Neutral Citation Number: [2014] IEHC 582

THE HIGH COURT

[2012 No. 15 SP]

BETWEEN/

EWAEN FRED OGIERIAKHI

PLAINTIFF

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND

THE ATTORNEY GENERAL AND AN POST (No.2)

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 22nd December 2014

1. This decision represents the latest stage of what has been a lengthy legal saga, the details of which will be set out at greater length in the course of this judgment. In essence, the plaintiff sues the State for damages by reason of its failure properly to transpose or apply Article 16(2) of the Free Movement Directive (Directive 2004/38/EC)("the 2004 Directive") in national law by reference to the *Francovich* principles (Case C-6/90 and Case C-9/90 *Francovich v. Italian Republic* [1991] E.C.R. I – 5357). As this date has assumed a particular importance so far as this claim is concerned, it should be noted at the outset that Article 40.1 of the 2004 Directive specified that Member States were required to approximate their laws and practices to comply with its requirements by 30th April 2006. The plaintiff also sues for damages for breach of his constitutional right to a good name as protected by Article 40.3.2 of the Constitution.

2. The plaintiff, Mr. Ogieriakhi, was originally a Nigerian national, but since 2012 he has been an Irish citizen through naturalisation. This case, however, concerns events which took place immediately before and after October 2007 when the plaintiff was dismissed from his employment as a postal sorter with An Post on the sole ground that he could not establish at the time to the satisfaction of his employer that he had the right to work in the State. It is important to state at the outset that the plaintiff was dismissed only by reason of his supposed lack of legal status and it was accepted that he was otherwise a diligent employee.

3. The plaintiff claimed that he had acquired the status of permanent resident by virtue of his marriage to a Ms. Georges, a French national, who was employed here (save for relatively short intervals) between the years 1999 to 2004. The plaintiff had himself originally arrived in Ireland in May 1998 whereupon he sought asylum. He married Ms. Laetitia Georges in May 1999 and he then subsequently withdrew the asylum application. He was given a residence permit by the Minister for Justice on 11th October, 1999.

4. That marriage split up at some stage in late 2001 or by early 2002 at the latest. A few months thereafter Mr.Ogieriakhi left the accommodation in which he had previously been living with Ms. Georges in order to make a new life with an Irish national, Ms. Catherine Madden. Ms. Georges and Mr.Ogieriakhi divorced in January, 2009 and Mr.Ogieriakhi and Ms. Madden married later that year in June, 2009. Mr. Ogieriakhi and Ms. Madden have a daughter who was born in 2003.

Article 16 of the 2004 Directive and the right of permanent residence

5. Article 16(1) of the 2004 Directive provides:

> "Union citizens who have resided legally for a continuous period of five years in the host Member States shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III."

6. Article 16(2) adds that:

> "Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years."

7. Article 16(4) further provides that:

> "Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period of exceeding two consecutive years."

8. The 2004 Directive came into force on 30th April, 2006. It was transposed into Irish law by the provisions of the European Communities (Free Movement of Persons)(No.2) Regulations 2006 (S.I. No. 656 of 2006), which came into force on 1st January 2007. If, therefore, Mr. Ogieriakhi's residence within the State between 1999 and 2004 satisfies the requirements of the Directive, it follows that he would have been entitled to permanent residence within the State as and from that date.

9. In these present proceedings the plaintiff now sues the State in a *Francovich*-style action for damages claiming that the State failed properly to transpose the provisions of Directive 2004/38/EC ("the 2004 Directive") into domestic law or else to apply the Directive's provisions in a manner compatible with EU law. It is accepted that the plaintiff can only succeed in such a claim if it can be shown that Ireland failed properly to transpose or to apply the relevant provisions of Union law; that such a breach of Union law was a sufficiently serious one and that he or she suffered loss as a result.

10. The proceedings first came before me in early 2013. I took the view that as the plaintiff could not succeed unless he could show that he, in fact, had an entitlement to permanent residence by virtue of Article 16(2) and, specifically, that his five years pre-2006 residency here was by virtue of EU law. I accordingly decided to refer three separate questions to the Court of Justice pursuant to Article 267 TFEU: see *Ogieriakhi v. Minister for Justice and Equality* [2013] IEHC 133.

11. By decision dated 10th July 2014 the Court of Justice ultimately ruled in the plaintiff's favour so far as the proper interpretation of

Article 16(2) of the 2004 Directive is concerned: see C-244/13 *Ogieriakhi* [2014] ECR I-2068. As that Court stated in its concluding summary of its decision:

> "Article 16(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as meaning that a third-country national who, during a continuous period of five years before the transposition date for that directive, has resided in a Member State as the spouse of a Union citizen working in that Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with Union citizenship."

12. In the wake of that decision, it cannot be doubted but that the State failed properly to apply Union law insofar as Mr. Ogieriakhi was wrongly refused residency on the basis that such residency had concluded prior to 30 April 2006 and, indeed, this is no longer disputed by the defendants. The effect of the decision of the Court of Justice can be summarised by saying that as the plaintiff was previously married to an EU national for the period of five years in respect of which she had exercised her free movement rights in this State, he then became entitled to permanent residency in this State. Before considering the legal issues which now arise so far as this action for damages is concerned, it is necessary first to resume the narrative to recount events which took place between 2004 and 2011.

The events between 2004 and 2011

13. On 11th September, 2004, Mr.Ogierakhi presented himself to the Office of the Garda National Immigration Bureau for the purpose of having his resident's permit renewed. On this occasion he was informed that Ms. Georges should attend in person at the office of the Bureau for the purpose of considering whether or not there was continuing compliance with the criteria laid down with regard to her erstwhile spouse's residence in this jurisdiction. Mr. Ogierakhi replied in correspondence pointing out that he could not arrange for Ms. Georges to come to the Garda National Immigration Bureau for this purpose since they had agreed to live apart. This matter was then referred by the Gardaí to the Minister and Mr. Ogierakhi's application was refused on 3rd November, 2004. The Minister refused Mr. Ogierakhi's application because it would have been necessary to show in accordance with Article 10 of the 1968 Regulation that there was a tenancy agreement rent book in the name of either the applicant or his EU national spouse and details as would identify a current contract of employment on the part of Ms.Georges.

14. This decision was subsequently successfully challenged by Mr.Ogierakhi in judicial review proceedings. In a decision of this Court delivered on 11th March, 2005, MacMenamin J. quashed the decision on the basis that the Minister had had no regard to information which had subsequently come to light to the effect that Ms. Georges was still in employment.

