27 January 2016

PRESS SUMMARY

Mirga (Appellant) v Secretary of State for Work and Pensions (Respondent); [2016] UKSC 1
Samin (Appellant) v Westminster City Council (Respondent) [2016] UKSC 1
On appeals from [2012] EWCA Civ 1952 and [2012] EWCA Civ 1468

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Kerr, Lord Clarke, Lord Reed

BACKGROUND TO THE APPEALS

These two appeals concern the claims of two EU nationals to claim benefits in the United Kingdom.

Ms Mirga was born in Poland and, having previously lived in the UK with her parents for four years, moved back here in 2004. The benefit rights of people from Poland in the UK were mostly governed by the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) ("the A8 Regulations") which were enacted to give effect to the Treaty on Accession 2003 ("the Accession Treaty") under which Poland (and seven other countries) joined the EU.

After finishing her education in April 2005, she carried out registered work within the meaning of the A8 Regulations for seven months. She then became pregnant and did around three months of unregistered work. Ms Mirga claimed income support in August 2006 under the Income Support (General) Regulations (SI 1987/1967) ("the Income Support Regulations") on the grounds of pregnancy. The Secretary of State refused Ms Mirga's application for income support and his decision was upheld by the First-tier Tribunal. The Upper Tribunal and then the Court of Appeal affirmed that decision, on the ground that Ms Mirga did not have a right of residence in the UK under the A8 Regulations and therefore was excluded from income support by the Income Support Regulations.

Mr Samin was born in Iraq in 1960. In 1992, he and his family were granted asylum in Austria in 1992 and he was granted Austrian citizenship the following year. He then became estranged from his wife and children and came to the UK in December 2005, since when he has lived here alone. Where the A8 Regulations do not apply, the benefit rights of EU nationals in the UK are mostly governed by the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the EEA Regulations"), issued pursuant to EU Directive 2004/38/EC ("the 2004 Directive").

Mr Samin is socially isolated and suffers from poor mental and physical health. Mr Samin occupied private accommodation until 2010, when he applied to Westminster City Council ("the Council") for housing under the homelessness provisions of the Housing Act 1996 ("the Housing Act"). 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 EEA Regulations. That decision was affirmed in the Central London County Court, whose decision was in turn upheld by the Court of Appeal.

JUDGMENT

The Supreme Court unanimously dismisses both Ms Mirga's and Mr Samin's appeals for reasons set out in a judgment given by Lord Neuberger (with which Lady Hale, Lord Kerr, Lord Clarke and Lord Reed agree).

REASONS FOR THE JUDGMENT

Submissions of the parties

The Secretary of State contended that the Court of Appeal's decisions were right. At the time she applied for it, Ms Mirga was ineligible for income support because she was a "person from abroad", and could not claim to be a "worker" as she was an A8 national who had not done 12 months' employment and thus could not qualify under the A8 Regulations. Even if the A8 Regulations did not apply, the Secretary of State argued, Ms Mirga would not have been a "worker" under the EEA Regulations as she had not worked for 12 months before claiming income support **[36]**. In respect of Mr Samin, the Council contended that he was not a "worker" within the EEA Regulations because he is now incapable of work and had not worked for 12 months in the UK **[37]**.

In response to these contentions, two arguments were raised on behalf of Ms Mirga and Mr Samin.

The first argument rested on the Treaty on the Functioning of the European Union ("the TFEU"). Ms Mirga contended that, given her right to respect for family and private life under article 8 of the European Convention on Human Rights, and given that she had been a worker, albeit not for the requisite period under the A8 Regulations (or the EEA Regulations), she could not be removed from the UK; accordingly, she contended, her right of residence under article 21.1 of TFEU could not lawfully be cut back by restricting her right to income support as the Income Support Regulations purport to do **[38, 41]**. Mr Samin argued that refusal of housing assistance to him constituted unlawful discrimination contrary to article 18.1 of the TFEU because such assistance would have been accorded to a citizen of the UK or a qualifying member from another member state who was in the same position as Mr Samin **[39, 42]**.

Ms Mirga's alternative argument was that, even if the Income Support Regulations could have the effect for which the Secretary of State contended, it would only be so if it could be shown that providing her with income support would be disproportionate – i.e. if it would place an unreasonable burden on the UK social assistance system, and there has been no inquiry into that question **[38, 58]**. To much the same effect, Mr Samin's alternative argument was that the refusal of housing allowance to him could only be justified if it could be shown that the grant of such an allowance would be disproportionate and there had been no inquiry into that question **[58]**.

The first issue: do the domestic Regulations infringe the appellants' TFEU rights?

The right accorded to Ms Mirga by article 21.1 of TFEU is qualified by the words "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". In the present case, the "measures" include the Accession Treaty and the 2004 Directive, and hence the A8 Regulations and the EEA Regulations respectively **[43]**. A significant aim of these measures was to ensure 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. Further, any right of residence after three months can be subject to conditions, and EU nationals can be refused social assistance where appropriate **[44]**.

Whether the Accession Treaty or the 2004 Directive applied, Ms Mirga has not done 12 months' work in the UK, and therefore cannot claim to be a "worker", and she is not a jobseeker, self-employed, a student or self-sufficient. Therefore she can be validly denied a right of residence in the UK and can be excluded from social assistance. Article 21.1 of TFEU therefore cannot assist her **[45]**.

The article 18 right claimed by Mr Samin 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. Further, the right is without prejudice to any special provisions contained in the Treaties. Therefore, Mr Samin's argument fails for the same reasons that Ms Mirga's does **[47]**.

Examination of recent judgments of the Court of Justice of the European Union ("CJEU"), especially *Dano v Jobcenter Leipzig* [2015] All ER (EC) 1 and Case C-67/14 *Jobcenter Berlin Neukolin v Alimanovic* clearly support this conclusion. **[48-57]**

The second issue: the arguments based on lack of proportionality

The argument that the determinations of the courts and tribunals below in relation to Ms Mirga's claim and Mr Samin's claim were flawed because no consideration was given to the proportionality of refusing each of them social assistance is rejected. The judgments of the CJEU relied on by the appellants do not support the argument **[58-66]**. On the other hand, the judgment and reasoning in *Dano*, supported by the judgment in *Alimanovic* undermine the argument **[66, 67, 71]**. It is unrealistic to require an individual examination of each particular case, as is recognised by the jurisprudence from the CJEU **[68]**. Where a national of another member state is not a worker, self-employed or a student and had no, or very limited, means of support and no medical insurance, it would undermine the whole thrust 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 **[69]**. 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 or residence or the right against discrimination was invoked **[69]**. Even if there is a category of exceptional cases where proportionality would come into play, Mr Samin and Ms Mirga do not fall into it **[70]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html