereinafter "the 2015 Regulations"] giving effect to the requirements of the Citizens' Rights Directive 2004/38/EC [hereinafter "the 2004 Directive"], in particular Article 7(3) thereof. Regulation 6(3)(c) of the 2015 Regulations provides for the retention of a right to residence on the part of an EU citizen exercising free movement rights in the State in prescribed circumstances including, in material part (under Regulation 6(3)(c)(ii)), where 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 Enterprise Affairs and Social Protection [hereinafter "DEASP"].

2. An issue arises as to whether the Respondent should, when determining whether a person is involuntarily unemployed for the purpose of Regulation 6(3)(c)(ii) of the 2015 Regulations, have regard to the decision of the DEASP to award Jobseeker's Allowance

pursuant to the provisions of the Social Welfare (Consolidated) Act, 2005 [hereinafter "the 2005 Act"]. A further question arising from the terms in which the proceedings have been opposed is whether, where an EU citizen spouse is in involuntary unemployment, it is necessary for the said EU citizen spouse to have been in continuous employment for more than a year immediately prior to registering as involuntarily unemployed in order to successfully rely on retained rights as a worker to establish a derived right of residence at the time of initiation of divorce proceedings or whether periods of earlier employment prior to that time could suffice.

3. A preliminary issue as to time is raised in relation to the Applicant's entitlement to maintain these proceedings in circumstances where the papers were filed one day outside the three-month time period prescribed under O.84, r. 21(1) of Rules of the Superior Courts 1986. The leave application was moved some eight days outside the prescribed period and accordingly an extension of time pursuant to O. 84, r. 21(3) is required.

BACKGROUND

4. The Applicant is a non-EEA national and divorced spouse of an EU citizen. He entered the State on foot of a student visa in October, 2002. In July, 2009 the Applicant married the EU Union citizen in the State and applied for a residence permission pursuant to the 2004 Directive and Regulations on the basis of being the spouse of an EU citizen. This application was refused in February, 2010. The Applicant made further application on the 17th of July, 2011 and this was again refused on the 9th of February, 2012. In both instances the reason for refusal was that enquires made with the EU citizen's employer as detailed on the application forms (different in each application) revealed that she was at the time of assessment of the application, which was sometime after the application was made on each occasion, no longer in employment with the employer identified in the application. The Applicant made a third application for residence permission in March, 2013 and on this occasion was granted permission valid for five years until September, 2018.

5. Subsequent to the grant of residence permission to the Applicant deriving from the exercise of his EU citizen spouse of EU Treaty Rights in the State, the Applicant and his former spouse were divorced. The divorce was effected by foreign decree issued in the EU citizen spouse's country of origin in July, 2014 on foot of proceedings initiated in June, 2014. The marriage had subsisted for five years by the date of its dissolution. The Applicant's permission

to reside was not revoked following his divorce. He continued to work. His former spouse continued to reside in the State (albeit with possible periods of absence during return trips to her country of origin) and information disclosed from the DEASP during the decision-making process confirms that she was receipt of Jobseeker's Allowance and Child Benefit.

6. In August, 2018, the Applicant sought retention of his residence permission in a personal capacity in reliance on Regulation 10(2) of the 2015 Regulations. Regulation 10(2) provides for retention of a derived status in the event of divorce in certain circumstances where a marriage has lasted for three years or more including at least one year in the State. At that time of his application in August, 2018 the Applicant had periods of lawful residence which well exceeded five years when periods of residence as a student and periods of residence pending determination of his application for recognition of his EU derived rights are added together with the five year residence permission which issued on foot of his March, 2013 application as spouse of an EU citizen exercising EU Treaty Rights in the State.

7. No issue arises regarding the duration of the marriage or the period of married residence in the State in these proceedings.

8. The Applicant's application for retention of residence permission was refused in October, 2019. The Applicant was advised in the refusal letter that his derived rights were dependent on his EU spouse continuing to exercise her EU Treaty Rights in the State. He was advised that once his Union citizen spouse ceased to comply with the conditions of Regulation 6(3)(a) of the 2015 Regulations, he ceased to hold any derived right to reside in the State in accordance with Regulation 6(3)(b) unless he could establish that he retained a right of residence under the provisions of Regulation 9 or 10 of the 2015 Regulations at the time his EU citizen wife ceased to exercise her EU Treaty Rights in the host Member State. It was acknowledged that his application was made in reliance on Regulation 10 but stated that he had not submitted evidence of the European Union citizen's activity in the State at the time when divorce proceedings were initiated. It was stated:

> *"In this regard, information available to the Minister from the Department of Employment Affairs and Social Protection, indicates that the EU citizen was not exercising their rights through employment, self-employment, the pursuit of a course*

of study, involuntary unemployment or the possession of sufficient resources in accordance with Regulation 6(3) of the Regulations from 13/09/2013 to 23/09/2017."

9. The Applicant was advised that:

"as the Union citizen was not residing in the State in conformity with the Regulations at the time of initiation of divorce, you do not qualify for retention of a residence card under Regulation 10(2) of the Regulations."

10. The recommendation submission prepared in respect of the first instance refusal records the documents received as evidence of compliance with the Regulations as including:

- A decree of divorce from [country of origin of EU spouse], dated 18th of July, 2014;
- Evidence of date of initiation of divorce in June, 2014;
- Evidence that marriage had subsisted for several years in the State in the form of tenancy agreements in both names dated the 7th of March, 2009, 1st of March, 2010 and the 1st of August, 2012, PRTB letters in both names dated the 6th of August 2013, letter from the ESB in both names dated 23rd of October 2010, Airtricity bill in both names x4 dated 10th of March, 2011, 10th of May, 2011, the 12th of September, 2011 and the 10th of November, 2010, letter from Bord Gais Energy in both names dated the 15th of August 2012 and Bord Gais Energy electricity bill in both names dated the 18th of September 2012, letters from Permanent TSB x 2 in both names dated the 20th of May, 2011 and the 2nd of October, 2012 and Permanent TSB bank statements dated for the period of June 2011 to January 2014;
- Evidence of the activity and residence of the EU citizen at the time of the divorce had been submitted in the form of a letter confirming employment from [named employer] dated the 10th August 2011, 4x payslips from [different named employer] dated the 8th of July, 2011, the 15th of July, 2011 and the 22nd of July, 2011, 4 x Payslips from [a further named employer] dated 26th of April, 2012, 3rd of May, 2012, 6th of December, 2012 and 10th of January, 2013 together with a P60 for the tax year 2010, a P60 for the tax year 2012 and a P21 for the tax year 2012.

11. The submission document records that the check carried out by the DEASP in August, 2018 revealed that the EU spouse was in receipt of Child Benefit from April, 2009 and had been in receipt of Jobseeker's Allowance from the 13th of September, 2013 until the 3rd of September, 2017 and from the 19th of February, 2018 until the 19th of June, 2018.

12. While the EU spouse was said to be in receipt of Child Benefit from April, 2009, her activity in the State, if any, prior to April 2009 is not referred to by the First Respondent. No reference is made to her being in receipt of any benefits other than child benefit until 2013, notwithstanding that it is apparent that she had been residing in the State at least since April, 2009 at that stage and had periods of employment (unquantified until 2013) between 2009 and 2014. She was recorded as being in receipt of Supplementary Welfare Allowance from June, 2018.

13. In terms of PRSI contributions, 37A contributions were recorded in 2013 and 2A contributions in 2014. The details of her contributions in the period between 2009 and 2012 are not set out but documents were listed including her P60 for 2010 and 2012 and payslips in respect of periods of employment in 2011, 2012 and 2013. It is not clear what periods of employment these demonstrated as this information is not set out.

14. Under the heading "*Recommendation*" in the Recommendation submission it was stated as follows:

> *"The applicant has submitted insufficient evidence that they have an entitlement under Regulation 10(2) of the Regulations. The applicant and the EU citizen, [identity obscured], were married on [dated in July, 2009] in [place in Ireland]. A certified translated document shows divorce proceedings were initiated on [date in June, 2014] and a decree was granted in [country of birth of EU citizen] on [date in July, 2014]. The applicant has not submitted evidence to show activity of the EU citizen at the time of initiation of divorce. Information available to the Minister from the Department of Social Protection shows that the EU citizen had no record of employment in 2015 and only two weeks of recorded employment in 2014, which is when divorce proceedings were initiated. This would indicate that the EU citizen was not exercising her rights in the Sate at the time of initiation of divorce as is required under the Regulations. Since*

the EU citizen stopped working sometime around 2014, the derived right of the applicant would have ceased at this time also."

15. In the record of the decision submission, an officer in the EU Treaty Rights Division decided, based on the recommendation and documents received, that the application should be refused as:

> *"the information available from the DEASP indicates that the EU citizen was not exercising her EUTR in the State through employment at the date of the initiation of divorce proceedings in [date in June, 2014] – she was resident here but was in receipt of Jobseekers Allowance from 13/09/2013 to 23/09/2017."*

16. By letter dated the 17th of October, 2019, the Applicant's solicitor sought a review of the decision. In this letter a copy of the information received from the DEASP was requested. It was further stated that the EU citizen former spouse was lawfully resident in Ireland at the material time (date of initiation of divorce proceedings) and that she was in receipt of social welfare. It was stated that the Applicant and his former EU spouse did not enjoy an ongoing relationship but that his solicitors had written to her seeking her assistance in providing details as to her activities in the State during the periods referred to by the Respondent but reiterating a belief that she was in receipt of social welfare during at least some of that period. It was indicated that the Applicant had no way of verifying his understanding that his former spouse was in receipt of social welfare during this period without her assistance and co-operation. It was contended that the Applicant had paid some maintenance to his former EU citizen spouse in the period following the divorce and had assisted her by paying her rent.

17. By separate letter dated the 17th of October, 2019, exhibited in the proceedings, the Applicant's then solicitor contacted the Applicant's former spouse seeking information regarding her activities in the State at the time the divorce proceedings were initiated. He followed up by letter dated the 24th of October, 2019, asking her to confirm whether she was willing to provide assistance. From the correspondence exhibited she does not appear to have offered any response.