15. On this point MacMenamin J. stated:-

> "Such investigations as have been carried out tend to indicate that the applicant's spouse has in fact continuing connections with this jurisdiction, has worked here within the last year, has resided here and has availed of her rights as an EU citizen to draw social welfare here. In my view this information is relevant to a consideration of the applicant's status. As is it plain such information has been adduced with a matter which was within the procurement of the respondent or other servants of the state, at the very minimum it would appear that such material would and should have a significant effect on the outcome of the decision to be made. I am satisfied that the absence of such information in the previous decision created a situation where there is an absence of fair procedures."

16. In the wake of that decision of this Court the Minister then made a further decision on 13th April 2005 rejecting the plaintiff's claim for residency. The Minister held that in order for Mr. Ogieriakhi to qualify for residency under Article 10 of Regulation 1612/68 (EEC), it was necessary for him to demonstrate that his EU national spouse was currently exercising her EU Treaty rights by working or residing in the State. The Minister's inquiries established that Ms. Georges last resided in Ireland in December 2004 and thereafter had returned to Paris to take up employment. That decision was never challenged by Mr. Ogieriakhi.

17. It should also be recorded at this juncture that MacMenamin J. subsequently delivered a further judgment on 9th May 2007 in which he rejected a *Francovich*-style claim for damages for breach of EU law in respect of the decision of 3rd November 2004. This claim was rejected by MacMenamin J. on the grounds that:

> "There is no evidence here of a manifest or grave disregarding on the limits of the exercise of the discretionary power vested in the State. This Court held, simply, that the determination was ultra vires. There was no finding of bad faith, malice or spite. There is no evidence either that the State engaged in a breach of Community law in which it persisted despite the existence of a judgment establishing the infringement or by way of preliminary ruling or settled case law."

18. MacMenamin J. also rejected a claim for damages for breach of domestic law. Relying on the Supreme Court's decision in *Glencar Explorations plc v. Mayo County Council* (No.2) [2002] 1 I.R. 84, he held that there was no evidence of the commission of a recognised tort such as negligence or breach of statutory duty.

19. It should be said, however, that the present claim for damages under the *Francovich* doctrine relates exclusively to events which post-dated the decision of May 2007 and in the entirely new legal context where Article 16(2) of the 2004 Directive was now in force. The most significant change effected by the 2004 Directive is that it provided for a right of permanent residence for a family member of an EU citizen following a continuous period of residence within the Member State in question for a five year period.

20. In the meantime Mr. Ogieriakhi had commenced working as a postal sorter with An Post on 12th November 2001 at the Dublin Mails centre. He was originally working on a 21 hour contract as an auxiliary postal sorter, but this was subsequently upgraded to a 48 hour contract on 13th February 2006 as a full-time postal sorter.

21. During this period Mr. Ogieriakhi was pursuing a course of legal studies. I accept the evidence from Mr. Seamus Thompson, human resources manager with An Post, that the documentary records from this period show Mr. Ogieriakhi applied for and was informally granted permission to revert to his prior status as an auxiliary postal worker at some stage in late September/early October 2007.

22. Some months earlier in March 2007 Mr. Ogieriakhi had applied to the Minister for permanent residence under the provisions of Article 16 of the 2004 Directive. On the 19th September 2007, Mr. Ogieriakhi was informed by the Minister that the application for residency was incomplete and could not be considered. It is common case that at that time the Minister interpreted the 2004

Directive as granting a right of permanent residence on the basis of a continuous five year period up to and including the 30th April 2006, but not in respect of a five year period which had expired *prior to that date*. In essence, therefore, Mr. Ogieriakhi was refused residency because he could not demonstrate such a period of residence. The letter refusing residency also threatened Mr. Ogieriakhi with deportation proceedings.

23. Mr. Ogieriakhi then challenged the decision refusing residency in judicial review proceedings (2007 No. 1232 JR) which he commenced on 26th September 2007. In those proceedings Mr. Ogieriakhi contended that he was entitled to remain in the State on the basis that he had acquired a right of permanent residence under Article 16 of the 2004 Directive. Those proceedings were heard by this Court on 25th January 2008. In an *ex tempore* decision delivered on that day Charleton J. held that the 2006 Directive did not have retroactive effect so as to apply to a continuous period of residence which ended prior to 30th April 2006. No appeal was taken at the time against that decision.

24. In the meantime things had taken a turn for the worse so far as the plaintiff's employment with An Post was concerned. An article in a Sunday newspaper had highlighted the fact that he had been threatened with deportation on the ground that he lacked status in the State. It appears that this came to the attention of a trade union official who in turn reported the matter to senior management at An Post. The company then sought outside legal advice as to the legality of employing a non-EU national who did not have a valid work permit. That advice was to the effect that this would be illegal. It does not appear that any outside legal advice was sought by An Post as to whether Mr. Ogieriakhi had a right to work in the State by virtue of EU Treaty rights, although, of course, An Post also wrote at this point to the Chief State Solicitor's Office to inquire regarding Mr. Ogieriakhi's legal status.

25. According to the evidence of Mr. Thompson (which I accept), Mr. Ogieriakhi was then dismissed by An Post on the sole ground that he did not have a valid work permit and, as a result, he could not lawfully work for the company. He was first suspended by the company on 22nd October 2007 and he was told that he must produce a valid work permit at the next meeting on 24th October 2007. Mr. Ogieriakhi did not attend at that meeting and he was then dismissed. The letter of dismissal indicated that An Post would be prepared to re-employ him should he obtain a work permit at some stage in the future, subject to the existence of a suitable vacancy. That letter crossed with a letter from Mr. Ogieriakhi protesting that he had, in fact, acquired a right of residence here by virtue of EU law.

26. An Post's solicitors then wrote to the EU Treaty Rights section of the Department of Justice, Equality and Law Reform inquiring regarding the plaintiff's entitlement to work. A reply was received from the Chief State Solicitor on 8th November 2007 to the effect that as Mr. Ogieriakhi had voluntarily withdrawn his application for asylum, he had no such entitlement. The letter also referred to the fact that the plaintiff had applied for residency and had been refused, although judicial review of that decision was then pending. As a result of these inquiries An Post concluded that there was no legal basis upon which it could lawfully employ Mr. Ogieriakhi.

27. Mr. Ogieriakhi then commenced proceedings before the Employment Appeals Tribunal claiming that he had been unfairly dismissed. That hearing took place over two days on 4th April 2008 and 27th June 2008.

28. On the first day of the hearing, namely, 4th April 2008, the plaintiff received a message from the Department of Justice by telephone to the effect that he had just been given what is known as a Stamp 4 status by the Minister. The effect of this was that Mr. Ogieriakhi could then have lawfully worked in the State, with leave to remain here for a three year period. While this development was then brought to the attention of the Tribunal, it ruled that it would need to have formal written confirmation of this. A few days later on 8th April 2008 the Minister wrote to the plaintiff confirming that he was being granted Stamp 4 status.

