

Casebase Number: G0084

Title of Payment: Child Benefit



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

Date of Final Decision: 25 November 2016

Title of Payment: Child Benefit

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Keywords: Child Benefit – social welfare inspector – appeal – oral hearing – appeal allowed

Organisation who represented the Claimant: Community Law & Mediation Northside (CLM)

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Case Summary:

This case relates to a review of the Appellant's entitlement to Child Benefit payable in respect of her daughter, aged 17. The Appellant had been in receipt of Child Benefit since 1999. In January 2016, following an application for Child Benefit by another family member, the Appellant's entitlement was reviewed.

On 20.1.2016 the Appellant was informed by letter that "*Child Benefit Section has been advised that your child ***** left your household and no longer resides with you*". The Appellant was further advised that if this was the case, she was no longer entitled to be in receipt of Child Benefit in respect of her daughter. The Appellant was provided with an opportunity to comment on the Department of Social Protection's (DSP) assertion, and submit "any facts or circumstances" relevant to the matter at issue before a decision was made.

On 23.01.2016 the Appellant responded to the DSP in writing. The Appellant confirmed that her daughter was in fact residing with her, and she provided information concerning her daughter's health difficulties, and also informed the DSP of the difficulties that had been experienced with the family member who had made the Application for Child Benefit, the Appellant's eldest daughter.

On 1.02.2016 the DSP wrote to the Appellant and requested a "*detailed breakdown of the exact amount of time including overnights your daughter ... resides with you.*" The Appellant was further notified that her Child Benefit payment was "temporarily suspended" pending a decision being issued.

On 4.02.2016 the Appellant wrote to the DSP stating that her daughter continued to reside with her and had done so over the relevant period.

On 11.04.2016 a Social Welfare Inspector (SWI) made an un-notified call to the Appellant's home.

On 21.04.2016 the DSP again wrote to the Appellant and informed her that "on the basis of information received, I am stopping your claim for Child Benefit from February 2016 because ... no longer resides with you". The Appellant was not informed of the source or content of this information.

By way of letter, dated 13.05.2016, the Appellant appealed the decision of the Deciding Officer to the Social Welfare Appeals Office. In her letter, the Appellant restated her position that her daughter resides with her, and that she is responsible for medical and educational bills in respect of her daughter.

The Appellant attended CLM in June 2016, and was advised to seek her file from the DSP under the Freedom of Information Act 2014 (FOI). Relevant information on file included:

- The report of the Social Welfare Inspector, dated 19.04.2016, which confirmed that the SWI had made an un-notified call to the Appellant's home on 11.04.2016. This report was part

Casebase Number G0084
25 November 2016

redacted, the FOI officer relying on s. 37 of the FOI Act for this purpose. According to the SWI's report, the Appellant's child was not present at the time of her visit. The report refers: "[...] was not on site for my visit and on interview the information appeared to change as to her whereabouts from being next door, to being up with [...], to be around in her mother's. [...] stated that [...] does stay sometimes with [...] as since the child benefit was stopped she does not have money for food. I advised that I would also have to interview [...] and [...] did not have an issue with that..."

- The submission on behalf of the Deciding Officer to the Social Welfare Appeals Office ¹, dated 15.06.2016. The submission referred: *"Under S.W Regs a qualified child cannot be regarded as resident with more than one person. Where a child is resident with more than one of the following, mother, stepmother, father, stepfather and where those people are resident in separate households the qualified child is regarded as normally residing with the person with whom s/he resides for the majority of the time. In this case, the child is residing with her sister from 01.02.2016 and she is therefore the person qualified to receive Child Benefit for her"*

On 17.08.2016 CLM requested that the decision of the FOI Officer to withhold certain information/documents be reviewed; CLM asserted that this information should be released on the basis that the information relates to the requester herself, pursuant to section 37(2)(a) of the Freedom of Information Act 2014. On 26.08.2016 the FOI Internal Reviewer affirmed the decision made by the original decision maker as *"all of the information redacted relates to a third party and not to your client. Therefore section 37(2)(a) of the Freedom of Information Act 2014 does not apply to the release of Documents 6,10,13 or 22."* The Internal Reviewer relied on section 37(1) of the Act to ground her decision.