18. By letter dated the 12th of February, 2020, the Applicant's solicitor again wrote to the EU Treaty Rights Section advising of the EU citizen's lack of co-operation despite efforts to make contact with her. In this letter reference was again made to the fact that the Applicant understood that she was in receipt of social welfare, a fact which the Respondent was already aware of from enquiries directed to the DEASP. It was clear that it was the Applicant's position that his former spouse was exercising EU Treaty rights in Ireland and continued to reside here, albeit not in employment in the State throughout much of the period since the couple's divorce. It was set out clearly, however, that the Applicant was constrained in his ability to furnish information and documentation. Repeated requests were made to the Respondent for disclosure of the information referred to as received from the DEASP.

19. The Applicant himself has submitted evidence confirming a full employment history dating back many years and this is not disputed.

20. Ultimately the review application was determined in November, 2021 following repeated correspondence complaining of delay on behalf of the Applicant.

21. The record of the review officer's decision (also the deponent on behalf of the Respondent in these proceedings) sets out a summary of the history on the file including the claim that the EU citizen spouse had been employed in different positions between 2009 and 2013 when applications for residency were made. No reference was made, however, to the record of her PRSI contributions during this period or the cumulative duration of these periods of employment. It is recorded that she was in receipt of Jobseeker's Allowance between September, 2013 and September, 2017 (such that it appears she was in receipt of Jobseeker's Allowance when the divorce proceedings were initiated in June, 2014). The terms of Regulation 6(3)(c)(i) and (ii) of the 2015 Regulations were referred to but the decision maker then states:

> *"In this case, there is no information on file in regard to the circumstances of the EU citizen's departure from her previous employment, whether that was voluntary or involuntary. Furthermore, there is nothing on file to suggest that [name of EU citizen] had been in employment for more than one year or had been on a fixed-term contract of less than one year prior to her registration with DEASP. Indeed, DEASP information on file indicates that the EU citizen was in employment for just 37 weeks in 2013 and*

two weeks in 2014, which is less than the one-year period set out in the Regulations. As such, I find that the Union citizen in this case was not exercising her EU Treaty Rights through involuntary unemployment in 2014, the year in which divorce proceedings were initiated and finalised."

22. The record of the decision continues:

"Although it is acknowledged that the EU citizen was in receipt of benefit payments in 2014, the Minister is not bound by any determination of the Department of Social Protection, and the continued payment of social welfare payments to the Union citizen is not determinative of the EU Treaty Rights matter before the Minister."

23. It was concluded with reference to retained rights following divorce as provided for in Regulation 10(2) of the 2015 Regulations as follows:

"As it has been found that the EU citizen in this case was not exercising her Treaty Rights in the State on the date that divorce proceedings were initiated, or on the date upon which they were finalised, this application does not conform with this Regulation."

24. From the record of the decision, it appears that the decision was based on a conclusion that at the time of the initiation of the divorce proceedings the Applicant's EU citizen spouse was not exercising her EU Treaty rights because she had not been working for a period of twelve months when divorce proceedings were initiated calculating that 37 weeks in 2013 and two weeks in 2014 did not amount to a year as considered to be necessary under the Regulations.

25. By letter dated the 22nd of November, 2021, the Applicant was informed of the decision following review. The basis for the decision as recorded in the letter was that there was no information on file regarding the circumstances of her departure from her previous employment – whether that was voluntary or involuntary and nothing on file to suggest that she had been in employment for more than one year or had been on a fixed term contract of less than one year prior to her registration with DEASP (based on her employment of 37 weeks in 2013 and 2 weeks in 2014). It was concluded that she was not exercising her EU Treaty Rights through involuntary unemployment in the year 2014, the year in which divorce proceedings were

initiated and finalised because her period of unemployment was not preceded by twelve months working. The letter stated that although it was acknowledged that the EU citizen was in receipt of benefit payments in 2014, the Respondent is not bound by any determination of the DEASP and the continued payment of social welfare payments to the Union citizen is not determinative of the EU Treaty rights matter before the Respondent.

26. No consideration is recorded anywhere in the record of the decision as having been given to the question of whether the EU citizen might have worked for in excess of one year during the period of her residence in the State prior to September, 2013 when she first received Jobseeker's Allowance and no account was taken of these earlier periods of activity in the State in determining whether the EU citizen had been exercising EU Treaty Rights in the State at the date of initiation of the divorce proceedings.

PROCEDURAL HISTORY

27. The decision under review in this case is dated the 22nd of November, 2021 but leave was only granted on the 1st March, 2022 (eight days over three months post decision). The Respondent's Statement of Opposition was filed over four months later on the 26th of July, 2022. Between the first return date of the 14th of March, 2022 and the delivery of opposition papers, the matter was listed on a further seven occasions (25th April 2022, 26th April 2022, 10th May 2022, 24th May 2022, 21st June 2022, 5th July 2022 and 26th July 2022) for the opposition papers to be delivered.

28. In a further Affidavit sworn on the 2nd of November, 2022 the Applicant's solicitor dealt with various issues including the nature and extent of the Applicant's "*file*" and asked the Respondent to exhibit the entire immigration file and in particular information from the DEASP relating to the EU citizen. No substantive response was made to the matters canvassed in that Affidavit. Application for a hearing date was made on the 8th of November, 2022 and while the Respondent obtained liberty to put in a replying affidavit, none has been filed.

ISSUES

29. As noted above, a preliminary issue is raised that the proceedings are out of time and the Respondent argues against the grant of an extension of time.

30. The parties argue for different interpretations of the one-year employment requirement contained in Regulation 6(3)(c) of the 2015 Regulations and Article 7(3)(b) of the Directive. The Applicant contends that a cumulative approach which allows for the addition of periods of work across several years is permitted. It is the Applicant's case that account may be taken of periods of work in previous years. The Respondent maintains that the one-year requirement is only met by one continuous period of work.

31. It is further contended on behalf of the Applicant that the payment of Jobseeker's Allowance by the DEASP is evidence of duly recorded involuntary unemployment, whereas the Respondent maintains that the test for eligibility for Jobseeker's Allowance does not involve a determination that a person is involuntarily unemployed within the meaning of the 2015 Regulations and a burden remains on the person seeking to secure a right of residence under the Regulations to satisfy the Respondent as to the fact that the EU national was involuntarily unemployed. Furthermore, it is the Respondent's position that in addition to establishing that the EU national was involuntarily unemployed at the material time, it is also necessary to adduce evidence of having registered as a job seeker.

32. It is separately complained that the Respondent erred in law in having regard to what the EU citizen was doing in the period after the divorce, but the Applicant accepts that this consideration does not affect the operative part of the Decision. Accordingly, this argument was properly not pursued at hearing before me.

33. In addition to the central issue of law raised concerning the interpretation and application of Regulation 6(3)(c) of the 2015 Regulations and Article 7(3)(b) of the 2004 Directive, it is contended that the decision was taken in breach of the requirements of fair procedures by reason of a failure to disclose the material relied upon in advance.

STATUTORY FRAMEWORK

34. Article 7 of the 2004 Directive and Regulations 6 and 8 of the 2015 Regulations set out the conditions under which an EU citizen exercising free movement rights is entitled to stay in the State beyond an initial three-month period and to be treated as a worker for all purposes

(including social security payments) by the State. The retention of the right of residence of family members in the event of divorce is provided for under Article 13 of the 2004 Directive and Regulation 10 of the 2015 Regulations. Provision is also made for retention of residence rights on the part of the EU citizen exercising EU Treaty Rights most particularly at Articles 14, 16 and 17 of the 2004 Directive and Regulation 11 of the 2015 Regulations.

The 2004 Directive

35. While Article 7 of the 2004 Directive is most central to the question which I must determine, other provisions of the 2004 Directive assist in interpreting that provision and where considered relevant will be set out here.

36. Article 7 of the 2004 Directive provides for a right of residence for more than three months as follows:

"1. All Union citizens shall have the right of residence on the territory of another Member State for
a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and
have comprehensive sickness insurance cover in the host Member State; or

(c) – 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).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner."

37. As apparent, Article 7(3) of the 2004 Directive provides that, for the purposes of paragraph 7(1)(a) of the 2004 Directive, a Union citizen who is no longer a worker or self-employed person shall nevertheless retain the status of worker or self-employed person in certain circumstances as set out, namely where he or she is temporarily unable to work as the result of an illness or accident, where, in certain situations, he or she is in involuntary unemployment, or where, under specified conditions, he or she embarks on vocational training.

38. Article 13(2) of the 2004 Directive provides for the retention of a right of residence by non-EU national family members in the event of divorce, in relevant part, as follows:

> *"2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:*
>
> *(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or…."*

39. Article 14 provides for retention of a right of residence as follows:

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

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

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

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

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

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

40. Article 16 of the 2004 Directive provides that as a general rule Union citizens and their family members who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. Article 16(3) provides that continuity of residence shall not be affected by temporary absences not exceeding a total of six months in a one-year period, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country. Article 16(4) provides that once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

41. Article 17 of the 2004 Directive provides by way of exemption for persons no longer working in the State as follows:

"By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.

If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;

(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.

If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;

(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.

For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.

Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.

2. ….

3…

4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that:

(a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or….”

42. Article 18 of the 2004 Directive provides for the acquisition of the right of permanent residence by certain family members who are not nationals of a Member State by providing the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

The Regulations

43. Giving effect to Article 7 of the 2004 Directive, Regulation 6(3)(c) of the 2015 Regulations provides:

“(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."

44. Similarly, Regulation 8 of the 2015 Regulations, in material part, provides for retention of status in prescribed circumstances in similar terms to Article 17 of the 2004 Directive as follows:

"8. (1) The period of validity of a residence card issued under Regulation 7 shall be equivalent to the envisaged period of residence in the State of the Union citizen in respect of whom the recipient of the card is a family member, or 5 years from the date of issue of the card, whichever is the lesser period.

……

(5) The validity of a residence card shall not be affected by any of the following on the part of the recipient of the card:

(a) temporary absences not exceeding 6 months in a 12 month period;

(b) absences of a duration longer than 6 months in a 12 month period for compulsory military service;

(c) one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in a Member State or a third country."

45. Regulation 10(2) of the 2015 Regulations mirrors Article 13 of the 2004 Directive by providing for the retention of rights in the event of divorce in the following terms:

"10. (2)(a) Subject to subparagraph (b), where the marriage or civil partnership of a Union citizen is dissolved or annulled and, at the time of the dissolution or annulment,

as the case may be, he or she had a right of residence in the State under these Regulations, a family member who is not a national of a Member State may retain a right of residence in the State on an individual and personal basis.