29. At the resumed hearing on 27th June 2008 it is clear that counsel for An Post was asked by a member of the Tribunal as to whether the offer of re-employment was still available. This comment was obviously made against the backdrop of the most recent development regarding the Stamp 4. While there was some dispute about whether this exchange had happened, I accept the evidence of both Mr. Thompson and the company's solicitor, Mr. Seamus Bowe, that they were both present during this hearings and that they both confirmed to the Tribunal through counsel that the offer remained open. I also accept their evidence to the effect that Mr. Ogieriakhi told the Tribunal that he was no longer interested in that offer because he had just established a company of his own.

30. As it happens, in April 2008 the plaintiff and Ms. Madden had incorporated a company known as Sahara Foods Ltd. Their intention was that this company would cater for the ethnic food market in the Kildare region. While the company started trading in July 2008 assisted by a loan from a local credit union, the company ultimately made a loss and ceased trading about one year later.

31. The Tribunal delivered its decision on 14th July 2008. It upheld the validity of the decision of An Post, saying that it could only judge matters as of the date of that dismissal on 22nd October 2007. As the plaintiff had not established a legal entitlement to work as of that date, it followed that the dismissal was lawful. An Post never formally invited Mr. Ogieriakhi to resume his employment after that date through correspondence in writing and nor did Mr. Ogieriakhi ever formally seek re-employment until February 2011.

32. It is clear that Mr. Ogieriakhi thereafter made many other attempts to secure gainful employment, but given the most unpromising state of the labour market during these very difficult years it is not surprising that these endeavours were unavailing. During this period Mr. Ogieriakhi resumed his legal studies and was financially dependent on his wife, Ms. Madden. The family's financial circumstances became precarious in early 2010 when Ms. Madden was made redundant. I accept her evidence as to the financial difficulties which the dismissal of her husband from her employment has had on their family.

33. Mr. Ogieriakhi wrote again to An Post on 17th February 2011 drawing attention to the decision of the Court of Justice in C-162/09 *Lassa*l (the significance of which decision I will next consider) which had been delivered a few months previously. He contended that this judgment demonstrated that the decision to terminate his contract was unlawful and he called upon the company to make appropriate reparation to him. The company responded on 25th February 2011 stating that as the decision of the Tribunal not been appealed, that decision still stood. The company stated that it would fully defend any new proceedings which were thereafter commenced.

The decision of the Court of Justice in *Lassal* in October 2010

34. The legal understanding as to whether Article 16 of the 2004 Directive had retroactive effect - and which had informed the decisions of both the Minister and the Irish courts - was, however, shown to be incorrect as a result of the important decision of the Court of Justice in Case C-162/09 *Secretary of State for Work and Pensions v. Lassal* [2010] E.C.R. I-9217, a judgment delivered on 7th October 2010. In *Lassal* a French national had exercised free movement rights as a worker in the United Kingdom for a five year period between September, 1999 and February, 2005 in that she was either working or seeking work during that five year continuous period. She then left the UK for a ten month period but upon her return she was subsequently refused social security payments on the ground that she had no right of permanent residence there.

35. Following an Article 267 reference from the Court of Appeal from England and Wales, the Court of Justice held that continuous periods of residence of five years which were completed *prior* to the entry into force of the 2004 Directive on 30 April 2006 were required to be taken into account for the purposes of calculating the requisite periods of time spent in the host state for the purposes of Article 16(1). The Court further held that absences from the host state of less than two consecutive years did not affect that worker's Article 16(1) entitlement to permanent residence assuming, of course, she had already satisfied the five years legal residence in that State.

The aftermath of *Lassal* and the present case
36. In the wake of the decision in *Lassal* the plaintiff then sought an extension of time within which to appeal the decision of Charleton J. to the Supreme Court. While that Court refused such an extension of time in an *ex tempore* decision delivered on 18th February 2011, the Court further noted that this was in a context where the Minister had agreed to review the application for residency in the wake of *Lassal* and where the plaintiff was free to pursue "such remedies (including those based on Community law) as he may wish."

37. The Minister duly undertook a review of the application and sought the opinion of counsel on the legal points raised. Following the receipt of the opinion of counsel, the plaintiff was granted permanent residency in the State on November 7, 2011. To complete the picture, the Stamp 4 permission had been renewed for a further three years earlier that year. The plaintiff was granted Irish citizenship by naturalisation in 2010.

The Francovich claim
38. The present proceedings claiming *Francovich* damages were commenced in early 2012. So far as this claim for damages for breach of EU law is concerned, the Court of Justice itself has given useful guidance on this question when giving judgment in the preliminary reference in the present case. It will be recalled that the third question posed by me was whether the fact that this Court found it necessary to make a reference was itself a factor which I should take into account in assessing whether the breach of EU law was an obvious one. On that point the Court of Justice responded thus:

> "In the light of the foregoing considerations, the answer to Question 3 is that the fact that, in relation to a claim for damages for infringement of EU law, a national court has found it necessary to seek a preliminary ruling on a question concerning the EU law at issue in the proceedings on the substance must not be considered a decisive factor in determining whether there was an obvious infringement of that law on the part of the Member State."

39. The Court also conveniently re-stated the *Francovich* principles in the following terms

> "First of all, it should be borne in mind that the principle of State liability for loss and damage caused to individuals as a result of infringements of EU law for which the State can be held responsible is inherent in the system of the Treaty *(Francovich and Others*, EU:C:1991:428, paragraph 35; *Brasserie du pêcheur and Factortame,* C-46/93 and C-48/93, EU:C:1996:79, paragraph 31; and *British Telecommunications*, C-392/93, EU:C:1996:131, paragraph 38).
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> Similarly, it should be recalled that the Court has also held that EU law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the infringement must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties *(Brasserie du pêcheur and Factortame*, EU:C:1996:79, paragraph 51).
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> As regards the second condition, after stating that the decisive test for finding that an infringement of EU law is sufficiently serious is whether the Member State concerned manifestly and gravely disregarded the limits of its discretion, the Court indicated the criteria that national courts — which have sole jurisdiction to find the facts in the main proceedings and to decide how to characterise the infringements of EU law at issue — may take into account, such as the degree of clarity and precision of the rule infringed *(Brasserie du pêcheur and Factortame,* EU:C:1996:79, paragraphs 55, 56 and 58).

40. It is these principles which I am now called upon to apply in the present case.

First condition: does Article 16(2) of the 2004 Directive confers rights on individuals?
41. As to the first condition, there really can be very little doubt. The very language of Article 16(2) of the 2004 Directive makes it clear that this provision was intended to confer rights on individuals. This is not only obvious from the context, structure and language of Article 16 itself, but it is, in any event, confirmed by the reasoning of the Court of Justice itself on the Article 267 reference which I made in this case:

> "40. That interpretation is also consistent with the need not to construe Directive 2004/38 narrowly and not to deprive its provisions of their effectiveness. In that regard, it should be noted that, if Article 16(2) of the Directive were to be interpreted literally, a third-country national could be made vulnerable because of unilateral measures taken by his spouse, and that would be contrary to the spirit of that Directive, of which one of the objectives is precisely — according to recital 15 thereto — to offer legal protection to family members of citizens of the Union who reside in the host Member State, in order to enable them, in certain cases and subject to certain conditions, to retain their right of residence exclusively on a personal basis."

