Hilary Term

[2016] UKSC 1

On appeals from: [2012] EWCA Civ 1468 and 1952

JUDGMENT

Mirga (Appellant) vSecretary of State for Work and Pensions (Respondent)

Samin (Appellant) vWestminster City Council (Respondent)

before

Lord Neuberger, President

Lady Hale, Deputy President

Lord Kerr

Lord Clarke

Lord Reed

JUDGMENT GIVEN ON

27 January 2016

Heard on 9 and 10 March 2015

Appellant (Mirga)	Respondent (SSWP)
Richard Drabble QC	Jason Coppel QC
Zoe Leventhal	Amy Rogers
(Instructed by Public Law Project)	(Instructed by The Government Legal Department)
Appellant (Samin)	Respondent (Westminster CC)
Richard Drabble QC	Ian Peacock
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LORD NEUBERGER: (with whom Lady Hale, Lord Kerr, Lord Clarke and Lord Reed agree)

Introductory

1.
These appeals are brought by a Polish national, Roksana Mirga, and an Austrian national, Wadi Samin, against decisions of the Court of Appeal upholding determinations that they were not entitled to certain benefits, namely income support and housing assistance respectively, pursuant to the provisions of United Kingdom domestic law. The arguments have changed somewhat over the course of the two sets of proceedings, but the essential issue raised now is whether the provisions and the current implementation of the domestic law in question infringe the rights of residence in the UK of citizens of European Union member states.

2.
Shortly before this judgment was to be delivered, counsel for the appellants informed us of an Opinion which had been delivered by Advocate General Wathelet in Jobcenter Berlin Neukölln v Alimanovic (Case C-67/14) [2016] 2 WLR 208, which they contended assisted their arguments. We decided to await the judgment of the Court of Justice in that case. Judgment was given on 15 September 2015, and the parties have had the opportunity to make written submissions as to its effect on these appeals.

3.
It should perhaps be added that, after we received those further submissions, the appellants' counsel drew to our attention Advocate General Cruz Villalón's Opinion in European Commission v United Kingdom (Case C-308/14), and suggested that we await the judgment of the Court of Justice in that case, or alternatively that we refer these two cases to that court. In my opinion, following the judgment in Alimanovic, any issue on which we have to rule in these appeals is acte éclaré, and accordingly we should now determine these two appeals.

The factual background

The facts relating to Ms Mirga

4.
Ms Mirga was born in 1988 in Poland. In 1998, she came to this country with her parents and three siblings, but they returned to Poland in 2002 after being refused asylum. Two years later, in June

2004, on Poland's accession to the EU, the family returned to the UK. Sadly, her mother died four months later, and her father, who had been working, gave up his job owing to depression a few months afterwards. He received income support until late 2007, when it was decided that he should not have been receiving it, on the ground that he did not have the right of residence in the UK.

5.
Meanwhile, Ms Mirga finished her education in April 2005 and embarked on registered work within the meaning of the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) ("the A8 Regulations"). She continued with that registered work until November 2005. In February 2006, she became pregnant and started to do unregistered work, which she continued for two months or so. In June 2006, she left home for rented accommodation, and did a month's further unregistered work around June 2006. In August 2006, she claimed income support under the Income Support (General) Regulations 1987 (SI 1987/1967) ("the Income Support Regulations") on the grounds of her pregnancy. Her baby son was born in October 2006.

6.
The Secretary of State for Work and Pensions refused Ms Mirga's application for income support, and his decision was upheld by the First-tier Tribunal, whose decision was affirmed, albeit for different reasons, by Judge Rowland in the Upper Tribunal. The Upper Tribunal decided that the Secretary of State was entitled to refuse Ms Mirga's application because she did not have a right of residence in the UK under the A8 Regulations and therefore was excluded from the ambit of income support by virtue of the Income Support Regulations. The Upper Tribunal's decision was upheld by the Court of Appeal in a judgment given by Laws LJ, with which Tomlinson LJ and Sir David Keene agreed - [2012] EWCA Civ 1952.

The facts relating to Mr Samin

7.
Mr Samin was born in Iraq in 1960. After ten years military service, he successfully sought asylum in Austria in 1992, together with his wife and children, and he was accorded Austrian citizenship the following year. Sadly, he became wholly estranged from his wife and children, and he came to the UK in December 2005, since when he has lived in this country on his own. During the ten months following his entry into the UK, he had some paid employment on occasions, often part-time, but he has not worked since some time in 2006, and has not been looking for work since 2007.

8.
Mr Samin is socially isolated and suffers from poor mental health, principally from clinical depression and post-traumatic stress disorder. Having attempted to kill himself in the past, he remains a moderately high risk of suicide in the medium term. He also suffers from diabetes, hypertension and kidney stones, and he needs physiotherapy.