(b) A right of residence of a family member referred to in subparagraph (a) is subject to the Minister being satisfied that—

(i) prior to the initiation of the dissolution or annulment proceedings concerned, the marriage or civil partnership had lasted at least 3 years, including one year in the State;"

46. While Regulation 12(b) of the 2015 Regulations provides for an entitlement to permanent residence in the State for a family member of a Union citizen who has resided with the Union citizen in the State in conformity with these Regulations for a continuous period of 5 years, it is noteworthy that in Article 18 of the 2004 Directive the right of permanent residence for a divorced family member is acquired after residing legally for a period of five consecutive years in the host Member State without a requirement being expressed that this be residence with the Union citizen throughout all of that period.

47. In very broad summary, the 2004 Directive and the 2015 Regulations provide that as a general rule Union citizens and their family members who have resided legally for a period of five years in the host Member State shall have a right of permanent residence there and, once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years. In certain instances, rights to permanent residence may be acquired and retained even where the EU citizen residing in the State in exercise of EU free movements rights has not been in employment throughout a five-year period. Furthermore, a right of residence is not interrupted by temporary failure to exercise EU Treaty rights. Once the EU citizen has established a retained right to residence, the Directive (Article 17) provides that periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment. This is the legal context in which the issues arising in these proceedings present for determination.

DISCUSSION AND DECISION

Extension of Time Issue

48. The Respondent refers to the fact that the Applicant's proceedings have been issued and brought out of time. In fact, the papers were filed one day out of time and the leave application was moved 8 days late. As leave to proceed by way of judicial review was sought out of time, an extension of time is necessary to maintain proceedings. The Applicant grounds an application for an extension of time on an affidavit of his solicitor sworn in February, 2022. At paragraph 7 of the said Affidavit the Applicant's solicitor states:

> *"In addition to the foregoing, I say and believe and am so advised that an application of this type must be brought within 3 months of the date of knowledge of the impugned decision. I say that these proceedings are brought marginally outside of that time-period and therefore an extension of time is required and this is sought in the Statement of Grounds. They delay in question is small and came about in circumstances where it was determined that the issues involved are potentially complex and would benefit from the involvement of senior counsel. I initially sent papers to counsel (junior) in early to med-December of 2021 and then the Christmas Vacation intervened. It was during the new (Hilary) Term that i t was decided to seek the input of senior counsel and in the process of drafts being provoked by junior counsel and then settled by senior counsel there were some delays due to pressures of work and ultimately, once drafts had been settled it was necessary for me to collate the exhibits and arrange for the filing of the pleadings. All of the foregoing gave rise the situation where a short extension of time is required. However, none of the delay can be attributed to the Applicant."*

49. It is clear from the papers that the Applicant was always anxious to challenge the refusal of his application. Following the initial refusal and while the decision on review was pending, the Applicant was anxious about and concerned by delays in the decision-making process. His concern as to delay was reflected in his correspondence with his previous solicitors which somewhat unusually has been exhibited in the proceedings on behalf of the Applicant.

50. Ultimately the Applicant changed solicitors during the currency of the decision-making process and while the decision on review was pending. He instructed his new solicitors to complain about the delay where a decision on his application was then pending for almost three years. Whether this complaint precipitated the negative decision challenged in these proceedings or the timing was coincidental, it is a fact that the decision now challenged issued within a relatively short time of the Applicant's new solicitors corresponding on his behalf to make a complaint about delay.

51. While papers were briefed to counsel in good time by the Applicant's new solicitors, the Christmas vacation period intervened. A view was then taken, as averred to by the Applicant's solicitor, that further legal input from Senior Counsel was required. The specific dates are not volunteered on behalf of the Applicant. Upon receipt of draft papers, the Applicant's new solicitors confirm that they were then required to collate papers. It is apparent from the papers exhibited that there then existed a voluminous file which had been taken over from the Applicant's previous solicitors.

52. It is important to note that the three-month time limit is a rule of court as opposed to a statutorily prescribed time limit. It is accepted that I have a jurisdiction to extend time on foot of an application on behalf of the Applicant but the Respondent maintains that no valid reason has been given to ground the exercise by me of this discretion. The Respondent relies on caselaw to the effect that delay by legal advisers is not an excuse such as would warrant an extension of time. It is contended that cases such as *Muresan v Minister for Justice, Equality and Law Reform & Ors* 2003 WJSC-HC 9156, cited by Clarke J. in *M v Refugee Appeals Tribunal & Ors* [2009] IEHC 331 and Donnelly J. in *K v Minister for Justice and Equality* [2022] IECA establish that delay or mistake by legal advisors is not a good and sufficient reason to extend time. The Respondent accepts, however, that the delay is minimal and I have not been referred to any other case in which a discretion to grant an extension of time has been refused where the time delay is as short as seven or eight days.

53. It is noted that many of the cases cited on behalf of the Respondent are concerned with applications made out of time to amend Statements of Grounds. Furthermore, these cases concern far more extensive periods of delay than at issue in these proceedings. In *Muresan* the Court was concerned with a failure to comply with court directions in relation to the bringing of a motion in the context of the specific statutory time-frame prescribed under s. 5

of the Illegal Immigrants (Trafficking) Act, 2000, as opposed to the power contained in O.84 of the Rules of the Superior Courts, 1986. It should also be observed that in *Muresan*, the High Court (Finlay-Geoghegan J.) indicated (p. 17-18 of her judgment) when refusing to exercise her discretion in respect of a challenge to a decision which was nearly a year old when the motion issued, that had arguable grounds been disclosed she would have been minded to extend time to permit the inclusion of a challenge to a more recent decision where the period of delay was short (in the order of some three weeks in that case). *K v Minister for Justice and Equality* may also be distinguished on the basis that in *K*, considerable significance was attached to the lack of any explanation for delay (see paras. 56 and 58 of judgment). While issue may be taken with the adequacy of the explanation in this case particularly as regards the failure to provide the dates that certain steps were taken, an explanation has been offered.

54. I was also referred on behalf of the Respondent to recent dicta of Barr J. in *G.K. v International Protection Appeals Tribunal & Ors* [2022] IEHC 204, where he found in relation to delays by Counsel in furnishing draft pleadings, from para. 55 of his judgment onwards:

> *"If the court were to grant an extension on the basis of the explanation given by the applicant in this case, it would render the legislative time limit near ineffective, as any applicant could claim that their counsel had 'other commitments' to attend to.*
>
> *There is a significant importance placed on time limits in administrative proceedings, for good reason. This court would be slow to depart from the time limit imposed by the Oireachtas in s. 5(2) of the 2000 Act on the basis of a short, one -sentence explanation for a significant delay. On the basis of the foregoing, the court refuses to grant an order extending the time within which the applicant's challenge was brought, on the basis that there is no good or sufficient reason to do so. "*

55. The Respondent acknowledges that the delay in *G.K.* was clearly more than that at issue in these proceedings and was in the context of the shorter statutory period of 28 days contained in s. 5(2) of the 2000 Act (the application in that case was 51 days late) but nonetheless relies on the case as authority for the proposition that delay on the part of counsel does not provide an adequate explanation justifying an extension of time. It is noted, however, that the barest of explanations was advanced in *GK*, namely "*other commitments of counsel*"

and the judgment (at para. 58) records that the Court would be slow to depart from the time limit imposed by the Oireachtas in s. 5(2) of the 2000 Act on the basis of a short, one-sentence explanation for a significant delay. The situation here is different in that not only does the explanation go somewhat further but it is also in the context of a much shorter delay and a time limit imposed under the rules of court as opposed to statute. It is further noted in the judgment that it had been suggested by counsel on his feet in *GK* that a period of the delay was due the Easter vacation whereas the judge was less than impressed with this explanation being satisfied from his own calculations that the time-period had already expired before the Easter vacation. It is noteworthy nonetheless that although he refused an extension of time in *GK* on the facts and circumstances in that case, Barr J. proceeded to deal with the substantive basis for challenge and also dismissed the application on its merits.

56. As stated in *GK*, when considering the exercise of my discretion and whether good and sufficient reason exists for extending time, I should have regard to:

I. The length of the delay;
II. The explanation for delay including any personal fault on the part of the applicant as distinct from his agents;
III. All relevant facts and circumstances, including the decision sought to be impugned, the nature of the claim made that it is unlawful or invalid and any relevant facts and circumstances pertaining to the parties;
IV. The interests of justice including the consequences for the applicant if the claim fails on grounds of delay.

57. I adopt this summary from the judgment in *GK* as a correct approach and note that the question of prejudice to the Respondent is encapsulated within the interests of justice criterion. Given that *GK* was a decision under a statutory time-period, it is also necessary to add as a consideration whether the time limit is imposed by statute or under the Rules of Court.

58. In this case, as already noted, the delay in question is short. The Applicant is responsible for the delay of his agents, but it has been established in evidence that he himself has been active in seeking legal advice (voluminous correspondence with his former solicitors has been exhibited) and in pursuing his application including to the point of changing solicitors and instructing correspondence complaining of delay in the decision-making process itself.

Accordingly, I accept that the Applicant was dependent on his legal advisors to act in his interests and, having already changed solicitors, it would be harsh to hold him culpable in respect of such a short period of additional time taken to seek the advice of senior counsel in view of the complexity of the issues identified by junior counsel as warranting such advices. In realistic terms, the Applicant was dependent on his lawyers to properly present his case in the manner advised and by reason of this dependence, he was unable to prevent delay in the making of the application.

59. Most importantly, there is no identifiable prejudice to the Respondent whereas the application of the time limit under the Rules would result in significant prejudice to the Applicant. The decision he seeks to challenge is of great importance to the Applicant concerning, as it does, the lawfulness of his ongoing residence in the State after a period living here which now exceeds twenty years. Unless an extension of time is granted in exercise of the Court's discretion under the Rules, he will be unable to access the Court to challenge a negative decision of very significant consequence for him personally. In terms of the nature of the claim, the claim advanced is primarily one of error of law and involves a question of the State's obligations as a matter of EU law and the short delay in question in these proceedings has no impact.

60. As noted above it took the Respondent more than three years to determine the Applicant's application. It took them almost four months to file opposition papers. In all of the circumstances, which I consider should include the considerable delays in the decision-making process and on the part of the Respondent, it seems to me that it would be unfair and contrary to the interests of justice to refuse an extension of time in this case.