42. It is thus plain that the right of residence under Article 16(2) is personal to the third-country national. The first condition is accordingly satisfied.

Second condition: whether the breach was sufficiently serious
43. The second question is whether the breach was sufficiently serious. I accept fully the evidence given by both Mr. Thompson and Mr. Bowe on behalf of An Post and by Mr. Aengus Casey (a Higher Executive Officer attached to the Residence Section of the Irish Naturalisation and Immigration Service of the Department of Justice and Equality) on behalf of the Minister that all decision-makers had acted honestly by reference to their understanding at the time of the requirements of the Directive. Yet it is still impossible to avoid the conclusion that, viewed objectively, the breach of Article 16(2) which took place in the present case was a very serious one with grave consequences for Mr. Ogieriakhi.

44. It is clear from the case-law that whereas the presence of malice and the absence of *bona fides* coupled with the existence of a breach of EU law will necessarily ground liability, the converse is not the case. At common law, a decision-maker will be liable for the tort of misfeasance in public office where he or she acted illegally and with malice: see, e.g*., Pine Valley Developments Ltd. v. Minister for the Environment* [1987] I.R. 23, 36-37, *per* Finlay C.J. The Court of Justice has, however, already held in *Brasserie du*

Pêcheur (at para. 73 of the judgment) that a requirement that something akin to misfeasance must be shown before liability under the *Francovich* principles could be established would insufficiently protect EU law rights:

> "Likewise, any condition that may be imposed by English law on State liability requiring proof of misfeasance in public office, such an abuse of power being inconceivable in the case of the legislature, is also such as in practice to make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law where the breach is attributable to the national legislature."

45. It is, moreover, clear from the leading domestic authority on *Francovich* liability that the question of the seriousness of the breach must be assessed objectively and the mere fact that the ministerial officials acted *bona fide* and, for example, endeavoured quickly under difficult circumstances to put together a scheme of compensation for farmers affected by the outbreak of serious animal disease could not excuse liability in damages for breach of Union law: see *Maxwell v. Minister for Agriculture* [1999] 2 I.R. 474, 484, *per* McCracken J.

46. In *Maxwell* a scheme of compensation which differentiated without any objective justification between producers who exported live steers and producers who sold animals directly to the factories for slaughter was held to constitute a breach of the non-discrimination provisions of Article 40(3) EC (now Article 40(2) TFEU). McCracken J. regarded this breach of European Union law as a very serious one.

47. As the Court of Justice confirmed in its judgment on the preliminary ruling in the present case, paragraphs 55, 56 and 58 of *Brasserie du Pêcheur* are of particular importance in any assessment of whether the breach of Union law was a sufficiently serious one:

> "55. As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
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> 56 The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.
>
> 57 On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.
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> 58 While, in the present cases, the Court cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterize the breaches of Community law at issue, it will be helpful to indicate a number of circumstances which the national courts might take into account."

48. So far as the criteria of the clarity and precision of the rule breached and the measure of discretion left by that rule to the national or Community authorities, it has to be said that the terms of both Article 16(1) and Article 16(2) of the 2004 Directive are absolutely unambiguous and are both couched in unambiguous language ("..shall have the right of permanent residence…"…"shall also apply to family members who are not nationals of a Member State"). Assuming the conditions of Article 16(2) apply, Member States enjoy no discretion in the manner.

49. Nor can it be said that this error was objectively excusable. It is true that the matter was only ultimately clarified in *Lassal*. Even then a further reference from this Court to the Court of Justice was required before there could be absolute finality in respect of the present case given that *Lassal* concerned an EU national (Article 16(1)), whereas Mr. Ogieriakhi's case as a non-EU national fell for consideration under Article 16(2). One might also here point to the fact that the plaintiff lost his pre-*Lassal* challenge in this Court in February 2008,

50. Nevertheless, the fact remains that the Minister adopted an interpretation of Article 16(2) which was always inherently unlikely to prevail as it was at odds with one of the key objectives of the 2004 Directive as explained by recitals 17, 18 and 19:

> "(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship. There is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the Host Member state in compliance with the conditions as laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.
>
> (18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizens reside, the right of permanent residence, once obtained, should not be subject to any conditions.
>
> (19) Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the Host Member state, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No.1251/70 29 June 1970 on the right of workers to remain in the territory of a Member State after having being employed in that State in Counsel Directive 75/34/EEC of 17th December 1974 concerning the rights of nationals of a Member State to remain in the territory of another Member State after having pursued therein a activity in a self-employed capacity."

51. Quite apart from the fact that the language of the recitals ("A right of permanent residence…for all Union citizens and their family members *who have resided* in the host Member State….) is perfectly apt to capture past events, one might have expected that if pre-2006 residence was not to count for this purpose then this would have found expression if not in the substantive provisions of the 2004 Directive themselves, then at least in the recitals.

52. Besides, as the Court of Justice noted at para. 34 *et seq*. in *Lassal* if the pre-April 2006 residence could not be taken into account this would lead to some striking anomalies, depending on whether the residence started on, before or was completed by 30 April 2006. Given that the pre-existing legislative entitlements of free movers and their families to remain in the host Member State contained in provisions such as Article 10 and Article 11 of Regulation (EEC) No. 1612/68 were being repealed with effect from 30th

April 2006 by virtue of Article 38 of the 2004 Directive, this was a further clear textual indication that the Union legislator assumed that pre-April 2006 residence would count for this purpose, as it can scarcely have been supposed that Union citizens who acquired rights of residence prior to April 2006 under the old regime were now to find that they had neither rights under the old regime (which had been repealed) or under the new regime. Any such conclusion would have led to an outright absurdity which would be entirely at odds with the nature and purpose of the 2004 Directive in general and Article 16 in particular.

53. One could also add that as recital 19 makes clear, the pre-acquired rights of certain workers and self-employed persons to permanent residence after a stay in the host Member State of less than five years which had been conferred by virtue of Commission Regulation (EEC) No.1251/70 and Directive 75/34/EEC are expressly preserved. Article 17(1) provides that this specific entitlement to residence after less than five years in these circumstances is "by way of derogation from Article 16." If, however, Article 16 did not apply at all to pre-April 2006 events, one might well ask what the purpose of recital 19 was or why Article 17 was in this respect expressed to be by way of derogation from Article 16? There is here again further clear textual evidence that Article 16 contemplated that pre-April 2006 residence could count in any assessment of the five year residency period.