9.
After occupying temporary accommodation, Mr Samin lived in a studio flat in North London, which he had to vacate after four years in June 2010. He then applied to Westminster City Council ("the Council") for housing under the homelessness provisions in Part VII of the Housing Act 1996 ("the Housing Act"). After making inquiries, the Council decided that he was "a person from abroad who is not eligible for housing assistance" within the meaning of section 185(1) of the Housing Act, because he did not have the right of residence in the UK under the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the EEA Regulations"). That decision was affirmed in the Central London County Court by His Honour Judge Mitchell, whose decision was in turn upheld by the Court

of Appeal for reasons given by Hughes LJ, with which Etherton and Tomlinson LJJ agreed - [2012] EWCA Civ 1468; [2012] WLR(D) 336.

The legislative background

The Treaty on the Functioning of the European Union

10.
Under article 18 of the Treaty on the Functioning of the European Union ("TFEU"), "any discrimination on grounds of nationality" is "prohibited" in so far as it is "[w]ithin the scope of application of the Treaties". The importance of avoiding discrimination is emphasised by article 19 of TFEU which states that the Council "may take appropriate action to combat discrimination …".

11.
Article 20 of TFEU states in para 1 that every national of an EU member state "shall be a citizen of the Union", and, in para 2(a), that citizens of the Union should have "the right to move and reside freely within the territory of the member states", albeit that that right is to be "exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder".

12.
Article 21.1 of TFEU provides as follows:

"Every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in the Treaties and in the measures adopted to give them effect."

13.
Article 45 of TFEU, which is also concerned with freedom of movement for workers, requires "the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment".

The 2003 Accession Treaty

14.
In 2004, ten countries, including Poland, acceded to the EU pursuant to the Treaty on Accession 2003 ("the 2003 Accession Treaty"). By virtue of articles 10 and 24 of the Act of Accession forming the second part of the Treaty, existing member states, including the UK, were accorded, by way of derogation, certain transitional powers. Those powers included a right to derogate in relation to the free movement of workers within the EU, which was then governed by Regulation (EEC) No 1612/68 ("the 1968 Regulation"), in relation to nationals (known as "A8 nationals") of eight of the ten new member states. Those powers of derogation in relation to Polish nationals were contained in paragraphs 1-14 of Part 2 of Annex 12 to the 2003 Accession Treaty. So long as these provisions were in force, they enabled a host member state to exclude Polish nationals from freedom of movement rights unless they had been working in that state for "an uninterrupted period of 12 months" following accession.

The 2004 Directive

15.
The right of EU nationals to reside in all member states of the EU has been qualified and regulated by EU Instruments, most notably by the 1968 Regulation and by Directive 2004/38/EC of 30 April 2004

(“the 2004 Directive”), which made substantial amendments to the 1968 Regulation. The 2004 Directive is concerned with “the right of citizens of the Union and their family members to move and reside freely within the territory of the member states”.

16.
The preamble to the 2004 Directive includes the following:

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

…

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host member state they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host member state should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.”

Recital (31) emphasises that the 2004 Directive should be implemented in a non-discriminatory way.

17.
Article 6 states that “Union citizens shall have the right of residence on the territory of another member state for a period of up to three months without any conditions or any formalities”, and that the right extends to family members.

18.
Article 7 is concerned with the “Right of Residence for more than three months”, and it starts 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.”

Para 1(c) of article 7 deals with students, and para 1(d) and para 2 deal with family members.

19.
Article 7.3 provides that a person does not lose the status of a worker or self-employed person on ceasing to work in certain circumstances. Those circumstances include (a) if he or she is “temporarily unable to work as the result of an illness or accident”, and (b) if he or she has been employed for more than a year, is involuntarily unemployed and has registered as a job-seeker.

20.

Article 8 is concerned with “Administrative formalities for Union citizens”, and articles 8.1 and 8.2 deal with the right of member states to require Union citizens residing for more than three months “to register with the relevant authorities”. Articles 8.3 and 8.4 include the following:

“3. For the registration certificate to be issued, member states may only require that: …

… Union citizens to whom point (b) of article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein; …

4. Member states may not lay down a fixed amount which they regard as ‘sufficient resources’ but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host member state become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host member state.”

21.
Article 14.1 states that the three months’ right of residence under article 6 applies “as long as [the citizen and his or her family] do not become an unreasonable burden on the social assistance system of the host member state”. Article 14.2 provides that “Union citizens and their family members have the right of residence provided for in [article 7] as long as they meet the conditions set out therein”. But article 14.3 states that an “expulsion measure” should not be “the automatic consequence” of “recourse to the social assistance system”. Article 14.4 provides that an expulsion measure shall not be adopted against Union citizens who (a) “are workers or self-employed persons”, or (b) entered the host state to seek employment and “can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged”.

