

Casebase Number: G0014

Title of Payment: Family Income Supplement



Northside Community Law and Mediation Centre
Northside Civic Centre
Bunratty Road
Coolock
Dublin 17

Date of Final Decision: 12/10/2009

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Date of final Decision: 12th October 2009

Keywords: Shared Custody- application for FIS refused- High court ruling-children resident in the state-appeal-allowed

Organisation who assisted claimant: Northside Community Law and Mediation Centre (NCL&MC)

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Case Summary:

Family Income Supplement (FIS) claim. The Appellant shares custody of his children with the children's mother. The children reside with their mother in another EU State. The Appellant applied for Family Income Supplement. His application was refused by the Deciding Officer on the grounds that the children did not reside with the Appellant in the State and because he shared joint custody of them with ex-partner. The Appellant appealed this decision. The High Court had ruled in granting guardianship, access and custody of the children to the Appellant (initially sole custody and in a later decision, joint custody) that the children did reside in the State. On this basis, the Appeals Officer allowed the appeal.

Summary of Benefit(s) Received:

Family Income Supplement (FIS). This is a weekly payment for families, including one parent families. An applicant for FIS must have at least one qualified child under age of 18 or age 18 to 22 in full time education who normally lives with and is being supported by the applicant. The rules governing the payment of FIS are contained in Part 6 of the Social Welfare Consolidation Act, 2005 (as amended). A "child" for FIS purposes is a child who normally resides with the family. The Social Welfare (Consolidated Claims, Payments and Control) Regulations (SI 142 of 2007) provides that a "qualified child resident with one parent who is living apart from the other parent (...) shall be regarded as residing with the other parent if that other parent is contributing substantially to the child's maintenance".

Background:

The Appellant had two children from his relationship with his ex-partner. The ex-partner left Ireland for another EU country in 2006 with the children. Following abduction proceedings in 2006 the Appellant was awarded guardianship and sole custody of the children. While the majority of the time the children lived with their mother outside the State, they visited the Appellant during holidays and the Appellant travelled over there on a regular basis (every three weeks until January 2008). The Appellant was responsible for his travel costs and those of his children, in lieu of paying maintenance. Eventually, due to financial constraints, the Appellant was only able to visit his children every six weeks. Because his daughter has cerebral palsy the Appellant could not always consider the

cheapest flights as length of travel impacted unfavourably on his daughter. Furthermore, as a result of his daughter's condition, he had to incur additional costs to pay for gymnastic and physiotherapy equipment for his daughter during her stays with him.

The Appellant's low income was making it difficult for him to keep in contact with his children. His application for FIS was refused by the Deciding Officer on the grounds that the children were not resident in Ireland and that he shared joint custody of the children with his ex-partner. The Appellant appealed this decision in late 2008 and was granted an oral hearing.

Date Appeal Taken:

15th September 2008

Date of oral hearing:

1st April 2009

Appeals Officer's Decision:

12th October 2009

At Hearing:

The Appellant was represented at the oral hearing by a legal representative from the Northside Community Law and Mediation Centre who presented a written submission to the Appeals Officer. At the appeal the family situation was outlined, from the breakdown of the relationship between the parents to the eventual granting of joint custody. The problems the Appellant faced in keeping in contact with his children due to his low income were highlighted. In the written submission the following points were made:

- There was no basis for refusing FIS on joint custody grounds;
- The courts had decided that the children were resident in Ireland;
- The Appellant's children were effectively being discriminated against in comparison to the situation of migrant workers who lived and worked in Ireland but whose children lived outside the State. In such cases FIS is payable even though the children are resident in another state;
- The European Convention on Human Rights protects the right to privacy and to family life. It was argued that refusing FIS interfered with the Appellant's right to have access to his children and prevented him from having the finance necessary to achieve the access; and
- The Irish Constitution provides a person with a right to maintain their family. It was argued that the refusal of FIS was depriving the Appellant of the capacity to maintain his family.
- It was submitted that there was no basis for refusing FIS and that it breached the Appellant's rights as set out above.

Decision:

APPEAL ALLOWED

Relevant Evidence put forth by the Social Welfare Services:

- No evidence was put forth by the Social Welfare Services. The decision by the Appeals Officer was taken based on the relevant facts.

Relevant Evidence put forth by Appellant:

- The Appellant's representative from the Northside Community Law Centre outlined the issues explained in the submissions. Following the oral hearing further evidence was submitted by Northside Community Law Centre in respect of the court decisions regarding custody.

Appeal Officer's Reasoning and Conclusion:

The Appeals Officer noted that the issues raised were complex and that the circumstances were almost unique. It was noted that the children spent most of their time with their mother in another EU country. Consequently, it might seem "incongruous" to find the children resident in Ireland for FIS purposes. However, the Appeals Officer accepted the fact that the Courts had found the children to be resident, in effect, in both countries. Having examined all of the evidence in the case, the Appeals Officer concluded, "In effect, the Courts have decided the residency of these children. Despite my reservations stemming from the practical reality, I will allow the appeal."

Our Observations:

The key question in this case was whether the fact of the children's primary physical residence outside the State meant that there could be no award of FIS. While there was no reason in law to prevent the award of FIS in a case of joint custody the fact of the children's residence outside the State appeared in the first instance to prevent the children being considered "qualified children" for FIS purposes. As the Appellant was Irish and living in Ireland he could not on the face of it claim protection under EC Regulation 1408/71 which governs the award of "family benefits" in circumstances where a migrant worker exercises their right of free movement. The Appeals Officer was silent on any question of EC Law and the potential discrimination against on the Appellant's children. On balance the Appeals Officer took the view that as the courts were satisfied that the children could be regarded as domiciled in Ireland as well as another EU State the Department of Social Protection should maintain consistency with the court's ruling.

The six and a half months delay in promulgating the outcome of the client's appeal is notable in this case given that the client's legal representative submitted the court orders within 14 days of the Appeals Officer's request. There is an implied obligation on a decision-maker to make a decision within a reasonable period of time. Arguably, given the potential prejudice to the claimant, the delay in this case may have been unreasonable in law. The detailed circumstances under which a child may be regarded as a "qualified child" are now provided for in the Social Welfare Consolidation Act 2005 as a result of the amendments contained in s. 3 of the Social Welfare (Miscellaneous Provisions) Act 2010.

For ***more information***, contact us at:

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