54. In arriving at this conclusion I do not overlook the fact that the Minister interpreted the 2004 Directive as including a five year period which pre-dated 30th April 2006, provided at least some of that period crossed over the 30th April 2006 date. On this interpretation, residence which commenced in June 2001 and concluded in June 2006 would, for example, have been acceptable, whereas residence which commenced in March 2001 and concluded in March 2006 would not. But there is simply nothing at all in either the text, the recitals or the stated purposes of the 2004 Directive which warrants that particular interpretation. Article 16 was either capable of embracing pre-April 2006 residency or it was not. If it was, there was nothing in the Directive to suggest that it was critical that the five year period should not have concluded before 30th April 2006. If it was not so capable of including pre-April 2006 residency, then there was no basis at all for the Minister's approach. In any event, if the Union legislator had intended to bring about such striking anomalies between broadly similar categories of otherwise eligible persons so that, for example, there was a requirement that any pre-April 2006 residency which was to be counted for the purposes of the five year period should not have concluded prior to 30 April 2006, one would have expected that this would have been expressly stated.

55. Nor do I overlook the fact that Article 16 is "one of the novelties of Directive 2004/38": Guild, Peers, Tomkin, *The EU Citizenship Directive – A Commenatary* (Oxford, 2014) at 177. It is accordingly true that Article 16 introduced a general right to permanent residency for this first time, supplanting the conditional right of residence of workers and self-employed (and their families) which had previously been recognised in earlier EU legislative texts. When measured against the objects of EU free movement principles in general and the 2004 Directive in particular, it would, however, make little sense that only-2006 permanent residency should be recognised for this purpose. This was the very point made by the Court of Justice in *Lassal.*

56. For completeness, I should add that it is clear from the answer given by the Court of Justice in respect of the third question posed on the reference that the fact that I considered it appropriate to make an Article 267 reference cannot in itself be regarded as a significant issue in any assessment as to whether, viewed objectively, the breach of Union law was a serious one.

57. It follows, therefore, that for the reasons stated, the second condition is accordingly satisfied.

Third condition: whether there is a causal link between the breach and the damage suffered
58. Just as with the first condition, there is little doubt but that there is a causal link between the breach of EU law and the damage suffered by the plaintiff. Mr. Ogieriakhi was dismissed from his employment *simply* because it could not be established that he had the right to work or reside here. Yet the reason why his entitlement to reside here was not acknowledged rested *entirely* on the Minister's pre-*Lassal* interpretation of the scope of application of Article 16(2) of the 2004 Directive *ratione temporis*, i.e., that periods of five year residency completed prior to 30 April 2006 simply did not count for this purpose.

59. It follows, accordingly, that there is such a direct causal link between the breach of Article 16(2) of the 2004 Directive and the loss and damage suffered by Mr. Ogieriakhi.

Conclusions on the liability issue
60. It follows, therefore, that as Mr. Ogieriakhi has satisfied all three conditions prescribed in the *Francovich* test, he is entitled to damages for breach of Union law. I now turn to a consideration of the quantum of damages.

61. The plaintiff's claim to damages really raises three issues which we can now consider in turn. First, there is the extent of the losses suffered by him as a result of his dismissal from employment. Second, there is the extent of his duty to mitigate his loss. Third, there is the question of general damages for breach of his constitutional rights.

The losses suffered by Mr. Ogieriakhi as a result of his dismissal from employment
62. I first turn to consider the extent of the losses suffered by Mr. Ogieriakhi. As I have already indicated, the evidence establishes that at the time of his dismissal Mr. Ogieriakhi was employed as an auxiliary postal sorter with a basic salary of €362 per week or €18,724 per year. In addition, however, there was the potential of earning overtime at the rate of €15 per hour.

63. In 2007 there were significant opportunities for overtime, with some auxiliary employees working as much as 16 extra hours. I fully accept the evidence of Mr. Thompson to the effect that the opportunities for overtime were contingent on the approval of management and, in any event, were dependent on a "turns" system, so that individual employees could not, as it were, appropriate all the available overtime to themselves as opportunities had to be shared among the workforce. Furthermore, Mr. Thompson explained that given the economic downturn since 2008 and the simultaneous increasing use of electronic mail by customers, An Post has had to cut the size of his workforce significantly in recent years. All of this means that the opportunities for overtime declined significantly over this period.

64. While it is naturally always difficult to say what would have happened had certain events not occurred, my own assessment is that Mr. Ogieriakhi would have remained as an auxiliary postal worker and that he would have worked an average of an additional 20 hours per month overtime during this period. I do not think that, but for the dismissal, the plaintiff would have left his job. I appreciate that after his dismissal the plaintiff sought to establish his own company and shop, but I do not think that this would have occurred were it not for the fact that he had been dismissed from his employment with An Post. In expressing this view I have not overlooked the fact that Mr. Ogieriakhi indicated to the Tribunal in June 2008 that he did not want his job back. But those comments were made after his dismissal and one can understand Mr. Ogieriakhi's sense of disillusionment after those events and the attitude he then adopted must be understood in that light.

65. It must be accepted that this is something of a rough and ready estimate. While I think that Mr. Ogieriakhi would have wished to have worked more overtime and possibly even return to his earlier status as a full-time postal worker, I do not think that the very

difficult financial circumstances prevailing in An Post during this period would have allowed for this possibility. On this basis, therefore, Mr. Ogieriakhi's gross loss (before tax) would have been €22,324 per year.

66. A further consideration is the number of years in respect of which I should allow Mr. Ogieriakhi to claim. This is partly tied to questions of the duty to mitigate loss, which I will next consider. While it would be wrong to permit any plaintiff to claim on an open-ended basis no matter how wronged they have been, one cannot ignore the fact that (save for odd jobs) this plaintiff has been left more or less unemployed since his dismissal. I think that in the circumstances I should allow him to claim for six years from 24 October 2007 until 23 October 2013, i.e., the maximum period tacitly permitted by the Statute of Limitations.

67. It follows, therefore, that, subject to the duty to mitigate (which I will next consider), the plaintiff's gross loss over the six year period is €133,944 *(i.e.*, 6 x €22,324).

The plaintiff's duty to mitigate

68. The plaintiff was under a clear duty to mitigate his loss and this included taking such appropriate steps either to be restored to his original employment with An Post or else to find alternative employment. In my view, measured by reference to a context where the plaintiff now claims damages by reason of his dismissal from his position with An Post, it was objectively unreasonable of him not to avail of the offer from An Post made at the resumed Tribunal hearing to re-engage him once an appropriate vacancy occurred. Had he done so, I imagine that the plaintiff would have been re-engaged within three months after that date, so that he would have still lost the entirety of the equivalent of one year's work, i.e., from October 2007 to October 2008.