22.
Article 24.1 states that “all Union citizens residing on the basis of this Directive in the territory of the host member state shall enjoy equal treatment with the nationals of that member state”, albeit “subject to such specific provisions as are expressly provided for in the Treaty and secondary law”. Article 24.2 specifically entitles a member state to refuse social assistance “during the first three months of residence, or, where appropriate, the longer period provided for in article 14(4)(b)”.

23.
Article 28 is concerned with “Protection against expulsion”, and para 1 provides that:

“Before taking an expulsion decision on grounds of public policy or public security, the host member state shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin.”

24.
Articles 30 and 31 are concerned with protecting the rights that are the subject of the Directive (and the width of their ambit is emphasised by article 15.1). Article 30 deals with notification, and article 31 deals with “Procedural safeguards”, including access to judicial “redress procedures”.

Domestic legislation: the EEA Regulations

25.
On 30 April 2006, the EEA Regulations came into force in the United Kingdom. They were, as the Explanatory Note explains, intended to “implement” the 2004 Directive.

26.
Regulation 13 of the EEA Regulations provides that all EEA nationals have the right to reside in the UK for three months. Regulation 14 provides that a “qualified person” is entitled to remain in the UK so long as he is so qualified. Regulation 6 of the EEA Regulations defines what is meant by “qualified person”. It includes a “jobseeker”, a “worker”, a “self-employed person”, a “self-sufficient person”, and a “student”. Regulation 4, which has been amended on various occasions, is concerned with definitions of most of those expressions, including “worker” and “self-sufficient person”.

27.
Regulation 4(1)(a) defines “worker” by reference to the TFEU. Regulations 5 and 15 certain workers “who [have] ceased activity” have a permanent right of residence, and they include (2) those who have retired having worked in the UK for at least 12 months and resided there for at least three years, and (3) those who have stopped working “as a result of permanent incapacity”, having resided in the UK for at least two years. Regulation 6 extends qualified person status to people who are temporarily no longer working owing to “illness or accident”, or who worked but are now involuntarily unemployed and registered as jobseekers (but only for six months if they were employed for less than a year), or who have lost their jobs and are in vocational training.

28.
Regulation 4(1)(c) of the EEA Regulations provides that:

“‘self-sufficient person’ means a person who has -

i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and

ii) comprehensive sickness insurance cover in the United Kingdom.”

29.
Regulation 4(2), (3) and (4) contain further provisions dealing with what constitutes “sufficient resources”, but only para (4) is of any relevance in these proceedings. It has been amended at least twice. Ignoring references to family members which are irrelevant in these two cases, regulation 4(4) now provides that resources “are to be regarded as sufficient” if “(a) they exceed the maximum level … which a British citizen … may possess if he is to become eligible for social assistance” in the UK, or “(b) … taking into account the personal situation of the person concerned … it appears … that [his] resources … should be regarded as sufficient”. The paragraph originally only included what is now sub-para (a), and sub-para (b) was added in 2011.

30.
Regulation 19 of the EEA Regulations is concerned with refusal of admission and removal, and para 3 provides that a person who has been admitted into, or acquired a right to reside in, the UK may be removed if he does not have or ceases to have a right to reside. However regulation 19(4) states that a person cannot be removed “as an automatic consequence of having recourse to the social assistance system of the [UK]”.

Domestic legislation: the A8 Regulations

31.
Pursuant to the terms of the 2003 Accession Treaty, the European Union (Accessions) Act 2003 was enacted, which, under section 2, permitted the Secretary of State to make the A8 Regulations (which were revoked in May 2011). Regulations 2 and 5 of the A8 Regulations provided that A8 nationals

would only have full access to the UK labour market if they had been in registered employment under the Worker Registration Scheme for a continuous period of 12 months. The consequence was that, so long as the A8 Regulations were in force, A8 nationals could not become “qualifying persons” under the EEA Regulations unless and until they had performed registered employment for a continuous period of at least 12 months.

Domestic legislation: income support

32.
Entitlement to income support arises under section 124 of the Social Security Contributions and Benefits Act 1992 and the Income Support Regulations. In very summary terms, income support is available for certain people provided that they are not engaged in relevant work or receiving relevant education, and their income is below the “applicable amount”. The effect of regulation 21 of the Income Support Regulations, however, is that a “person from abroad” is to be treated as having an “applicable amount” of nil, and is therefore not eligible for income support.