An oral hearing was held on 8.11.2016.

Key Conclusions

Appeal allowed

"Having carefully considered all of the facts of the case, including those adduced at the oral hearing, I conclude that in accordance with relevant legislation the Appellant is the qualified person to receive Child Benefit in respect of her daughter [...] and that this decision takes effect from February 2016. Accordingly, the appeal is allowed."

Summary of Benefit(s) Received:

Section 220 (1) of the Social Welfare Consolidation Act 2005 (as amended) – "the Act", provides the definition of "qualified person" for the purposes of Child Benefit.

220.—(1) Subject to subsection (3), a person with whom a qualified child normally resides shall be qualified for child benefit in respect of that child and is in this Part referred to as "a

¹ In accordance with Article 10 of the Social Welfare (Appeals) Regulations 1998, the Deciding Officer, or a person on his or her behalf, must submit a statement to the Social Welfare Appeals Office setting out the extent to which the facts and contentions advanced by the appellant are admitted or disputed, and

(b) any information, document or item in the power or control of the deciding officer that is relevant to the appeal.

qualified person”.

Article 159 of the 2007 Regulations² (as amended) sets out the criteria for determining the normal residence of a qualified child for the purpose of Child Benefit. Article 159 provides:

159. For the purposes of Part 4, the person with whom a qualified child shall be regarded as normally residing shall be determined in accordance with the following Rules:

1. Subject to Rule 2, a qualified child, who is resident with more than one of the following persons, his or her –

*mother,
step-mother,
father,
step-father,*

shall be regarded as normally residing with the person first so mentioned and with no other person.

2. Where the persons referred to in Rule 1 are resident in separate households, the qualified child shall be regarded as normally residing with the person with whom he or she resides for the majority of the time.

3. A qualified child who is resident with one only of the persons mentioned in Rule 1, shall be regarded as normally residing with that person and with no other person provided that, where that person is the father and he is cohabiting with a woman as husband and wife, this Rule shall not apply in respect of the child where the father so elects and, on such an election, the child shall be regarded as normally residing with the woman with whom the father is cohabiting.³

4. Subject to Rule 8, a qualified child, who is resident elsewhere [sic] than with a parent or a step-parent and whose mother is alive, shall, where his or her mother is entitled to his or her custody whether solely or jointly with any other person, be regarded as normally residing with his or her mother and with no other person.⁴

5. Subject to Rule 8, a qualified child, who is resident elsewhere than with a parent or step-parent and whose father is alive, shall, where his or her father is entitled to his or her custody whether solely or jointly with any person other than his or her mother, be regarded as normally residing with his or her father and with no other person.⁵

6. A qualified child, to whom none of the foregoing Rules apply, shall be regarded as normally residing with the woman who has care and charge of him or her in the household of which he or she is normally a member and with no other person provided that where there is no such woman in that household he or she shall be regarded as normally residing with the head of that household and with no other person.

7. Where the normal residence of a qualified child falls to be determined under Rule 4 or 5 and the person with whom he or she would thus be regarded as normally residing has

² Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (as amended). S.I. 142 of 2007.

³ Rule 3 substituted by Art 14 S.I. No. 604/11

⁴ Rule 4 Art 159 substituted by Art 3 S.I. No. 859/07

⁵ Rule 5 Art 159 substituted by Art 3 S.I. No. 859/07

abandoned or deserted him or her or has failed to contribute to his or her support, the relevant Rule shall cease to apply in respect of that child and the person with whom the child shall be regarded as normally residing shall be determined in accordance with Rule 6.