69. But what of the situation thereafter? While Mr. Ogieriakhi was at fault in not pursuing that offer, An Post were also objectively at fault in failing formally to take any appropriate steps to this end. It is fair to acknowledge (as I have already found) that they made such an offer through counsel before the Tribunal, but it really should have been accompanied by a subsequent formal offer in writing. Without such a written offer, the plaintiff could not properly assess the terms on which he might have been re-engaged and, if so, when.

70. The failure to take reasonable steps to mitigate loss can amount to contributory negligence for the purposes of s. 34 of the Civil Liability Act 1961: see *McCord v. Electricity Supply Board* [1980] I.L.R.M. 153, 163, *per* Henchy J. Given that there was fault on both sides, I will measure Mr. Ogieriakhi's contributory negligence by reason of the failure to mitigate at 50% for the period from October 2008 to February 2011.

71. The position changed again in February 2011 when Mr. Ogieriakhi sought re-instatement from An Post in the wake of the decision of the Court of Justice in *Lassal* . By this stage the invalidity of the 2007 dismissal as amounting to a breach of Union law was manifest and the failure of the defendants at this point to take any steps to redress this wrong even in the wake of *Lassal* cannot be objectively defended. As that failure amounted to something akin to a fresh wrong to Mr. Ogieriakhi, it would be inappropriate to apply the reduction based on contributory negligence from that point onwards until the close of the claim in October 2013.

72. I will accordingly assess damages for loss of income as follows:

October 2007 - October 2008: €22,324 (100%)

October 2008 - October 2009 €11,162 (50%)

October 2009 - October 2010 €11,162 (50%)

October 2010 - February 2011 € 3,716 (50%)

February 2011 - October 2011 €14,893 (100%)

October 2011 - October 2012 €22,324 (100%)

October 2012 - October 2013 €22,324 (100%)

Total: €107, 905

73. That figure is, of course, subject to the payment of appropriate income tax and fiscal charges having regard, *inter alia,* to the provisions of ss. 123 and 201 of the Taxes Consolidation Act 1997 (as amended) and the guidance given on this issue in cases such as *Sullivan v. Southern Health Board* [1997] 3 I.R. 123 and *Nerney v. Thomas Crosbie Holdings Ltd. [*2013] IEHC 127.There will be liberty to apply in relation to this matter if required.

General damages for breach of his constitutional rights

74. So far as the claim for general damages is concerned, I entirely accept the evidence of Mr. Ogieriakhi and that of his wife, Ms. Madden, that his dismissal from employment had serious financial and reputational consequences for him and his family. It brought about serious financial strain. It is clear, however, that damages for inconvenience, upset and distress falling short of a cognisable psychiatric injury are not recoverable in an action for negligence: see, *e.g., Devlin v. National Maternity Hospital* [2007] IESC 50, [2008] 2 I.R. 222, *Larkin v. Dublin City Council* [2007] IEHC 416, [2008] 1 I.R. 391 and *Walter v. Crossan* [2014] IEHC 377.

75. Independently of any claim in tort, however, the plaintiff nevertheless also sues for damages for breaches of his constitutional rights to a good name and to his property rights as protected by Article 40.3.2 of the Constitution by reason of the circumstances in which he came to be dismissed. So far as general damages are concerned, this, indeed, is his principal claim. This appears to be the first case in which this Court has been required to determine whether a person who has been dismissed in this or similar fashion can sue for breach of his constitutional right to a good name by reason of the injury to his reputation resulting in that dismissal.

76. There is no doubt but dismissal from employment brought about by operation of law clearly engages the protection of the property rights protected by Article 40.3.2: *see Cox v. Ireland* [1992] 2 I.R. 503, 522, *per* Finlay C.J.. In Cox, the plaintiff was dismissed from his employment by reason of the operation of a statutory provision which was later found to be unconstitutional.

77. Article 40.3.2 provides:

> "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

78. Moreover, the Supreme Court has stressed the importance of the Courts upholding the "solemn guarantee" contained in Article 40.3.2 so that adequate protection is afforded to the person who is unjustly removed from office. As Henchy J. put it in *Garvey v. Ireland* [1981] I.R. 75, 101:

> "That guarantee would be abandoned and abrogated if, in every case of dismissal from an office such as this, the possibility of error, unfairness and injustice were to be compounded by silence and then rendered it immune from judicial inquiry by the concept of executive immunity. An office such as this, which provides its holder with his livelihood, and in which he may reasonably hope to qualify for honourable retirement, is such an integral part of what goes to make up his dignity and freedom that his removal from it should have attached to it at least the justification of a stated and examinable reason."

79. These words were admittedly uttered in the context of whether the Government were obliged to give reasons for the removal from office of a statutory officer but they might nevertheless be thought to have a peculiar resonance for the present case.

80. It is true that two subsequent judgments of Henchy J. have clarified the extent of the State's duty under Article 40.3.2. In *Pine Valley Developments* the plaintiffs had paid an enhanced price for lands with the benefit of a planning permission, which permission was later held to be *ultra vires*. Henchy J. stressed that in those circumstances the plaintiffs could either have sued the vendor for breach of the latter's covenant for title or brought an action for unjust enrichment. In those circumstances Henchy J. considered that "it may therefore be said that they have failed to prove that an injustice has been done to them for the purposes of Article 40.3.2": see [1987] I.R. 23, 42. In effect, therefore, Henchy J. held that there had been no breach of the State's duty under Article 40.3.2 because the ordinary law of vendor and purchaser and together with the law of unjust enrichment provided the plaintiff with an effective remedy and an adequate means of redress.

81. A similar approach was taken by Henchy J. in *Hanrahan v. Merck, Sharpe & Dohme Ltd.* [1988] I.L.R.M. 623, 636 where he said that a plaintiff suing for breach of his constitutional rights must normally first invoke his rights at common law or under statute, save where these rights were "basically ineffective to protect his constitutional rights."

82. Can it be therefore said that the ordinary law affords the plaintiff an effective remedy such that no "injustice" has been done to him for the purposes of Article 40.3.2 in respect of the protection of either his property rights or his good name in the manner contemplated by Henchy J. in both *Pine Valley* and *Hanrahan*?

83. In the case of his property rights, it may be said that the *Francovich* remedy provides the plaintiff with an effective and adequate protection of the property rights which are associated with his employment and the right to earn a living. In other words, the award of €107,905 may be taken to represent an adequate and just compensation for the wrongful interference with his property rights in respect of the loss of income which he might fairly have anticipated had he not been dismissed.