33.
Regulation 21AA(1)-(3) of the Income Support Regulations states that certain people will be treated as “persons from abroad” unless they are “habitually resident” in the UK (and certain other places, including Ireland), and have the right to be so under certain statutory provisions not germane to the present appeals. Regulation 21AA(4) provides, however, that a person is not a “person from abroad” if he is, inter alia, a “worker” (or “self-employed person”, or is to be treated as a “worker” or “self-employed person”) within the meaning of the 2004 Directive.

Domestic legislation: housing assistance

34.
Part VII of the Housing Act imposes duties on local housing authorities in relation to homeless people. The duty extends, under section 193, to providing them with accommodation where they are involuntarily homeless and in priority need – unless they are not “eligible for assistance”. Eligibility for assistance is dealt with in section 185 of the Housing Act, which provides, inter alia, that “a person who is subject to immigration control” is ineligible for housing assistance unless of a class prescribed by regulations, along with any other person from abroad treated as ineligible by virtue of regulations.

35.
The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294) (“the Eligibility Regulations”) define the classes of persons subject to immigration control who are eligible for housing assistance and the classes of other persons from abroad who are ineligible, and the effect of regulations 2(2) and 6(2) is that a person from abroad is eligible if he is a worker for the purposes of the definition of a “qualified person” in regulation 6(1) of the EEA Regulations.

The issues raised on these appeals

36.
Mr Coppel QC and Ms Rogers, on behalf of the Secretary of State, contend that, at the time that Ms Mirga applied for income support, she was ineligible for income support under the Income Support Regulations, because she was a “person from abroad”. This was on the basis that she could not claim to be a “worker” as she was an A8 national who had not done 12 months’ registered employment (under the A8 Regulations), and thus could not be a “qualifying person” for the purpose of the EEA Regulations. Even if the A8 Regulations did not apply, Mr Coppel argues that Ms Mirga would still not

have been a “worker”, as the EEA Regulations would have required her to have worked for at least 12 months before she claimed income support. There is no question of Ms Mirga having been a “jobseeker”, a “self-employed person”, or a “student” under the EEA Regulations. Further, it seems clear that Ms Mirga could not claim to be a “self-sufficient person” under the EEA Regulations, as she had no significant means of support and no health insurance (but if she had had been a “self-sufficient person” she would presumably not have needed income support anyway).

37.
With the support of the Secretary of State for Communities and Local Government, Mr Peacock contends for the Council that Mr Samin is not a “worker” within the EEA Regulations because he is now permanently incapable of work, and in any event he cannot claim to be a “worker” because he has not worked for 12 months in the UK. Accordingly, argues Mr Peacock, Mr Samin is not a “qualified person” under the EEA Regulations, from which it follows that he is “ineligible” for the purposes of the Housing Act. It is also said that Mr Samin cannot claim to be “a self-sufficient person” within the EEA Regulations because he has no assets and no health insurance.

38.
The first argument raised by Mr Drabble QC, who appears with Ms Leventhal on behalf of Ms Mirga, is that, in the light of her right to respect for her private and family life, under article 8 of the European Convention on Human Rights, she cannot be removed from the UK, and therefore her right of residence in the UK, as accorded by article 21.1 of TFEU, cannot be limited or cut back in the way that the Income Support Regulations seek to do, namely by restricting her rights to income support because she has not achieved a continuous 12 month period in registered employment. His alternative argument is that, even if it would be permissible to refuse Ms Mirga income support on that ground, it is only possible in practice if it would be proportionate to do so, and in particular if the grant of income support to her would place an unreasonable burden on the social assistance system of the UK, and there has been no inquiry into that question.

39.
The first argument raised on behalf of Mr Samin by Mr Drabble, appearing with Mr Carter and Mr Cowan, is that the refusal of housing assistance to Mr Samin constituted unlawful discrimination in breach of article 18 of the TFEU, even though he may not have had a right of residence in the UK. The alternative argument raised on behalf of Mr Samin reflects the alternative argument in Ms Mirga’s case, namely that there should have been an investigation as to whether it was proportionate to refuse Mr Samin housing assistance, in particular on the ground that it represented an unreasonable burden of the UK social assistance system.

40.
Mr Drabble’s arguments were supported by Ms Demetriou QC, assisted by Mr Banner and Ms MacLeod, on behalf of The AIRE Centre, and it is right to record the court’s appreciation of their pro bono work in this case, and their assistance to the court.

Discussion

Issue one: do the domestic Regulations infringe the appellants’ TFEU rights?