61. I am satisfied that good and sufficient reason has been demonstrated on the facts and circumstances of this case to justify me in the exercise of my discretion to grant an order extending time under O. 84, r. 21(3) of the Rules of the Superior Courts, 1986.

62. In view of this finding, I do not consider it necessary to address further the submission on behalf of the Applicant that an argument on a time point should be made promptly and by a motion *in limine*, relying on a decision of Mr. Justice MacEochaidh in *M v. Minister for Justice* (High Court, 20th of June, 2013). That case is not authority for the proposition that a time point can only be dealt with by way of discrete, preliminary application. As far as I am

concerned, the time point has been properly and actively pleaded on behalf of the Respondent and I am entitled to consider that point and to reach a decision on it in a proper exercise of my discretion. Whereas there may be cases where it is more appropriate to pursue such applications by way of a discrete preliminary motion, it is not uncommon in my experience for them to be dealt with at the substantive stage and without the necessity to bring a separate preliminary motion.

63. Finally, as I am satisfied that it is appropriate to exercise my discretion to grant an extension of time on the facts and in the particular circumstances of this case, it is not necessary to consider the Applicant's argument that Irish law falls short of the EU law requirement of effectiveness or the Respondent's reliance on the CJEU decision in Case C-429/15 – *Evelyn Danqua v Minister for Justice and Equality Ireland and the Attorney General* which recognised the principle of national procedural autonomy in response to this submission.

Whether the Minister applied the Correct Test in Finding that the Applicant's EU Citizen Wife was not exercising her EU Treaty Rights at the time of the Divorce

64. The decision which it is sought to impugn in these proceedings found in relevant part:

> *"The Minister is not satisfied thåt Union citizen [Name] was exercising her EU Treaty Rights in the State through employment, self-employment, the pursuit of a course of study, involuntary unemployment, or the possession of sufficient resources in accordance with the Regulations on the date that the divorce proceedings were initiated or on the date that these proceedings were finalised."*

65. The Applicant challenges this finding on three broad bases as follows:

I. Firstly, by alleging that the Respondent erred in law in basing the decision on a finding that there was no information on file to say whether the EU citizen's leaving of her previous employment was voluntary or involuntary, the correct question being whether she was in "*involuntary unemployment*";

II. Secondly, by alleging that the Respondent erred in law failing to treat as a relevant consideration the fact that the DEASP had awarded the EU citizen Jobseeker's Allowance in deciding whether the EU citizen was in involuntary unemployment;

III. Thirdly, by arguing that the Respondent erred in finding that the EU citizen did not, prior to her unemployment, satisfy the one-year period of employment required by the 2004 Directive and the 2015 Regulations and in particular, failed to take a cumulative approach to her employment by including earlier employment in 2009, 2010, 2011 and 2012 into account but focussing instead on her employment in the period immediately preceding the initiation of divorce proceedings.

66. Both I and II are directed to the proper application of the "*involuntary unemployment*" requirements under Regulation 6(3)(c)(ii), whereas III relates to proper interpretation the one-year employment requirement.

Whether the Respondent Properly Applied the "Involuntary Unemployment" under Regulation 6(3)(c)(ii)?

67. It is the Respondent's case that simply because the EU citizen was recorded as in receipt of Jobseeker's Allowance by DEASP is not in itself sufficient to confirm that she was in "*duly recorded involuntary unemployment*" and meets the requirements of Regulation 6(3)(c)(ii) of the 2015 Regulations and/or Article 7(3)(b) of the 2004 Directive. It is contended that this is both because the payment of the allowance is not determinative of this issue and because it ignores the fact that the reference in Regulation 6(3)(c)(ii) and/or Article 7(3)(b) of the 2004 Directive to being in involuntary unemployment proceeds to say:

"...and has registered as a job-seeker with the relevant employment office"

68. It is contended that the use of the conjunctive *"and"* confirms that the registration requirement is one that is in addition to the necessity to be in "*duly recorded involuntary unemployment*".

69. The Respondent is undoubtedly correct in relation to the presence of the conjunctive "*and*" such that evidence that the EU citizen had registered as seeking employment at the relevant employment office is necessary to successfully invoke Regulation 6(3)(c)(ii) of the 2015 Regulations. There is no evidence before me of registration with FÁS or Intreo (understood to have been a relevant employment office operating under the auspices of the DEASP at the material time) and such evidence is necessary to establish eligibility under the Regulation 6(3)(c)(ii).

70. The absence of evidence of registration with a relevant office (separate to the DEASP itself in the context of the application for Jobseeker's Allowance) is not the end of the matter for present purposes, however, because it is not clear to me from reading the decision that the Respondent considered the absence of registration with FÁS/Intreo or registration with "*the relevant office of the Department of Social Protection*" a factor in the decision arrived at. Notwithstanding that the fact of registration is a condition precedent to qualification for retained residency under Regulation 6(3)(c)(ii) of the 2015 Regulations, no enquiries appear to have been carried out to establish whether or not the Applicant was in fact registered with a relevant employment office and no decision is recorded in respect of this condition. This may be because it was apparent from the fact that Jobseeker's Allowance was paid that the EU spouse had registered as unemployed with DEASP, the umbrella department for the State with State responsibility both for the provision of welfare services and employment services through Intreo Centres. Whatever the explanation, the absence of registration with "*the relevant office of the Department of Social Protection*" was not a factor identified in the decision to refuse.

71. Where the failure to demonstrate registration with the relevant employment office appears to have been identified *ex post facto* as non-compliance with a condition of eligibility to retain residency under Regulation 6(3)(c)(ii), it cannot be treated as a reason for refusal. While registration with the relevant employment office is a condition precedent to retaining status under Regulation 6(3)(c)(ii), it is also relevant to the question of whether a person is involuntarily unemployed, constituting evidence capable of supporting a conclusion that a person is involuntarily unemployed.

72. As for the question of involuntary unemployment in this case, the Respondent accepts that the Applicant's former spouse was unemployed but maintains that it is not clear that this

was involuntary within the meaning of Regulation 6(3)(c)(ii) of the 2015 Regulations. It is contended that there is no error as a matter of law in the Respondent coming to a different position than the DEASP because, the Respondent argues, the DEASP was not engaged in an assessment of whether the unemployment is involuntary or not. I am referred of behalf of the Respondent to s. 141(1) of the 2005 Act which provides that a person shall be entitled to Jobseeker's Allowance in respect of any week of unemployment where:

> *"(a) the person has attained the age of 18 years and has not attained pensionable age,*
> *(b) the person proves unemployment in the prescribed manner, and*
> *(c) the person's weekly means, subject to subsection (2)(d), do not exceed the amount of jobseeker's allowance (including any increases of jobseeker's allowance) that would be payable to the person under this Chapter if that person had no means. '."*

73. In disregarding the fact that the Applicant's former EU citizen spouse was assessed as eligible for Jobseeker's Allowance in finding that she was not involuntarily unemployed for the purpose of Regulation 6(3)(c)(ii), the Respondent submits that it is clear that to qualify for Jobseeker's Allowance, no enquiry is made by the DEASP as to the reasons for leaving prior employment. It is submitted that it is a qualitatively different assessment to that engaged in by the Respondent in assessing EU Treaty rights under the 2015 Regulations. It is further submitted that this position has already been accepted by both the High Court and the Court of Appeal. In this regard I have been referred to the decisions of Humphreys J. in *Abouheikaz v. Minister for Justice & Equality* [2019] IEHC 124 and separately the Court of Appeal (Baker J.) in *Hemida v. The Minister .for Justice and Equality* [2019] IECA 335.

74. It is contended that the latter authorities establish that the fact that a person was awarded a payment by the DEASP is not binding on the Respondent in terms of the question which requires to be decided by her under the 2015 Regulations. Of note, however, the Applicant does not demur from this proposition. The argument maintained on behalf of the Applicant is more nuanced being that the fact that Jobseeker's Allowance was determined as payable to the EU citizen, whilst not determinative of the issue, is evidence supportive of the Applicant's position that she was involuntarily unemployed because to qualify for Jobseeker's Allowance she was required to satisfy the DEASP that she was genuinely seeking work and was lawfully resident in the State be it as an EU citizen exercising free movement rights here or on some other basis. The Applicant's submission, as I understand it, is that such potentially

supportive evidence should be considered and could not properly be disregarded as of no significance just because the decision of the DEASP was not determinative of the application under the 2015 Regulations.

75. While I accept as clearly correct that the decision of the DEASP in finding the EU spouse eligible for Jobseeker's Allowance is not determinative of the question of involuntary unemployment under Regulation 6(3)(c)(ii), the Respondent's stark assertion that the process carried out by the DEASP is a qualitatively different assessment process warrants further scrutiny. The contention advanced on behalf of the Respondent in submissions that the DEASP conducts no enquiry into the reason for leaving employment and that the DEASP considers only whether a person is unemployed as opposed to involuntarily unemployed when deciding to award Jobseeker's Allowance is a contention which requires some testing in that it is clearly predicated on the terms of s. 141(1) without reference to the balance of that provision. The significance of the fact that as matter of law "*unemployed*" has a specific meaning, as manifest from consideration of s. 141 of the 2005 Act as a whole (including in particular s. 141(4)), has not been satisfactorily addressed on behalf of the Respondent in submission. Similarly, the fact that the decisions in *Abouheikaz v. Minister for Justice & Equality* [2019] IEHC 124 and *Hemida v. The Minister for Justice and Equality* [2019] IECA 335 are addressed to the question of lawful residence rather than involuntary unemployment status warrants some further consideration.

76. It is apparent from s.141(4) of the Social Welfare (Consolidation) Act, 2005 that a person shall not be treated as unemployed under the social welfare code unless that person is capable of work (s. 141(4)(a)), is available for work unless exempt from this requirement (s. 141(4)(b)) and is genuinely seeking, but is unable to obtain, suitable employment having regard to the person's age, physique, education, normal occupation, place of residence and family circumstances (s. 141(4)(c)). In short, as a matter of law, the decision of the DEASP to award Jobseeker's Allowance to an applicant is an evidence-based decision which, if properly taken, requires that DEASP be satisfied that the applicant is capable of work, is available for work and is genuinely seeking, but is unable to obtain, suitable employment. Accordingly, insofar as it is a qualifying condition for Jobseekers' Allowance that a person demonstrate to the satisfaction of the DEASP that he or she is genuinely seeking work, it seems to me that the DEASP is in fact concerned with a question which is closely connected to the question of whether a person is involuntarily unemployed. While the question to be

determined by the DEASP under the 2005 Act is not identical to the question to be determined by the Respondent under the 2015 Regulations, ignoring that there are overlapping evidential requirements in establishing eligibility under both statutory tests fails to properly acknowledge the real connection between the two decisions, both made in the discharge of public law functions.