Article 40.3.2 and the protection of the right to a good name

84. I take a different view, however, in respect of the protection of the plaintiff's constitutional right to a good name. The common law has traditionally declined to award damages for loss of reputation following dismissal from employment. The classic example is *Addis v. Gramophone Co. Ltd*. [1909] A.C. 488, a case where the House of Lords held (or, at least, appears to have held) that damages are not recoverable in contract for the manner in which an employee has been dismissed from his employment. In that case the plaintiff had been summarily dismissed from his employment in a humiliating manner which had seriously affected his reputation and standing.

85. It is true that the precise ratio of the decision is not easy to decipher, given the sometimes Delphic statements found in the majority judgments, with Lord Collins alone dissenting. As Lord Steyn pointed out in *Johnson v. Unisys Ltd*. [2003] 1 A.C. 518, 526-527 the headnote to the [1909] Appeal Case may well be incorrect insofar as it states that the a plaintiff could never recover such damages for loss of reputation in an action for contract of contract, as only the Lord Loreburn L.C. clearly stated this proposition.

86. In some ways, none of this really matters, because this, one way or the other, *Addis* has cast a long shadow over this branch of the law of contract. Lord Loreburn's analysis has been generally understood (whether correctly or otherwise) to reflect the prevailing view of the common law as laid down in that case. As a matter of principle, it seems hard to think that an *ex ante* exclusion of a claim for damages of this kind could be justified as a matter of ordinary contract law, given that as I observed in *Walter v. Crossan* [2014] IEHC 377 there are many examples strewn around other areas of the law of contract where damages for disappointment and inconvenience can be recovered:

> "There is no doubt but that damages for distress and inconvenience of this kind are at least in principle recoverable in an action for breach of contract. Thus, damages can be recovered for upset and disappointment arising from an unsatisfactory holiday: (*Jarvis v. Swan Tours Ltd.* [1973] Q.B. 223) or where a wedding party are wrongly denied access to food and drinks which a public house had agreed to supply for a post-wedding reception (*Dinnegan v. Ryan* [2002] IEHC 55) or where a worker is wrongfully denied the early retirement he had been promised and for which he had made arrangements (*Browne v. Iarnród Eireann* (No.2) [2014] IEHC 117). Damages for inconvenience can also be awarded for breach of contract in respect of the construction of a defective dwelling: see, e.g., *Johnson v. Longleat Properties Ltd.* [1976-77] I.L.R.M. 93, *Quinn v. Quality Homes Ltd*. [1976-77] I.L.R.M. 314, *Leahy v. Rawson* [2004] 3 I.R. 1 and *Mitchell v. Mulvey Developments Ltd.* [2014] IEHC 37."

87. To that list one might also add the various cases (such as, e.g., *Clayton v. Oliver* [1930] A.C. 209) where damages can be awarded for loss of reputation where "the main purpose of the contract was advertising or publicity": McDermott, *Contract Law* (Dublin, 2001) at 1132-1133.

88. A far more detailed analysis of the fallacies and muddled thinking which underpin the reasoning in *Addis* is to be found in Lord Steyn's masterly dissenting judgment in *Johnson v. Unisys Ltd* [2003] 1 A.C. 518. It may be correct to say – as Lord Atkinson did in *Addis* – that "damages for breach of contract were in the nature of compensation, not punishment." But this does not mean that if the plaintiff suffers reputational damage in the manner of his wrongful dismissal that he or she is not entitled to be compensated for this loss, even if the law of contract does not allow for something in the nature of exemplary damages by way of punishment in respect of any egregious conduct on the part of any party who broke the contract.

89. While some inroads into the rule in *Addis* were made in *Malik v. Bank of Credit and Commerce International SA* [1998] A.C. 20 (where the plaintiffs were allowed to recover "stigma" damages by reason of the fact that their employer had engaged in fraudulent banking practices, so making their re-employment more difficult), a majority of the House of Lords declined to take the opportunity in *Johnson* to overrule the earlier decision in *Addis*, even though a member of that majority, Lord Millett, also acknowledged that the rule

was "not easy to defend and may no longer be the law." Instead the justification offered by the majority was that overruling *Addis* would be tantamount to creating by judicial decision a parallel system of unfair dismissal legislation and that, given parliamentary intervention in this area, it would be inappropriate for the courts to take such a step.

90. So far as our courts are concerned, the question of whether damages could be awarded in an action in contract for breach of reputation was left over by Gilligan J. in *Carey v. Independent Newspapers (Ireland) Ltd.* [2004] 3 I.R. 52 (although his judgment contains an exceptionally helpful and insightful summary of the law in this area) and by Laffoy J. in *Nerney v. Thomas Crosbie Holdings Ltd*. [2013] IEHC 127. The *Addis* principle was, however, applied by McWilliam J. in *Garvey v. Ireland* (No.2) [1979] I.L.R.M. 266.

91. In that case the Garda Commissioner had been summarily dismissed by the Government. No reasons were given for that decision. As we have already seen, the Supreme Court held in *Garvey (No.1)* that this dismissal was invalid and the Court considered that the general fairness of procedure and the protection of his constitutional rights required the giving of reasons. After that decision the matter was remitted to the High Court for the assessment of damages.

92. At that point the plaintiff claimed damages for loss of job satisfaction, invasion of privacy "due to the public interest in his removal from office, injury to his health and general distress aggravated by the effect the events had upon his family." McWilliam J. rejected these claims, endorsing the principle in *Addis* ([1979] I.L.R.M. 266, 268):

> "I accept the decision in this case. Accordingly, unless some injury was occasioned by the plaintiff as a result of the wrongful removal from office of the plaintiff which could reasonably have been foreseen by the defendants, I am of the opinion that he is not entitled to any general damages under this heading."

93. However, McWilliam J. went on to award the plaintiff what even then was a relatively small amount of damages (IR£500) to reflect the arbitrary and oppressive conduct of the Government. The judge explained this relatively small sum by saying, however, that a "similar injury would, to a large extent, have been sustained by the plaintiff had he been lawfully removed from office."

94. There are a number of features of *Garvey (No.2)* which invite comment. First, the summary and very public removal of an office-holder in this fashion is something which will inevitably cause the holder immense personal distress, given its humiliating circumstances. Contrary to what McWilliam J. seemed to imply, it is very hard to see that this type of injury is not foreseeable. Second, the decision in *Addis* did not turn on questions of foreseeability, as such, but rather that the additional injury caused to the plaintiff's reputation by reason of the circumstances of his dismissal was simply not recoverable in an action for damages for breach of contract - as distinct from tort – precisely because (as the House of Lords saw it) of the nature of the cause of action in contract. Third, it is notable that McWilliam J. awarded damages (albeit reduced) for arbitrary conduct on the part of the Government, even though this was precisely the kind of damages for breach of contract which *Addis* seems to exclude. Fourth, McWilliam J. reduced the damages because he thought that the plaintiff would have suffered a similar injury had he in fact been lawfully removed from office. But this, with respect, surely begs the question as to whether the plaintiff could lawfully have been removed had due process been properly observed. In any event, even if this were so, the extent of the public humiliation suffered by the plaintiff would surely have been less had he been removed after due process rather than being removed in the arbitrary fashion which in fact occurred: this, after all, had been a key feature of the reasoning of Henchy J. in *Garvey (No.1).*

95. One other important issue which did not feature at all in *Garvey (No.2)* – even though, as we have seen, it was a critical element of the judgment of Henchy J. in *Garvey (No.1)* – was the protection of the plaintiff's good name in Article 40.3.2, as informed by the Preamble's commitment to the objective of securing the dignity of the individual. This is, however, a central feature of the instant case which presents this question, apparently for the first time.