41.
Mr Drabble’s first contention on behalf of Ms Mirga is that, as she is a “worker” (albeit one whose work was temporarily interrupted owing to her pregnancy), article 21.1 of TFEU accords her the right to “reside freely” within the EU, and therefore within the UK, and that the denial of income support to

her, at a time when she needed it in order to be able to live in the UK, was an impermissible interference with that right, as she would, in practice, be forced to return to Poland. That argument can be said to reflect the fundamental importance of freedom of movement and freedom of establishment to the single market concept, as well as the significance attached in articles 18 and 19 of TFEU to the avoidance of discrimination between citizens of a member state and other EU nationals.

42.
A similar argument cannot be run in relation to Mr Samin, because it is now accepted that owing to his inability to work he cannot claim to be a “worker”, even in the light of the extended definition in article 7.3 of the 2004 Directive and regulation 6 of the EEA Regulations. Accordingly, Mr Drabble’s first line of argument on behalf of Mr Samin is that the Council’s refusal to provide Mr Samin with housing assistance under Part VII of the Housing Act constituted “discrimination on grounds of nationality” prohibited by article 18 of TFEU, because such assistance would have been accorded to a citizen of the UK, or a qualifying worker from another member state, who was otherwise in the same position as Mr Samin.

43.
It seems to me that these arguments face real difficulties. The right accorded by article 21.1 of TFEU, which is relied on by Ms Mirga, although fundamental and broad, is qualified by the words “subject to the limitations and conditions laid down in the Treaties and in the measures adopted to give them effect”. In the present case, the “measures” include the 2004 Directive, and presumably include the 2003 Accession Treaty, which was adopted under article 49 of the Treaty on European Union.

44.
It appears clear from the terms of paragraph 10 of the preamble that it was a significant aim of the 2004 Directive that EU nationals from one member state should not be able to exercise their rights of residence in another member state so as to become “an unreasonable burden on the social assistance system”. It also seems clear that any right of residence after three months can be “subject to conditions”. This is reflected in the terms of article 7.1, in that it limits the right of residence after three months to those who are workers, self-employed, students, or with sufficient resources and health insurance “not to become a burden on the social assistance system of the host member state”. Indeed, it is worth noting that article 14.1 even limits the right of residence in the first three months. It further appears clear from article 24, that EU nationals’ right of equal treatment in host member states is “subject to … secondary law”, and in particular that they can be refused social assistance “where appropriate”.

45.
Accordingly, when one turns to the 2003 Accession Treaty and the 2004 Directive, I consider that, because Ms Mirga has not done 12 months’ work in this country, she cannot claim to be a “worker”, and, because she is not a “jobseeker”, “self-employed”, a “student”, or “self-sufficient”, it would seem to follow that she can be validly denied a right of residence in the UK, and therefore can be excluded from social assistance. In those circumstances, it must follow that article 21.1 TFEU cannot assist her.

46.
The fact that Ms Mirga may have to cease living in the UK to seek assistance in Poland does not appear to me to assist her argument. Although the refusal of social assistance may cause her to leave the UK, there would be no question of her being expelled from this country. I find it hard to read the 2004 Directive as treating refusal of social assistance as constituting a species of constructive

expulsion even if it results in the person concerned leaving the host member state. As I see it, the Directive distinguishes between the right of residence and the act of expulsion. However, quite apart from this, the Directive makes it clear that the right of residence is not to be invoked simply to enable a national of one member state to obtain social assistance in another member state. On the contrary: the right of residence is not intended to be available too easily to those who need social assistance from the host member state.

47.
Mr Samin's first argument appears to me to face similar difficulties. The article 18 right which he relies on does not constitute a broad or general right not to be discriminated against. First, its ambit is limited to "the scope of the Treaties", which means that it only comes into play where there is discrimination in connection with a right in the TFEU or another EU Treaty. Secondly, the article 18 right is "without prejudice to any special provisions contained [in the Treaties]". That brings one back to the argument raised on behalf of Ms Mirga.

48.
Contrary to the appellants' argument, I do not consider that the decision of the Third Chamber in Pensionsversicherungsanstaltv Brey (Case C-140/12) [2014] 1 WLR 1080 provides the appellants with much assistance. However, it is unnecessary to consider that possibility, because it seems to me clear that the first point raised by each appellant must be rejected as acte éclaré following the recent Grand Chamber judgments in Dano and another v Jobcenter Leipzig (Case C-333/13) [2015] 1 WLR 2519 (which was published after the Court of Appeal decided these cases) and in Alimanovic (Case C-67/14) EU:C:2015:597, which, as mentioned above, was published some time after the hearing of these appeals.It is appropriate to set out in summary terms the effect of those three decisions, not least because they have relevance to the second issue raised on behalf of each appellant, as well as the first.