8. Where normal residence would fall to be decided under Rule 4 or 5 above and where a qualified child has been placed in foster care, or with a relative by the Health Service Executive under section 36 of the Child Care Act 1991 (No. 17 of 1991), and has been in such care for a continuous period of 6 months he or she shall, on the 1st day of the following month or the 1st day of the 6th month following the first day of October 2007, whichever is the later, be regarded as normally residing with the woman who has care and charge of him or her in the household of which he or she is normally a member and with no other person provided that where there is no such woman in that household he or she shall be regarded as normally residing with the head of that household and with no other person.⁶

Key arguments submitted by CLM:

- CLM submitted on behalf of the Appellant that the Deciding Officer erred in fact and law when determining the “normal residence” of the qualified child in the Appellant’s case. Specifically, CLM asserted that the decision of the Deciding Officer was flawed in that it failed to properly apply the normal residence rules as set out in Article 159 of the 2007 Regulations to the facts in this case.
- CLM argued that Rule 3 of Article 159 makes clear that where a qualified child is resident in one household; that of their mother, step-mother, father or step-father, that child shall be regarded for the purposes of the Regulations as being normally resident with that person. It was submitted that in the Appellant’s case the qualified child, her daughter, was resident with the Appellant, her mother. It was argued that the rules contain a presumption in favour of the parents, and therefore applying the provisions of Article 159 Rule 3, the qualified child in this case is deemed to normally reside with the Appellant.
- Without prejudice to the argument relying upon Article 159 Rule 3, CLM also relied on Rule 4 of Article 159 which provides for circumstances where a qualified child is residing with a person other than a parent or step parent. The said rule provides that in those circumstances, and where the mother of the qualified child is entitled to custody of the qualified child, the child shall be regarded as normally residing with their mother.
- It was contended by CLM that the only circumstance where the normal residence of the child in this case would fall to be determined in a manner not in accordance with Rule 3 or 4 of Article 159, would be where the child had been “abandoned or deserted” by her mother. In these circumstances, Rule 7 of Article 159 would apply. It was submitted on behalf of the Appellant that there was no evidence of abandonment; on the contrary, evidence was submitted (in terms of receipts for all expenses re medical /educational /uniform etc) that in terms of all her daughter’s needs such as medical, financial, educational and other needs, it is the Appellant who provides and is responsible in all respect.
- CLM submitted that the statute provides a legal presumption that it is the Appellant who will be regarded as the “qualified” person for Child Benefit purposes. Furthermore, as the

⁶ Rule 8 Art 159 inserted by Art 4 S.I. No. 859/07

Appellant had an established entitlement to a payment, the burden of proof rests with the DSP to demonstrate that the Appellant was no longer entitled Child Benefit; the DSP had not met that evidential burden.

- CLM asserted that the DSP failed to afford the Appellant fair procedures, apply their own Guidelines regarding fair procedures or vindicate the Appellant's rights to natural and constitutional justice in their decision making process, because they did not provide the Appellant with sight of the evidence upon which the decision to terminate her payment was based. The decision in the Appellant's case presented as having been based wholly on the contents of information received from third parties. The Appellant was not informed of the nature or content of this information, and could not therefore advance an effective rebuttal.

The existence of this third party information only became known to the Appellant following a request for documentation under the Freedom of Information Act 2014. A considerable amount of information was redacted thereby limiting the Appellant's ability to address the DSP's assertions.

- CLM submitted that the decision, dated 02.01.2016, to suspend payment of Child Benefit was not based on any available evidence and was premature and prejudicial as it was taken prior to the Inspector's interview with the Appellant in April 2016.

Decision of Deciding Officer: 21.04.2016

Deciding Officer's decision and reasoning:

- The Deciding Officer contended that on the basis of information received, the Appellant's child no longer resided with her as from 1.02.2016. Based on the record provided, the information to which the Deciding Officer refers, is the information received directly from the Appellant when interviewed by the SWI on 11.04.2014, and the information from third parties which the Appellant did not have sight of. The SWI had reported that the Appellant provided different answers as to the whereabouts of her daughter when being interviewed at her home on 11.04.2016.
- The submission on behalf of the Deciding Officer to the Social Welfare Appeals Office, dated 15.06.2016 refers: *"Under S.W Regs a qualified child cannot be regarded as resident with more than one person. Where a child is resident with more than one of the following, mother, stepmother, father, stepfather and where those people are resident in separate households the qualified child is regarded as normally residing with the person with whom s/he resides for the majority of the time. In this case, the child is residing with her sister from 01.02.2016 and she is therefore the person qualified to receive Child Benefit for her"*

Oral Hearing: 8.11.2016

In attendance:

Appellant, CLM Solicitor, Barrister, trainee solicitor
Social Welfare Inspector
Appeals Officer

The Appeals Officer invited the other claimant, the Appellant's eldest daughter, to attend the hearing. She did not attend.