77. It is noted that part of the Respondent's objection to reliance on the decision of the DEASP in the decision-making process under the 2015 Regulations is explained by the assertion on behalf of the Respondent that the DEASP conducts no enquiry into the reasons for leaving former employment. This focus on the absence of enquiry into the reasons for leaving former employment is somewhat of a red herring and liable to lead into error unless properly understood as being a relevant consideration rather than the test. The 2004 Directive and transposing Regulations do not require that one leave former employment involuntarily but rather than one finds oneself involuntarily unemployed. Enquiry into the reasons for leaving former employment may therefore be relevant in determining whether a person is involuntarily unemployed (just as it may inform a decision by DEASP as to whether a person is genuinely seeking work) but it is not the legal test. By way of example only, one may leave former employment to take up a new position elsewhere but the new position may not materialize leaving one involuntarily unemployed. The real question in establishing eligibility under Regulation 6(3)(c)(ii) is simply whether a person is involuntarily unemployed.

78. In considering whether the Respondent's reliance on the decisions in *Abouheikaz v. Minister for Justice & Equality* [2019] IEHC 124 and *Hemida v. The Minister .for Justice and Equality* [2019] IECA 335 is well-founded, the first point to note is that in both cases the focus was on s. 141(9) of the 2005 Act. No reference was made or consideration addressed in either case to the impact of s. 141(4) of the 2005 Act because the Court was not considering the question of involuntary unemployment in either case. Instead, as noted above, those cases were primarily concerned with the question of lawful residence. As regards residence, s. 141(9) of the 2005 Act provides that:

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

79. The requirement to be habitually resident is set out in s. 246 of the 2005 Act (as amended). In particular, s. 246(4) (this provision was inserted by s. 30 Social Welfare and Pensions Act, 2007 and substituted by s.11(1)(d)(ii) Social Welfare and Pensions Act 2014) provides that a deciding officer when determining whether a person is habitually resident in the State for the purposes of the 2005 Act (as amended), shall take into consideration all the circumstances of the case including, in particular, the following:

(a) the length and continuity of residence in the State or in any other particular country,

(b) the length and purpose of any absence from the State,

(c) the nature and pattern of the person's employment,

(d) the person's main centre of interest, and

(e) the future intentions of the person concerned as they appear from all the circumstances.

80. Section 246(5) of the 2005 Act (as amended) provides that a person who does not have a right to reside in the State shall not, for the purposes of the 2005 Act, be regarded as being habitually resident in the State. Thus, even if a person is *de facto* habitually resident in the State, s/he will not satisfy the habitually resident condition unless s/he has a right to reside. Section 246(6) of the 2005 Act (as amended by a substitution effected by s. 18(a)(i) of the Social Welfare Act, 2016) provides that a person who has the right under the 2015 Regulations to enter and reside in the State or is deemed under the said Regulations to be lawfully resident in the State is to be taken as having a right to reside in the State.

81. While there have been amendments to s. 246 of the 2005 Act it seems that in making a determination that the EU spouse was entitled to receive Jobseeker's Allowance, at all material times the DEASP was required to consider whether the applicant for that allowance had a right to reside in the State. Of course, a right to reside may arise other than by reason of the exercise of EU Treaty Rights. It is therefore unarguable that the decision of DEASP under the 2005 Act (as amended) is qualitatively different to that of the Respondent in applying the 2015 Regulations. This does not necessarily mean, however, that the DEASP decision on whether a person is unemployed within the meaning of s. 141 of the 2005 Act is irrelevant to a fact-

based assessment of whether that same person is involuntarily unemployed for the purpose of the 2015 Regulations.

82. In *Abouheikaz*, Humphreys J. acknowledged the requirement to establish habitual residence under the social welfare code and stated (paras. 16-17) with regard to derived rights arising from marriage (albeit *de facto* separated) to an EU national as follows:

> *"16. As far as receiving benefits is concerned, to obtain social welfare benefits one has to be habitually resident in the State (see s. 141(9) of the Social Welfare Consolidation Act 2005 regarding jobseeker's allowance). To be habitually resident, one has to be lawfully resident (see s. 246(1) and (5)). Similar conditions apply to other benefits. It is clear from the review decision that the wife wasn't claiming social welfare benefits as of the date of that decision. The applicant certainly has not proved otherwise. An application of the conditions in reg. 6(3) of the 2015 regulations to the facts as found by the Minister shows that the wife does not qualify for social welfare benefits. Insofar as the material before the Minister was concerned, she was not in employment for one year and did not re-enter employment within six months of the end of the previous employment. The logic of that is that she ceased to exercise her EU Treaty rights six months from the end of the initial period of employment. The exact date she ended work in 2013 is not stated, but the loss of rights would have been mid-2014 at the latest. She entered into employment again in 2016. That restarted the clock, so she would have ceased to exercise such rights again by mid-2017 at the latest. The proposal to revoke was not issued until October, 2017.*
>
> *17. 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."*

83. It is clear from his decision that Humphreys J. was satisfied that the Respondent is not bound by the decision of the DEASP to the effect that a social welfare applicant has demonstrated lawful residence for social welfare purposes. Indeed Humphreys J. appeared to conclude that the DEASP had made a wrong decision in law in making social welfare payments, although that Minister was not a party to the proceedings. It is noteworthy that the EU citizen in that case had been residing in the State since 2005, a period of about fourteen years at the date of judgment, but insofar as can be ascertained from the judgment, the question of an acquired right to permanent residence over those years deriving from previous periods of employment or exercise of EU Treaty rights did not appear to arise for consideration either from the decision challenged or in the judgement of the Court. Instead, the focus, appears to have been on the work record of the EU citizen spouse in the period immediately preceding the notification of an intention to revoke residency in that case. It is unclear from the judgment whether there was any prior relevant work history. The question of law in *Abouheikaz* arose in the different context of a proposal to revoke residency on the basis that the Minister was of the opinion that the EU citizen was no longer residing in the State in exercise of her EU Treaty rights. A further distinguishing feature therefore was that the EU citizen in *Abouheikaz* was not claiming social welfare benefits in the State at the material time. Given that the material time in this case is the date of the initiation of the divorce proceedings, the facts here differ in that the EU citizen spouse was at that time recorded by the DEASP in the information furnished to the Respondent as in receipt of Jobseeker's Allowance.

84. In the later case of *Hemida*, the Court of Appeal accepted that the decision in *Abouheikaz* could be distinguished on its facts from *Hemida* because the EU spouse was not claiming social welfare payments at the date of the decision sought to be impugned. There are a number of important factors to note in the Court of Appeal's decision. From the decision of the Court of Appeal in *Hemida*, it appears that the Court proceeded on the basis of facts submitted by the non-EEA spouse to the respondent to the effect that the EU citizen spouse was employed in the State for less than a year. The judgment records that the claim of the non-EEA spouse to be permitted to remain in the State was based on the fact that his wife had been long-term in receipt of social welfare payments, including Jobseeker's Allowance within the State (para. 24). As this was the premise for the non-EEA's claim to a derived right to residency, the analysis of non-EEA spouse's application was confined to this premise. It is noted in the judgment that it was not suggested or argued that the EU spouse might be lawfully resident in the State on any other basis. Specifically, it is recorded that no evidence was

adduced that the EU spouse suffered any illness or accident or that she left work to take up vocational training leading the judge to observe that on a reading of the 2015 Regulations at best, she could have remained in the State under Regulation 6(3)(c)(iii) for six months after the cessation of her employment unless she entered employment or self-employment within that period, under Regulation 6(3)(d), and there was no evidence that she did.

85. While not determinative, the fact that the basis for a decision of the DEASP in deciding to pay Jobseeker's Allowance may be relevant on an application for residency under the 2015 Regulations is, however, acknowledged in the terms of the judgement of the Court of Appeal in *Hemida*. In the judgment of the Court of Appeal (Baker J.), it was stated (albeit *obiter*) as follows (para. 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."*

It seems to me that this *obiter* observation by Baker J. must be correct. Where the DEASP concludes that a person is genuinely seeking work when determining eligibility for Jobseeker's Allowance, such a conclusion is potentially supportive of a claim that the person is involuntarily unemployed. Accordingly, I do not read *Hemida* as authority for the proposition that the decision of the DEASP can be disregarded without weighing the potential evidential significance of that fact-based decision. On the contrary, the judgment acknowledges that it can constitute supportive evidence.

86. Where the Respondent concludes in making a decision under the 2015 Regulations that a person is not involuntarily unemployed despite the separate decision of the DEASP that they are capable of work, available for work and genuinely seeking, but unable to obtain suitable employment one would expect a rational weighing of the factual significance of this decision beyond a disregard of the decision on the asserted basis that the decision of the DEASP is not determinative. Despite the obvious potential relevance of the decision, the fact that DEASP

had concluded that the EU spouse was entitled to receive Jobseeker's Allowance was not considered by the Respondent as being potentially supportive of the Applicant's case and no interrogation of the basis for this decision or a weighing of its evidential value is apparent in the record of the decision-making process. In this case the Respondent proceeded as though the fact that the decision of the DEASP was not determinative meant that there was no requirement to consider whether the decision provided supportive evidence that the EU citizen was involuntarily unemployed at the material time. This constitutes disregard of a relevant consideration and a failure to weigh relevant evidence.

87. The disregard of a relevant consideration in deciding whether a person is involuntarily unemployed is consistent with a concern expressed in submissions on behalf of the Applicant that the Respondent misconstrued the legal test to be applied under Regulation 6(3)(c)(ii) as being whether the EU citizen had left her former employment involuntarily rather than whether she was involuntarily unemployed. Indeed, the possibility that the test applied by the Respondent was whether the EU citizen spouse had voluntarily left her previous employment is suggested by the statement in the record of the decision that there was no evidence that this was so. A failure to properly construe the test to be applied might explain why the relevance of evidence which might support a conclusion that the EU citizen was in a state of involuntary unemployment was not properly weighed and considered in the decision. A concern that the Respondent may have misconstrued the test to be applied is further supported by the failure to either enquire as to FÁS/Intreo registration or advert to the absence of evidence of such registration in the decision-making process. This failure would be consistent with the erroneous view of the Respondent that the test was whether the EU citizen had left work involuntarily as opposed to being in involuntary unemployment.