49.
In Brey, the applicant was a German national residing in Austria, who received a German pension and care allowance insufficient for his needs, and who was refused a compensatory supplement from the Austrian government, because he did not meet the necessary national residency requirements, which excluded those who did not have sufficient resources not to be a burden on the Austrian social security system. Shortly after that refusal, the Austrian government issued the applicant with an EEA citizen registration certificate. The question referred to the Court of Justice by the Austrian Oberster Gerichtshof was "whether article 7(1)(b) of Directive 2004/38 should be interpreted as meaning that, for the purposes of that provision, the concept of 'social assistance' covers a benefit such as the compensatory supplement" (para 26). The Chamber ruled, at para 80, that the 2004 Directive precluded national legislation which

"automatically - whatever the circumstances - bars the grant of a benefit, such as the compensatory supplement … to a national of another member state who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside … since obtaining that right of residence is conditional on that national having sufficient resources not to apply for the benefit."

50.
In Dano, the applicant and her son were Romanian nationals living in Germany (where the son had been born), and she had been issued with an unlimited residence certificate. The applicant neither had worked nor was looking for work, and she and her son were refused maintenance payments. The

Sozialgericht Leipzig referred a number of questions to the Court of Justice, and the Grand Chamber concluded that article 24 of the 2004 Directive and article 4 of Regulation 883/2004 (which concerns "the coordination of social security systems", and includes a similar anti-discrimination provision to the 2004 Directive):

"must be interpreted as not precluding legislation of a member state under which nationals of other member states are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of article 70(2) of Regulation 883/2004, although those benefits are granted to nationals of the host member state who are in the same situation, in so far as those nationals of other member states do not have a right of residence under Directive 2004/38 in the host member state." (para 84)

51.
In Alimanovic, Mrs Alimanovic and her three children were Swedish nationals who had gone to Germany and had been issued with a certificate of right to permanent residence. She and her children were refused subsistence and social allowances, and when they challenged this, the Bundessozialgericht referred three questions to the Court of Justice. The Grand Chamber ruled, at para 63, that article 24 of the 2004 Directive:

"must be interpreted as not precluding legislation of a member state under which nationals of other member states who are in a situation such as that referred to in article 14(4)(b) of that Directive are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of article 70(2) of Regulation No 883/2004, which also constitute 'social assistance' within the meaning of article 24(2) of Directive 2004/38, although those benefits are granted to nationals of the member state concerned who are in the same situation."

52.
In para 60 of Dano, the Grand Chamber said that the right granted by article 18 of TFEU was subject to the restrictions I have mentioned in paras 43 and 44 above, and the court referred in support to the decision in Brey, and in particular paras 46ff. In para 46 of Brey, the Chamber had referred to "the right of nationals of one member state to reside in the territory of another members state without being … employed or self-employed" as being "not unconditional". It is also worth noting that the Grand Chamber also referred to article 20 of TFEU and article 24 of the 2004 Directive in terms which made it clear that the rights they grant should, in the instant context, be treated similarly to the rights granted by article 18.

53.
In para 61 of Dano, the Grand Chamber described the right under article 18 of the TFEU as having been "given more specific expression in article 24 of [the 2004 Directive]". In para 63, citing Brey, para 61, the court pointed out that if someone has recourse to "assistance schemes established by the public authorities", he may "during his period of residence, become a burden on the public finances of the host member state which could have consequences for the overall level of assistance which may be granted by that state". In para 69, it was made clear that "a Union citizen can claim equal treatment with nationals of the host member state only if his residence in the territory of the host member state complies with the conditions of [the 2004 Directive]". In para 73, the court summarised the effect of article 7(1) of the 2004 Directive, and said in the following paragraph that, if "persons who do not have a right of residence under [the 2004 Directive] may claim entitlement to social benefits under the same conditions as those applicable to nationals [that] would run counter to an objective of the Directive". In para 76, the purpose of article 7(1)(b) of the 2004 Directive was

described as being “to prevent economically inactive Union citizens from using the host members state’s welfare system to fund their means of subsistence”. Finally, in para 80 the Grand Chamber said that a person’s “financial situation … should be examined specifically … in order to determine whether he meets the condition of having sufficient resources to qualify … under article 7.1(b)”.

54.
As already mentioned, the authority of the decision in Dano has been reinforced by the decision in Alimanovic, where, in paras 44 and 50 respectively, the Grand Chamber specifically referred to what was said in paras 63 and 69 of the judgment in Dano with approval. More broadly, as explained more fully below, the Grand Chamber in Alimanovic confirmed that a Union citizen can claim equal treatment with nationals of a country, at least in relation to social assistance, only if he or she can satisfy the conditions for lawful residence in that country. Thus, it was confirmed that article 24.2 of the 2004 Directive was, in effect, a valid exception to the principle of non-discrimination.