96. It may be immediately observed that a rule which provides that damages for loss of reputation are excluded from recovery would be *prima facie* incompatible with express terms of the guarantee imposed on the State by Article 40.3.2 to protect the good name of every citizen, as informed by what Henchy J. described in *Garvey (No.1)* ([1981] I.R. 75, 99) as the "broad motivating and purposive considerations" of the Preamble's commitment to human dignity. After all, employment is not just simply a means of earning a living. Employment gives dignity to what otherwise would be for many a soulless existence and our occupation may be said to be one of the key defining features of our life. The twin constitutional guarantees of dignity and good name would accordingly be purely hollow and emptied of any substance if the law did not provide an adequate remedy to compensate for loss of reputation in this kind of case and the affront to the dignity of the individual which such a humiliating unlawful removal from office entails. After all, as O'Byrne J. said in *Buckley v. Attorney General* [1950] I.R. 67, 81, it is the duty of the courts to ensure that these constitutional guarantees are given "life and reality."

97. So far as the present case is concerned, it is therefore sufficient to say that as the *Addis* rule would be "basically ineffective" (to use the words of Henchy J. in *Hanrahan*) to protect the constitutional right to a good name in the circumstances of this case, the plaintiff is accordingly entitled to sue directly for damages for breach of his constitutional rights. This is particularly so given the highly unusual feature of this claim where the dismissal of the plaintiff from his employment was brought about not by reason of his conduct or the financial situation of the employer, but rather because of the application of immigration rules in a manner which has been subsequently found by the Court of Justice to be contrary to the requirements of EU law. It is unnecessary in these circumstances to examine the extent to which the rule in *Addis* might have to suffer modification by reason of Article 40.3.2 so far as the generality of employment disputes governed by private law are concerned.

98. Nor could it be said that an action for the tort of defamation – which is the principal remedy provided by law for the vindication of the constitutional right to a good name – would have afforded adequate protection for this right, at least in the very special circumstances of the present case. As the employment cases themselves tacitly recognise, the vindication of the employee's right to a good name following dismissal must normally come through either the mechanism of contract law or not at all. This is because defamatory words or conduct will not normally accompany the act of dismissal and, even if they do, the uttering of such words will generally be protected by privilege in the manner now contemplated by s. 18 of the Defamation Act 2009.

99. It is, moreover, the very of act of dismissal which often sends the signal to future employers that the employee is not fit to be re-hired. The gist of the damage to the plaintiff's good name was the immediate and unlawful termination of his contract of employment with An Post. This was not capable of being remedied either by the tort of defamation (for the reasons just stated) or for breach of contract (by reason of the rule in *Addis*). It might have been capable of being remedied by means of proceedings under the Unfair Dismissal Acts 1977 to 2007, but, as we have seen, the Employment Appeals Tribunal rejected the claim that this dismissal was unfair.

100. For all of these reasons, therefore, the existing law did not adequately vindicate the plaintiff's constitutional right to a good

name, at least in the unusual and special circumstances of the present case.

101. What injury and loss to reputation did the plaintiff then suffer? There is no doubt but that An Post sought to minimise the loss and disruption which the plaintiff suffered. Nor could it be said that An Post acted in an arbitrary or high-handed fashion. Yet the plaintiff nonetheless suffered a grievous injustice: he was summarily dismissed over his protests that he had a legal entitlement to work here in circumstances that must have been personally humiliating and undignified. To make matters worse, his dismissal was totally unrelated to his work or performance or the necessity for the company to re-structure its business. The summary nature of the dismissal created the impression that he was not lawfully entitled to work and perhaps worse. The present case is quite different from a case such as *Nerney* where Laffoy J. found on the facts of that case that the sudden termination of the plaintiff's employment was related to the well-publicised financial difficulties which the defendant companies were experiencing at the time.

102. As against this, some of the adverse effects of the dismissal were partially mitigated by the granting by the Minister of the Stamp 4 permission in April 2008 and by the offer made by An Post in June 2008 to re-engage him should a suitable position become available. But by then, however, much of the damage had already been done.

103. I will accordingly award the plaintiff a sum of €20,000 under this heading as damages for breach of his constitutional right to a good name under Article 40.3.2. In making this particular award, I am also conscious of the fact that it might be argued that this particular loss should also have been dealt with as part of the main *Francovich* claim and not just simply as a separate head of loss for breach of constitutional rights.

104. I am not sure that very much turns on this. It suffices to say that if Irish domestic law affords a plaintiff a remedy in a case of this kind for damage to his good name (as I have held that it does, at least in a case of this kind), the principle of equivalence requires that a similar remedy be made available even where the claim is exclusively regarded as a claim for damages arising from a breach of European law: see, e.g., *Brasserie du Pêcheur* at para. 68-72.

Overall conclusions

105. In summary, therefore, I have concluded as follows:

106. First, the dismissal of the plaintiff from his position in An Post in 2007 resulted directly from the wrongful failure of the State properly to apply Article 16(2) of the 2004 Directive and was unlawful.

107. Second, this breach must be regarded, when viewed objectively, as amounting as a serious breach of EU law within the meaning of the *Francovich* principles, as elaborated in decisions of the Court of Justice in cases such as *Brasserie du pêcheur* and in *Ogieriakhi.*

108. Third, as the plaintiff is entitled to *Francovich* damages for breach of European law as against *Ireland and the Attorney General*, I have measured that loss as €107,905.

109. Fourth, the plaintiff is also entitled, at least in the special circumstances of this case, to sue directly for damages for breach of his constitutional right to a good name under Article 40.3.2, as the ordinary common law rules regarding claims for damages for breach of contract following the wrongful dismissal from employment – and reflected in cases such as *Addis v. Gramophone Co.* – would be "basically ineffective" to protect and to vindicate the right to a good name. I will award the plaintiff the sum of €20,000 under this heading.

110. I will accordingly make a total award of €127,905 by way of damages in favour of Mr. Ogieriakhi as against Ireland and the Attorney General.