88. Whatever about the identification of the precise parameters of the legal test applied by the Respondent in refusing this application and without reaching any concluded position on this question, I am satisfied that the fact that Jobseeker's Allowance was awarded by the DEASP is not determinative of the question of whether the EU citizen was involuntarily unemployed within the meaning of Regulation 6(3)(c)(ii) as contended on behalf of the Respondent. I am further satisfied, however, that this decision (and the factual or evidential basis for it) is relevant as potentially supportive of the Applicant's application and should have been the subject of further consideration. Instead, the decision of the DEASP was entirely discounted.

89. I have concluded that by failing to properly consider and weigh as part of the factual matrix that the EU citizen spouse had satisfied the DEASP as to her eligibility for Jobseeker's Allowance, the Respondent failed to have proper regard to all factors which properly bear on a decision as to whether the EU citizen was involuntarily unemployed. Lest I am wrong in this conclusion, however, I will now turn to consider the primary focus of the submissions on behalf of the Applicant which were directed to the failure to consider previous periods of employment.

Failure to Consider Previous Employment for the Purpose of the One-Year Requirement

90. The EU spouse in this case had been more than five years resident in the State at the date of the initiation of divorce proceedings giving rise to a possibility that she had an established right of residence in the State at the date of initiation of the divorce proceedings by reason of her prior exercise of EU Treaty Rights. Indeed, the marriage was in existence for a full five years with the Applicant residing in the State for its duration by the date its dissolution. The specific issue raised in these proceedings is whether the Respondent erred in law in her approach to the assessment of one years' employment under Regulation 6(3)(c)(ii) of the 2015 Regulation and/or Article 7(3)(b) of the 2004 Directive. In considering whether the EU citizen was exercising EU Treaty Rights in her decision under the 2015 Regulations, the Respondent considered only whether there was evidence of one years' employment in the 2013-2014 period. No consideration was given to the significance of her past employment and the period prior to 2013 in circumstances where EU citizen spouse had resided in the State since 2009 at the latest and is first recorded as being in receipt of Jobseeker's Allowance from September, 2013.

91. The Respondent's position has evolved. In opposing these proceedings, the Respondent maintains in submissions that the relevant qualifying test requires the Applicant to demonstrate that his EU citizen former spouse had one years' "*continuous*" employment before becoming involuntarily unemployed and registering as unemployed in order to satisfy Regulation 6(3)(c)(ii). The requirement to demonstrate "*continuous*" employment was not stated in the decision itself nor even in the Opposition papers but arose for the first time in written legal submissions filed for the purpose of the hearing before me. As a form of *ex post facto* reasoning, it requires to be treated carefully.

92. What is further clear from the decision and the disclosed record of considerations is that while the Respondent was made aware that the EU spouse was resident in the State at the latest from April, 2009 when she began claiming child benefit, her activity in the State, if any, prior to April 2009 is not referred to in the decision-making process. Recalling the necessity to establish lawful habitual residence for the purpose of claiming child-benefit also, the implication of the payment of Child Benefit to the EU spouse from 2009 is that the DEASP were satisfied as to the lawfulness of her residency. The fact that no reference is made to her being in receipt of any benefits other than child benefit from 2009 until 2013, notwithstanding that it is apparent that she had been residing in the State at latest since April, 2009 is also potentially significant particularly in view of the evidence submitted with regard to periods of employment (unquantified until 2013) between 2009 and 2014. In terms of PRSI contributions, 37A contributions were recorded in 2013 and 2A contributions in 2014 (without specification of dates) but the details and the dates of her contributions in the period between 2009 and 2012 are not set out making it entirely possible that she had established one years' employment during this period, be it continuous or otherwise which might give rise to an entitlement to treat a subsequent period of involuntary unemployment as grounding a right to retain residence under the 2015 Regulations and/or the 2004 Directive. Documents were listed as including her P60 for 2010 and 2012 and payslips in respect of periods of employment in 2011, 2012 and 2013 but it is not clear what periods of employment these demonstrated as this information is not set out in the decision or the consideration document.

93. The Respondent's consideration of the application is patently limited to the evidence showing employment in 2013 and 2014 (when divorce proceedings were initiated), it is apparent that no regard was had to her history of activity prior to this. The possibility that she had established or retained rights on the basis of this earlier activity is simply not addressed at all. The failure to set out clearly the record of the EU citizen's employment during the period prior to 2013 results from the fact that no significance was thought by the Respondent to attach to the activity of the EU citizen during these years, with the focus squarely on the time immediately preceding the initiation of divorce proceedings.

94. In the decision reached the Respondent proceeded on the basis that since the EU citizen had stopped working sometime around 2014, the derived right of the Applicant would have ceased at this time also whereas it was clearly the Applicant's case that the EU citizen was

resident in the State and in receipt of Jobseeker's Allowance in exercise of her EU Treaty Rights. In their letter of the 17th of October, 2019, seeking a review of the first stage refusal of the application, reliance was squarely placed by the Applicant's then solicitors on the fact that the Applicant was lawfully resident in Ireland at the material time in June, 2014 (when divorce proceedings were initiated) and that she was in receipt of social welfare, the point being that she had an established right of residency at that time in exercise of her EU Treaty Rights arising from former activity in the State. Further, however, the fact that the social welfare benefits she was receiving was Jobseeker's Allowance related to her status as a worker. The very fact that she was receiving Jobseeker's Allowance in the State was relied upon as a manifestation of the exercise by her of EU Treaty Rights.

95. While the primary focus in argument before me was on the correct interpretation of Article 7(3)(b) of the 2004 Directive (and, in turn, Regulation 6(3)(c)(ii)) of the 2015 Regulation, nonetheless the balance of Article 7 and the rest of the 2004 Directive is relevant to construing the one-year employment criterion contained in Article 7(3)(b). The use of the word "*temporary*" in Article 7(3)(a) and the express provision for the retention of the status of worker for a period of six months in the event of completion of a fixed term contract of less than a year during the first twelve months or involuntary unemployment during the first year in Article 7(3)(c) are both noteworthy. Both identify situations where non-continuous employment may be relied upon. Both have been the subject of helpful consideration by the Court of Justice of the European Union (see *Case C-442/16 Gusa v. Minister for Social Protection, Ireland and Attorney General* and *Case C-483/17 Tarola v. Minister for Social Protection*).

96. While it is clear from that the 2004 Directive does not require "*continuous*" employment for a period exceeding a year as a precondition to establishing residency in all circumstances because express exceptions have been prescribed, on the other hand, it has been argued on behalf of the Respondent that by providing expressly for retention in circumstances where one years' employment is not established (under Article 7(3)(a) or (c)), that it should be inferred that the general rule is that a period of "*continuous*" employment requires to be established. Again, it is noteworthy in this regard, that Article 17 relies extensively (and expressly) on "*continuous*" residence with Article 17(1)(a) requiring work for the preceding twelve months in the case of a person who reaches retirement age (albeit deeming a period of involuntary unemployment as a period of employment for these purposes). The use of the word

"*continuous*" tied with the phrase requiring work for the "*preceding twelve months*" to qualify the right for the purpose of Article 17 highlights the absence of the word "*continuous*" (or similar language which makes it clear that the twelve months work required must take place within a specified period) in Article 7(3) of the 2004 Directive. It is significant that where the EU legislative arm intended that a period of employment be "*continuous*", it used that word. I do not regard the omission of the word "*continuous*" in Article 7 to be accidental or of no consequence.

97. The Applicant relies in his submissions on the judgments of the CJEU in *Gusa* and *Tarola*, both references from the Irish Courts. In *Gusa*, the Irish Court of Appeal was required to determine the question of an entitlement, on the basis of a retained status, to Jobseeker's Allowance of an EU national who had become involuntarily unemployed. The Court of Appeal referred the following questions to the Court of Justice of the European Union for a preliminary ruling:

> *'(1) Does an EU citizen who (1) is a national of another Member State; (2) has lawfully resided in and worked as a self-employed person in a host Member State for approximately four years; (3) has ceased his work or economic activity by reason of absence of work and (4) has registered as a jobseeker with the relevant employment office retain the status of self-employed person pursuant to Article 7(1)(a) whether pursuant to Article 7(3)(b) of Directive 2004/38/EC or otherwise.*
>
> *(2) If not, does he retain the right to reside in the host Member State not having satisfied the criteria in Article 7(1)(b) or (c) of Directive 2004/38/EC or is he only protected from expulsion pursuant to Article 14(4)(b) of Directive 2004/38/EC.*

98. The facts in *Gusa* merit some consideration. Mr. Gusa was a Romanian national who had worked as a self-employed plasterer and, on that basis, paid his taxes in Ireland, as well as pay related social insurance and other levies on his income between 2008 and 2012. He ceased working in October 2012, claiming an absence of work caused by the economic downturn, and registered as a jobseeker with the relevant Irish authorities. He then had no more income, as his children had left Ireland and were no longer supporting him financially, as they had previously. In November 2012, he applied for a jobseeker's allowance in reliance on the

provisions of the 2005 Act. The application was refused on the basis that he had not demonstrated that he still had a right to reside in Ireland at that date.

99. In referring the questions above the Court of Appeal specifically queried whether Mr. Gusa should be considered to have retained the status of self-employed person on the basis of Article 7(3)(b) of 2004 Directive or of another provision of EU law, so that he would continue to have a right of residence in Ireland under Article 7(1)(a) of the 2004 Directive. In particular, the referring court asked, in essence, whether Article 7(3)(b) covered only persons who are involuntarily unemployed after having worked as an employee for more than one year, or whether that provision applies also to persons who are in a comparable situation after having been self-employed for that period.

100. In a short judgment, the Court of Justice of the European Union did not find it necessary to consider whether Mr. Gusa had a retained right of residence on some basis other than Article 7(3)(b) of the 2004 Directive. The Court found that the expression '*involuntary unemployment*' should be interpreted expansively and may, depending on the context in which it is used, refer to a situation of inactivity due to the involuntary loss of employment following, for example, a dismissal, as well as, more broadly, to a situation in which the occupational activity, whether on an employed or self-employed basis, has ceased due to an absence of work for reasons beyond the control of the person concerned, such as an economic recession.