55.
Dano and Alimanovic clearly demonstrate that the jurisprudence of the Grand Chamber of the Court of Justice is inconsistent with Mr Drabble’s first argument on behalf of Ms Mirga and Mr Samin, at least in so far as his argument is focussed on the 2004 Directive. It is fair to say that those cases were not concerned with the 2003 Accession Treaty. However, the House of Lords concluded in Zalewska v Department for Social Development [2008] 1 WLR 2602 that the A8 Regulations, which reflect the provisions of the 2003 Accession Treaty, were consistent with EU law, and nothing I have heard or read in connection with this appeal casts doubt on that conclusion. In particular, it appears to be consistent with the reasoning in Brey, Dano and Alimanovic.

56.
The only possible remaining issue in relation to this first set of arguments could be whether (i) in the case of Ms Mirga, the provisions of the Income Support Regulations, when read together with the A8 Regulations and the EEA Regulations, and (ii) in the case of Mr Samin, the provisions of the Eligibility Regulations, when read together with the EEA Regulations, complied with the requirements of the 2003 Accession Treaty and the 2004 Directive. As I understood his contentions, Mr Drabble did not suggest any discrepancy in the domestic regulations - unsurprisingly, as they were clearly intended to implement the EU instruments.

57.
Accordingly, in my judgment, following the clear guidance from the Grand Chamber in Dano and Alimanovic, the first arguments raised on behalf of Ms Mirga and Mr Samin cannot be maintained. That leaves their alternative arguments raised in the two appeals, based on proportionality.

Issue two: the appellants’ argument based on lack of proportionality

58.
Mr Drabble’s second argument in both appeals is that the determination of the authorities and the courts and tribunals below in the case of both Ms Mirga and Mr Samin was flawed because no consideration was given to the proportionality of refusing each of them social assistance bearing in mind all the circumstances of their respective cases, and in particular that the authority or tribunal concerned failed to address the burden it would place on the system if they were to be accorded the social assistance which they sought. In that connection, Mr Drabble relied on the Court of Justice’s decisions in St Prix v Secretary of State for Work and Pensions (Case C-507/12) [2014] PTSR 1448, Baumbast v Secretary of State for the Home Department (Case C-413/99) [2003] ICR 1347 and Brey.

59.
St Prix was concerned with the question whether a person ceased automatically to be a “worker” for the purpose of the 2004 Directive, and therefore the EEA Regulations, if she temporarily ceased work owing to the fact that she was pregnant. It provides no assistance to the appellants’ arguments as advanced by Mr Drabble, except to emphasise the purposive approach to be adopted to the interpretation of the 2004 Directive.

60.
The effect of the decision of Baumbast is that the fact that an applicant may fall short of the strict requirements of having “self-sufficiency” status under what are now the 2004 Directive and the EEA Regulations cannot always justify the host member state automatically rejecting his or her right to reside on the ground that the requirements for that status are not wholly complied with. In Baumbast the court was concerned, inter alia, with the issue whether an applicant could exercise the right to reside in the UK in circumstances where he was resting his case on the ground that he was a “self-sufficient person”. It is clear from paras 88 and 89 of the judgment that the applicant had sufficient resources to be self-sufficient in practice, and that he had medical insurance. His only possible problem was that the insurance may have fallen short of being “comprehensive” in one respect, namely that it was not clear whether it covered “emergency treatment”. The court held that, on the assumption that the insurance fell short in this connection, it would nonetheless be disproportionate to deprive the applicant of his right to reside.

61.
In para 92, the court pointed out that there were strong factors in the applicant’s favour, namely that he had sufficient resources, that he had worked and resided in the UK for “several years”, that his family had also resided in the UK for several years, that he and his family had never received any social assistance, and that he and his family had comprehensive medical insurance in Germany. In those circumstances, the court said in para 93 that it would be “a disproportionate interference with the exercise” of the applicant’s right of residence conferred by what is now article 21.1 of TFEU to refuse to let him stay in the UK because of a small shortfall in the comprehensiveness of his medical insurance.

62.
I do not consider that the appellants derive any assistance from Baumbast. Mr Baumbast’s case was predicated on the fact that he did not need any assistance from the state. Even if the decision is relied on by analogy, it is of no help to the appellants. The thrust of the court’s reasoning in that case was that, where an applicant’s failure to meet the requirements of being “a self-sufficient person” was very slight, his links with the host member state were particularly strong, and his claim was particularly meritorious, it would be disproportionate to reject his claim to enjoy the right of residence in that host state. Even though the applicant had a very strong case in the sense that he fell short of the self-sufficiency requirements in one very small respect, the court decided that he could rely on disproportionality only after considering the position in some detail.