Submissions at oral hearing:

Casebase Number G0084
25 November 2016

The Appeals Officer referred to the content of relevant submissions made available to her from both sides.

The Social Welfare Inspector read her report, dated 19.04.2016, in respect of her visit to the Appellant's home on 11.04.2016. The SWI stated that the Appellant was uncertain as to the whereabouts of her child and that the child had not been present at the time of the visit. She further stated that she had also visited the Appellant's other family member, and the child in question had been present and had stated that she resided with her sister. A Tusla report was also referred to. The SWI referred to a social worker being assigned to the Appellant's child, and that the Appellant had an obligation to contact Tusla in the event that there was any change in the care arrangements in respect of her daughter.

Counsel for the Appellant made the point that both the Tusla report and the full contents of the SWI's report only became known at the hearing. It was submitted on behalf of the Appellant that the fact that the Appellant had not been provided with this information at any time prior to the hearing was a breach of her rights to fair procedures in that she had not had the opportunity to consider it, present evidence in relation to it, and to address the allegations on which the DSP had sought to rely.

The Appeals Officer sought to clarify two key issues.

- Did the Appellant have custody of the child in question?
It was confirmed at the hearing that there was no evidence to suggest that any other person had custody of the child, or that custody was a matter of any legal proceedings.
- To what extent does the Appellant maintain her child?
It was confirmed by way of oral testimony and receipts that the Appellant continues to maintain and care for her child. The SWI also confirmed that she had no information to suggest abandonment.

Date of final Decision: 25.11.2016

Decision of Appeals Officer: 25.11.2016

Appeal ALLOWED

Appeals Officer's reasoning and conclusions:

The Appeals Officer cited the relevant statutory provisions as applies to the question of a child's normal residence for Child Benefit purposes; that is, Article 159 of the Regulations.

"In this case the Deciding Officer in making her decision appears to have relied solely on Rule 1 and Rule 2. Under these rules where a child is living with more than one of the following persons i.e. mother, step mother, father or step father the qualified child is regarded [sic] as normally residing with the person with whom he or she resides for the majority of the time.

In this case I consider that Rule 4 applies. This rule provides for where a qualified child is resident elsewhere other than with a parent or step parent and whose mother is alive and where the mother of the qualified child in [sic] entitled to custody of the qualified child the child shall be regarded as normally residing with her mother. There is no evidence to suggest that appellant who is the child's mother does not have custody of Even if is residing elsewhere her mother would remain the person entitled to receive Child Benefit under Rule 4.

The only circumstances, where the normal residency of a qualified child would fall to be determined in a manner not in accordance with Rule 4 are in circumstances where as per Rule 7 the qualified child has been abandoned or deserted. The evidence available to me, including receipts, presented at oral hearing would indicate that the child in this case has not been abandoned or deserted.

Rule 8 provides for the payment of Child Benefit where a child is placed in foster care or with a relative by the HSE under Section 36 of the Child Care Act 1991. This provision does not apply in this case.

I note the points in the submission regarding the burden of proof as well as those in relation to the retrospectivity of the decision in this case. There is an onus on the Department to make a satisfactory case for disallowance where an existing payment is being reviewed. A valid point is made in relation to the fact that the appellant's Child Benefit was suspended in February 2016 prior to report having been received from SWI which was dated 19/4/2016".

As regards the submissions on fair procedures and the failure by the Department to abide by its own guidelines, the Appeals Officer noted the points made but stated that she has "no function with regard to the release of documents under FOI".

The Appeals Officer concludes by stating:

"Having carefully considered all of the facts of this case, including those adduced at the oral hearing, I conclude that in accordance with relevant legislation the appellant is the qualified person to receive Child Benefit in respect of her daughter [...] and that this decision takes effect from February 2016."