101. The Court of Justice carried out an interesting exercise in considering the use of words *'after having been employed'* in Article 7(3)(b) which were used notably in the English-language version and in the French-language version ('*après avoir été employé*') noting that these words did not appear in the initial or amended proposals for a directive submitted by the European Commission (Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2001 C 270 E, p. 150), and Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2003) 199 final) while other language versions of that provision, in particular, the Greek-language version uses the expression '*επαγγελματική δραστηριότητα*', thus referring to the pursuit of an '*occupational activity'*, the Italian-language version uses the words '*aver esercitato un'attività*', referring to the pursuit of an activity, and the Latvian-language version contains

the words '*ir bijis(-usi) nodarbināts(-a)*', referring in general terms to persons who have '*worked'*.

102. The Court of Justice then returned to the purpose of the 2004 Directive and of Article 7(1)(a) specifically as being to confer a right of residence on all Union citizens who have the status of '*workers or self-employed persons'* with Article 7(3) referring, in its introductory sentence, to Union citizens who, although no longer *'worker[s] or self-employed person[s]',* are to retain the status of '*worker or self-employed person'* for the purposes of Article 7(1)(a). The Court observed that an interpretation which excluded the self-employed worker from the ambit of Article 7(3)(b):

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

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

104. While the period of work was not in question in that case in that Mr. Gusa had worked for some four years, what is particularly striking about the Court's reasoning is the weight attached to the fact that the worker had contributed to the social security and tax system of the Member State for more than one year. It was no part of the Court's reasoning that subsequent periods of unemployment would negative the entitlement to retain residence nor that the one years' contributions to the tax and social security system was required to be consecutive. What mattered appeared to be that contributions at that level had been made. Furthermore, an observation which properly flows from the different language versions of the requirement for a period of employment in the 2004 Directive is that it appears to be universally the case in

each of the language versions considered that Article 7(3) requires a period of employment in the past but without tying that period immediately in time to either the commencement of the period of involuntary unemployment or requiring that it be "*continuous*".

105. In a second Irish reference, Case C-483/17 *Tarola v. Minister for Social Welfare,* the Court of Justice of the European Union was again called upon to determine whether the special provision for retention of rights provided for in Article 7(3)(c) applied in the case of a self-employed worker as well as an employed worker. In that case the High Court **(**White J.) found that the employment of the applicant, Mr. Tarola, in the State as a casual labourer for a particular two week period was not sufficient to bring him within the terms of Article 7(3)(c) of the 2004 Directive such that he would have an entitlement to stay for at least a further six months and, accordingly, to claim job seeker's benefit once that period of employment ended (*Tarola v. Minister for Social Protection* [2016] IEHC 206). The appellant appealed to the Court of Appeal against that judgment. The fundamental question was whether the two-week period of employment entitled Mr. Tarola to extend his residence *qua* worker in Ireland for at least a further six months such as would entitle him to claim social security payments.

106. A ruling was requested from the Court of Justice of the European Union on a situation where a citizen of another EU member state arrives in the host state and works for a two week period for which he is genuinely remunerated and thereafter becomes involuntarily unemployed, whether that citizen thereby retain the status of a worker for no less than a further six months for the purposes of Article 7(3)(c) and Article 7(1)(a) of the 2004 Directive such as would entitle him to receive social security benefits on the same basis as if he were a resident citizen of the host State.

107. In its judgment on the preliminary reference, the Court of Justice of the European Union recalled that the purpose of the 2004 Directive (as seen from recitals 1 to 4 thereof), was to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1) TFEU, and that one of the objectives of the 2004 Directive is to strengthen that right (the Court referring, to that effect, to judgments of 25th July 2008*, Metock and Others*, C-127/08, EU:C:2008:449, paragraph 82, and of 5th of June, 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 18 and the case-law cited). The Court of Justice of the European Union stated that it is in this context that Article 7(1)(a) of the 2004 Directive

provides that all Union citizens have the right of residence for a period of longer than three months on the territory of a Member State other than that of which they are a national, provided that they have the status of worker or self-employed person in the host Member State.

108. The Court of Justice of the European Union explained that Article 7(3) of the 2004 Directive provides that, for the purposes of Article 7(1)(a), a Union citizen who is no longer a worker or self-employed person in the host Member State will nevertheless retain the status of worker or self-employed person in certain circumstances which are not listed exhaustively in Article 7(3) (judgment of 19th of June, 2014, *Saint Prix, C-507/12*, EU:C:2014:2007, para. 38), including when he becomes involuntarily unemployed. While the primary question in *Tarola* was whether Article 7(3)(c) of the 2004 Directive applies to employed or self-employed persons or to both categories of worker, the Court of Justice of the European Union had regard to the purpose of the 2004 Directive in arriving at its decision.

109. The Court of Justice of the European Union reiterated in *Tarola* it should be borne in mind that, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (para. 37). The Court considered in *Tarola* that in view of the context of 2004 Directive and the objectives that it pursues, its provisions cannot be interpreted restrictively and must not in any event be deprived of their practical effect. In *Tarola*, the Court concluded that a reading of the provisions of Article 7(1)(a) in conjunction with those of Article 7(3) of 2004 Directive showed an entitlement to retain the status of worker as provided for in the latter provision is afforded to all Union citizens who have pursued an activity in the host Member State, whatever the nature of that activity — that is to say, whether they worked in an employed or self-employed capacity even though Article 7(3)(c) makes no reference to self-employment.

110. The decision of the Court of Justice of the European Union in *C-507/12 Saint Prix v Secretary of State for Work and Pensions*, relied upon in *Tarola*, is particularly instructive. In that case the Court considered an interruption in work due to the physical constraints of the late stages of pregnancy in circumstances where Article 7(3) of the 2004 Directive does not expressly envisage the case of a woman who is in a particular situation because of the physical constraints of the late stages of her pregnancy and the aftermath of childbirth. As the Court had consistently found that pregnancy cannot be equated with illness, a woman in the situation of Ms Saint Prix, who temporarily gives up work because of the late stages of her pregnancy

and the aftermath of childbirth, could not be regarded as a person temporarily unable to work as the result of an illness, in accordance with Article 7(3)(a) of the 2004 Directive. The Court found, however, that it did not follow from either Article 7 of the 2004 Directive, considered as a whole, or from the other provisions of that Directive, that, in such circumstances, a citizen of the Union who did not fulfil the conditions laid down in that article was, therefore, systematically deprived of the status of '*worker*', within the meaning of Article 45 TFEU. The Court reiterated (para. 33) that according to the settled case-law of the Court, the concept of '*worker*', within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the FEU Treaty, must be interpreted broadly (see further, to that effect, *N.*, C-46/12, EU:C:2013:97, para. 39 and the case-law cited).

111. As stated at para. 36 of the judgment in *Saint Prix,* freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment (see, *inter alia, Antonissen*, C-292/89, EU:C:1991:80, para. 13). It has long been held to follow that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (see, to that effect, *Lair*, 39/86, EU:C:1988:322, paras 31 and 36). In *Saint-Prix*, the Court found that in those circumstances (para. 38):

> *"….it cannot be argued, contrary to what the United Kingdom Government contends, that Article 7(3) of Directive 2004/38 lists exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status."*

112. Ms. Saint Prix had been employed in the territory of the United Kingdom before giving up work, less than three months before the birth of her child, because of the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth. She returned to work three months after the birth of her child, without having left the territory of that Member State during the period of interruption of her professional activity. The Court found that the fact that such constraints require a woman to give up work during the period needed for recovery did not, in principle, deprive her of the status of '*worker*' within the meaning Article 45 TFEU. It further found that the fact that she was not actually available on the employment market of the host Member State for a few months did not mean that she has ceased to belong to that market

during that period, provided she returned to work or finds another job within a reasonable period after confinement (see, by analogy, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, para. 50).

113. The fact that the Court of Justice has reiterated on more than one occasion that the circumstances in which a right of residence will be retained are not exhaustively sets out in Article 7(3) is very telling as is the fact that temporary absences for reasons other than those prescribed under Article 7(3) have been accepted as not interfering with or interrupting the status of worker. In the circumstances, it is difficult to see how Article 7(3) of the Directive can be construed as requiring a continuous or unbroken period of employment immediately prior to a period of involuntary unemployment in order to give rise to the retention of a right of residence in the absence of words clearly stating such a requirement.

114. By a similar process of reasoning to that adopted by the Court of Justice in *Gusa*, *Tarola* and *Saint Prix*, it seems to me that an interpretation which permits of a cumulative approach to periods of past employment or allows reliance to be placed on periods of employment other than the last year before becoming unemployed and registering as such is consistent with the principal objective pursued by the 2004 Directive, which is to strengthen the right of free movement and residence of all Union citizens, and with the objective specifically pursued by Article 7(3) thereof, which is to safeguard, by the retention of the status of worker, the right of residence of persons who have ceased their occupational activity because of an absence of work due to circumstances beyond their control (see, to that effect, judgments of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597, paragraph 60; of 25 February 2016, *García-Nieto and Others*, C-299/14, EU:C:2016:114, paragraph 47; and of 20 December 2017, *Gusa*, C-442/16, EU:C:2017:1004, paragraph 42). Further, an interpretation which finds that an earlier period of employment, disconnected from a period of involuntary unemployment can give rise to a right to retain a residence status, is the interpretation which sits most easily with the fact that the 2004 Directive permits periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident to be regarded as periods of employment in certain circumstances (Article 17 of the Directive).

115. The Respondent submits that the position adopted by the Applicant suggests that an EU citizen could come to the State and work for a few weeks every year over a lengthy period of

time and at some stage would have accrued one years' worth of work so as then to retain the status of worker. It is contended that there is no logic to this position because such a person would lose the status of worker after six months in between those periods of work but could then look back and overall retain the status. This ignores the fact that the status is not lost if work is obtained within the six-month period and for this six-month period, the EU citizen is considered to be resident in the State in lawful exercise of EU Treaty Rights or that other temporary absences considered to be outside the control of the worker have been found not to disturb their retained status as worker (as seen in *Saint Prix*). In such circumstances there is a continuous period of lawful residence during which the person retains the status of "*worker*", even though not actually working continuously.