63.
Mr Drabble’s argument appears to derive greater assistance from some of the reasoning of the Third Chamber in Brey, where the Third Chamber held that the complementary supplement was “social assistance” within the meaning of the 2004 Directive and also that it was open to member states to provide such assistance to “economically inactive citizens of other member states in any circumstances”. Crucially, argues Mr Drabble, the Austrian government’s refusal of the complementary supplement to the applicant was held to be unlawful.

64.
The central reasoning of the Third Chamber in Brey for present purposes is in paras 75-78. In para 75, having considered a number of points, the court concluded that “the mere fact that a national of a member state receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host member state”. In the following paragraph, the court stated that the fact that a non-national has applied for the benefit in issue in that case was “not sufficient to preclude [him] from receiving it, regardless of the duration of residence, the amount of the benefit, and the period for which it is available”.

65.
In para 77, the court made the point that domestic legislation, such as the Austrian law in that case, could not provide that a national of another member state, who was not a worker, self-employed or a student, should be automatically barred from receiving a social benefit. In the next paragraph, the court stated that “the competent authorities” should be able “when examining the application of a Union citizen who is not economically active and is in Mr Brey’s position” to “take into account” certain factors. They included “the amount and regularity of [the applicant’s] income”, the fact that he had received a certificate of residence, the period for which he would receive the benefit, and “the extent of the burden [it] would place” on the social security system (which as Advocate General Wathelet said in Dano at paras 111-112 of his Opinion, must be a collective assessment, which was confirmed by the Grand Chamber in para 62 of Alimanovic). These factors were, the court said in para 78 of the judgment in Brey, for the domestic court to assess.

66.
Brey was an unusual case, because the applicant had been issued with a certificate of residence by the Austrian government, a factor which appears to have played a significant part in the court’s thinking, as it was recited in the re-formulated question (in para 32) and it is referred to expressly and impliedly in the crucial para 78 of the judgment, and indeed in the final ruling of the Third Chamber (see para 49 above). However, it is not necessary to address that point further, as it appears to me that the reasoning in Brey cannot assist the appellants on the instant appeals, in the light of the subsequent reasoning of the Grand Chamber in the subsequent decisions in Dano and Alimanovic.

67.
The observations of the Grand Chamber in Dano discussed in para 53 above are in point. In Alimanovic, para 59, the Grand Chamber specifically mentioned that the court in Brey had stated that “a member state [was required] to take account of the individual situation of the person concerned before it … finds that the residence of that person is placing an unreasonable burden on its social assistance system”. However, the Grand Chamber went on to say that “no such individual assessment is necessary in circumstances such as those in issue in this case”. In para 60, the Grand Chamber explained that:

“Directive 2004/38, establishing a gradual system as regards the retention of the status of ‘worker’ which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity.”

The court then went on to explain that article 7 of the 2004 Directive, when read with other provisions, “guarantees a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality”. (In this connection, the Grand Chamber took a different view from that taken by

Advocate General Wathelet in paras 105-111 of his Opinion, upon which Mr Drabble had understandably relied.)

68.
In my view, this makes good sense: it seems unrealistic to require “an individual examination of each particular case”. I note that this was a proposition which the Second Chamber rejected, albeit in a somewhat different (and probably less striking) context, on the ground that “the management of the regime concerned must remain technically and economically viable” - see Dansk Jurist-og Økonomforbund v Indenrigs-og Sundshedsministeriet (Case C-546/11) [2014] ICR 1, para 70, which was cited with approval in the present context by Advocate General Wahl in Dano at para 132 of his Opinion.

69.
Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of Ms Mirga and Mr Samin), it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.

70.
Even if there is a category of exceptional cases where proportionality could come into play, I do not consider that either Ms Mirga or Mr Samin could possibly satisfy it. They were in a wholly different position from Mr Baumbast: he was not seeking social assistance, he fell short of the self-sufficiency criteria to a very small extent indeed, and he had worked in this country for many years. By contrast Ms Mirga and Mr Samin were seeking social assistance, neither of them had any significant means of support or any medical insurance, and neither had worked for sustained periods in this country. The whole point of their appeals was to enable them to receive social assistance, and at least the main point of the self-sufficiency test is to assist applicants who would be very unlikely to need social assistance.

71.
Whatever sympathy one may naturally feel for Ms Mirga and Mr Samin, their respective applications for income support and housing assistance represent precisely what was said by the Grand Chamber in Dano, para 75 (supported by its later reasoning in Alimanovic)to be the aim of the 2004 Directive to stop, namely “economically inactive Union citizens using the host member state’s welfare system to fund their means of subsistence”.

Conclusion

72.
I would dismiss both these appeals.