Observations:

Where a person has an established claim, as in this case, the burden of proof falls to the DSP to demonstrate that there are facts and evidence to support a decision to withdraw a payment. The Department's own guidelines are consistent with this principle:

3. Where the claimant has been awarded benefit and a question arises of withdrawing it or of reducing the amount of payment, the burden is on the Department to show that his/her entitlement has changed, or that there was fraudulent concealment of relevant facts. In the case of allegations of such change or concealment, a higher degree of probability is required i.e. there must be clear evidence available to establish the truth of the allegation.⁷

In circumstances where a question arises as to the legitimacy of a person's on-going entitlement, s. 334 of the Act provides the DSP with the authority to suspend a person's payment prior to a decision being issued. However, a decision to suspend a payment cannot be made without first providing the claimant with the opportunity to respond to any allegations/evidence relied on by the DSP for the purpose of making a decision. Again, the Department's own guidelines provide clear direction in this regard.

Rule (1) - the other side must be heard

*This rule requires that every person who may be adversely affected by a decision must be informed of any statement or allegation affecting his/her claim of which s/he was not aware and on which any pending suspension or unfavourable decision may be based and **must** be*

⁷ <http://www.welfare.ie/en/Pages/Decision-Making-and-Natural-Justice.aspx#q3>

*given an opportunity to refute or comment before payment is suspended or before a decision is given in the case.*⁸

What is notable in this case is that while the DSP did provide the Appellant with an opportunity to comment and submit facts/evidence prior to her claim being suspended, that opportunity was arguably in name only as the Appellant did not know the evidence against her. Put plainly, it was not possible for the Appellant to submit a meaningful rebuttal to the DSP's position as the Appellant had only been informed that a question with respect to her entitlement arose because "*Child Benefit Section has been advised that your child ***** left your household and no longer resides with you*".

In not providing the Appellant with the evidence on which the DSP relied, the DSP essentially failed to adhere to the principles of natural justice and fair procedures, principles which the DSP themselves advise decision makers to adhere to when making decisions. Furthermore, the DSP in this case placed a wholly inappropriate evidential burden on the Appellant insofar as she was effectively required to disprove the assertions by a third party/or parties, of which she had no sight of.

With respect to the statute itself, neither the investigation nor the decision of the Deciding Officer present as properly grounded in the relevant rules; specifically, the statutory provisions that apply to the question of a child's normal residence for Child Benefit purposes. Had the rules been properly applied, the focus of any investigation would have been on any question as to the extent to which the Appellant continues to maintain and have responsibility for her child's needs, and matters relating to the Mother's legal custody of her child if relevant. Instead, the correspondence and investigation appears to have been focused solely on the child's physical residence.

The Appeals Officer focused on the relevant facts and law in order to make her finding. As the matter could be determined on the basis of the facts as to the custody of the child and the Appellant's continued maintenance of the child, there was no need for the Appeals Officer to comment further on any assertions/reports that were only made available to the Appellant at the hearing.

On the basis of the facts and the law, the Appellant in this case decided to proceed with the hearing despite not having access to all the evidence. In this, while the Appeals Officer is correct with respect to not having jurisdiction with regard to any question relating to a decision made under the Freedom of Information Act 2014, the Appeals Officer is obliged to ensure that the principles of natural justice and fair procedures are adhered to for the purpose of adjudicating on the matter at issue. Accordingly, it was open the Appellant and her advisors to request that the Appeals Officer direct the other side to release all evidence and that the Appeals Officer grant an adjournment to allow time for the Appellant to examine this evidence. The release of this information is matter that falls within the Appellant's right to natural justice and fair procedures, a right that persists regardless of any decision made under the Freedom of Information Act 2014. Separately, the matter of the FOI decision is being challenged by CLM.

For further information:

<http://www.welfare.ie/en/Pages/Decision-Making-and-Natural-Justice.aspx#g3>

http://www.welfare.ie/en/Pages/273_Child-Benefit.aspx

⁸ As 7.

http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/social_welfare_payments_to_families_and_children/child_benefit.html