116. It is established through the jurisprudence of the Court of Justice of the European Union that the fact that the worker is unemployed for a period of up to six months between a first interval of employment and a second does not negate the status of worker. Applying the purposive and expansive approach adopted in *Tarola*, it seems to me that the fact that one is only entitled to retain the status of worker for six months where one has worked for less than a year supports a view that where other work is obtained within the six months period required under the 2004 Directive, then the previous period work may be added to any new periods of work over a period when the EU citizen is lawfully in the State in exercise of EU Treaty rights in order to calculate the one-year period required to trigger an entitlement under Article 7(3)(b). The clock does not start again so long as one gains further employment within six months of the first interruption and can build up to the requisite years' employment. Contrary to what was suggested before me on behalf of the Respondent, I do not consider the distinction in the 2004 Directive between those who become unemployed having worked for a period shorter than a year and those who have worked for a year or more to be inconsistent with this interpretation. It is clear from earlier decisions such as *Saint Prix* that the nature and extent of any gap in employment is relevant to a consideration of whether a right may arise by reference to the non-exhaustive list of persons who are entitled to retain rights provided in Article 7(3)(c) of the 2004 Directive and the rights of workers under Article 45 TFEU.

117. I am satisfied that the Respondent erred in law in refusing the application for residence in this case in that she closed her mind to the potential relevance of employment and other activity evidencing the EU citizen's exercise of EU Treaty Rights during earlier years, focussing only on the twelve-month period prior to the initiation of divorce proceedings. The

facts pertaining to the EU Citizen's activity in the State have not yet been properly determined by the Respondent in a process in which the evidence of earlier periods worked is set out. It is unclear whether the facts that can be established with reference to a combination of the evidence submitted and held on file and information received from the DEASP are sufficient to enable findings to be made as to when and for how long the former EU spouse was engaged in activity in the State in exercise of EU Treaty Rights, the nature and duration of any gaps in activity (particularly activity related to her status as a worker) and the extent to which she contributed to the economy of the State through her activities. What is clear, however, is that the Respondent has proceeded to date as if these questions are irrelevant as the question of an entitlement to retain residency was governed by whether or not it could be demonstrated that the EU citizen spouse had worked for a continuous period of twelve months immediately prior to being rendered involuntarily unemployed at the time of the initiation of the divorce proceedings and therefore has not considered all of the information available in order to make reasoned findings in relation any rights which may derive from earlier activity by the EU citizen spouse in exercise of EU Treaty Rights.

<u>*Fair Procedures Issue*</u>

118. In concluding in *Hemida* that the decision of the Minister for Social Protection was not determinative and that the non-EEA citizen's case was not established, Baker J. placed some weight on the evidence before the Respondent in that case and the onus on the applicant for residence permission. At paragraphs 39-40 of her judgment, Baker J. found:

> *"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.*
>
> *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."

119. I am mindful in view of this dicta that the Applicant was married and living with his wife during the years 2009 to 2014 and must be presumed to know her activities during that period. There is a burden on him to adduce evidence in support of the residency entitlement he relies upon. This factor was relied upon in *Hemida* to conclude that there was no duty on the Respondent, on the facts of that case, to further disclose information obtained through inquiries conducted with the DEASP. There are three important distinguishing features to note, however.

120. Firstly, the reference to the evidence presented by the non-EEA national to the Minister in *Hemida* in the extract cited above likely refers to the evidence before the Minister in that case to the effect that the EU citizen was employed in the State for less than a year. An important distinguishing feature therefore seems to be that the evidence in this case is not similarly confined. Here there is evidence of employment going back many years which could potentially ground a finding that the EU spouse had established an entitlement to retained or permanent residency by the date of initiation of divorce proceedings. By adducing evidence in relation to former periods of employment on the part of his EU citizen spouse, the Applicant goes considerably further than the non-EEA national in the Court of Appeal in *Hemida* because the Applicant has indeed provided evidence which is capable of being supportive of a fact based conclusion that the EU spouse was lawfully resident in the State in exercise of EU Treaty rights over a period of some years ever before she became involuntarily unemployed and divorce proceedings were initiated.

121. Secondly, in clear contrast with the position in *Hemida*, the evidence is that the Applicant has sought consent from his former spouse to access her social welfare records but consent has not been forthcoming. Baker J. acknowledged that there might well be cases where disclosure of work or social welfare history of the Union Citizen spouse would be necessary (para. 53) as follows:

> *"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."*

122. As already noted, the factual situation in this case is very different to that pertaining in *Hemida* in that the application and material before the Respondent discloses a history of residence on the part of the EU spouse spanning many years prior to the initiation of divorce proceedings and employment in the State for parts of the years 2009, 2010, 2011, 2012 and 2013 giving rise to a question as to whether the EU citizen spouse's activity during the preceding years is such as to establish her residency status in determining the extent of the Applicant's derived rights, irrespective of her employment in the twelve month period immediately preceding the initiation of divorce proceedings, the only period seemingly considered by the Respondent for the purposes of Regulation 6(3) of the 2015 Regulations. In addition to providing information relating to his former spouses work related activities, the Applicant also points to the fact that she was in receipt of social welfare but cannot provide the detail of this in the absence of co-operation from his former spouse which it has been explained is not forthcoming. Further information is required to fill in gaps which would allow for the proper determination of a question of entitlement to residency deriving from his former spouse's rights at the time divorce proceedings were initiated but the Applicant has gone some way in providing an evidential basis for a decision in his favour.

123. Thirdly, there is no suggestion in the judgment that any record of contributions made was withheld in the *Hemida* case. While the evidence in this case suggests that the EU citizen spouse had a series of employers, what is not established from the record of the decision-making process is the duration of her various jobs during this period and the length of any gaps and when these occurred. This employment history may be apparent from her work-related contribution history during this time which it appears the Respondent may have received from the DEASP, but this has not been disclosed. This is an important distinguishing feature

between this case and *Hemida*. From my reading of the judgment in *Hemida* it appears that the information of the exact number of contributions made by the estranged wife and when these were made had been disclosed.

124. The Applicant in this case has specifically requested that the Respondent furnish him with the information received from the DEASP, but this has not been forthcoming. The Applicant has also pursued a Data Access request but has been denied access to the information received from the Department of Social Protection as this information is confidential to the EU citizen. While information is provided in the consideration documents concerning the number of insurance contributions from employment made during 2013 and 2014 (without an issue as to confidentiality being cited) to demonstrate that they amount to less than a year, no similar breakdown has been provided in respect of previous years and notably 2009, 2010, 2011 and 2012. Indeed, the Respondent does not in her decision address the possibility that EU residency rights may derive from this past employment as the Respondent has focussed only on the twelve-month period 2013-2014 being the twelve-month period prior to the initiation of divorce proceedings.

125. Against the particular factual background in this case in which a history of employment spanning several years on the part of the EU spouse is demonstrated and where the EU spouse has been non-co-operative in assisting the Applicant, it seems to me that this is one of those cases in which it is necessary for the Respondent to refer in redacted or other suitable form to the information available to her regarding the work or social welfare history of a Union citizen from whose rights the Applicant claims derived rights, to safeguard the fairness and transparency of the decision making process. It is not clear to me what impediment there is to disclosing information relating to the employment history and contributions made by his former spouse in the years 2009, 2010, 2011 and 2012, at least in similar fashion to the information relied upon by the Respondent in respect of the years 2013 and 2014.

CONCLUSION

126. While the decision of the DEASP to grant Jobseeker's Allowance is not determinative of whether the EU citizen is lawfully resident in the State and/or is involuntarily unemployed, nonetheless it is supportive of the Applicant's position and the basis for so concluding for social welfare purposes should be considered in deciding the separate question of whether the EU

citizen has a acquired a right of residency in the State based on her record of exercising free movement rights in pursuing activities in the State and/or by reason of being involuntarily unemployed following a period of more than one year in employment. If the DEASP was indeed satisfied that the Applicant's former spouse was available for work and genuinely seeking work, then as a matter of law this was a decision taken on the basis of an assessment of the facts. Where the DEASP has found, on the basis of a factual assessment in discharge of its statutory function, a person to be genuinely seeking work and to be available for work, this finding is a relevant consideration in deciding whether the same person is involuntarily unemployed for other purposes and should not be treated as being of no consequence.

127. The Respondent has not considered the EU citizen's employment or residence status during the period 2009, 2010, 2011 and 2012 despite the Applicant's reliance on these periods of employment to establish a derived right to residency, focussing instead on her employment in the period immediately preceding the application for Jobseeker's Allowance and the twelve-month period preceding the initiation of divorce proceedings. The condition of past employment which gives rise to a right to retain residence provided for in Article 7(3)(b) of the 2004 Directive and under Regulation 6(3)(c)(ii) is expressed as "... *after having been in employment for more than one year*" or "*having been employed for more than one year*". Temporary gaps in employment during these years do not necessarily result in the loss of worker status and these earlier periods of employment and the nature of the EU citizen spouse's residence during this period should be considered when determining the Applicant's application based on his derived rights and lawful residence in the State for a period of five years or more. The failure on the part of the Respondent to do so arises from an error of law on the part of the Respondent which improperly restricts the retention of a right of residence to circumstances where an unemployed EU citizen has been working for a twelve-month period immediately prior to registering as unemployed.

128. There is no mandatory requirement under Article 7(3)(b) or Regulation 6(3)(c)(ii) properly construed for a reckonable term of twelve months employment to be worked either continuously or immediately prior to registering as involuntarily unemployed for the purpose of Article 7(3) of the 2004 Directive or Regulation 6(3) of the 2015 Regulations. There are some circumstances in which a temporary loss of employment does not re-start the clock. Whether such circumstances are established on the evidence in this case is a matter for the

Respondent. Nothing in the 2004 Directive or the 2015 Regulations require that the qualifying period of employment must immediately precede registration as involuntarily unemployed.

129. In my view the failure to disclose the EU citizen spouse's contribution records for the years 2009, 2010, 2011 and 2012 in some redacted or appropriate form, if contained in the information received from the DEASP and available to the Respondent or to transparently address them in the decision making process, undermines the fairness of the process in circumstances where the Respondent is on notice that the Applicant contends that his former spouse was working during these years and has submitted some supporting evidence to this effect but he has no access to further information by reason of her lack of co-operation.

130. For the foregoing reasons, I will extend time for the bringing of the within proceedings and grant an order of certiorari quashing the decision of the Respondent to refuse a residence card to the Applicant as communicated by letter dated the 22nd of November, 2021.