Casebase Number: G0095

Title of Payment: Child Benefit

Community Law and Mediation Northside

Northside Civic Centre

Bunratty Road

Coolock

Dublin 17

Date of Final Decision**: 23rd January 2014**

Title of Payment: Child Benefit / Arrears

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Keywords: Child Benefit – Habitual Residence Condition – Zambrano – Right to Reside – Appeal – Appeal Disallowed

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

Casebase no: G0095 (See also related cases G0096 and G0097)

Case Summary:

This case concerns a challenge to a decision made by a Deciding Officer (DO) whereby it was asserted that the Appellant was not entitled to arrears of Child Benefit on the basis that she did not satisfy the habitual residence condition (HRC) as she had no legal right of residence prior to be being granted leave to remain in the State.

The Appellant has three children in Ireland. The Appellant is the primary carer of her three children. The Appellant's eldest child was born in Nigeria while the other two were born in Ireland. All three of her children are Irish citizens and hold Irish Passports. The three children are Irish citizens through their father, who was granted leave to remain in the State on the basis of his Irish citizen children. The children's father was granted naturalisation in 2012.

The Appellant first arrived in Ireland in 2006. She claimed asylum circa October 2006. This was rejected and a deportation order was issued against her and her children in 2010. She sought to challenge this decision by way of an application for Judicial Review in the High Court but this was withdrawn in March 2012 in favour of an application for leave to remain. Being the primary carer of an EU citizen child the Appellant grounded her application in the judgment of the Grand Chamber of the CJEU in *Ruiz Zambrano v. Office nationale de l'emploi, Case C-34/09,* 8th March 2011 (Zambrano). By way of letter dated 23 July 2013 the Irish Naturalisation and Immigration Service (INIS) granted the Appellant temporary leave to remain based on her parentage of an Irish child.

The Appellant made a claim for Child Benefit in respect of her three children on 12 March 2013. By letter dated 13 May 2013 the Department of Employment Affairs and Social Protection (DEASP) rejected the claim on the basis that the Appellant was not habitually resident in Ireland. The Deciding Officer noted that the Appellant did not satisfy the HRC and did not have a right to reside in the State at the time of her claim.

The Appellant sought assistance from CLM in July 2013 and authorised CLM to act on her behalf.

CLM appealed this decision and sought an oral hearing in regard to the case. The Appellant's file was also sought under the Freedom of Information Acts.

The Appellant reapplied for Child Benefit in September 2013 and by way of decision dated 12 November 2013 was granted Child Benefit but only from the date that she was provided with leave to remain which was granted by way of letter dated the 23 July 2013.

The case concerns a challenge to both decisions. CLM contended that the Appellant's right to reside persisted from the date of birth of her youngest son, an Irish Citizen, which was circa January 2012. Accordingly, Child Benefit should be awarded from that date.

An oral hearing was scheduled for 6th December 2013. The Appellant was represented by CLM and by Counsel. Prior to the hearing a submission was lodged with the Social Welfare Appeals Office setting out the arguments on behalf of the Appellant.

CLM submitted that the Appellant had a right to reside in the State through her children who were EU and Irish citizens. CLM submitted that arising from her children's lawful residence in Ireland, their mother and primary carer is also lawfully resident in the State. This is based upon the fact that the granting of her permission to remain and stamp 4 are in recognition of this right.

CLM submitted that the Appellant's children were exercising their EU Treaty rights under Articles 20 and 21 on the Treaty on the Functioning of the European Union (TFEU), and referred to the Grand Chamber judgment of the Court of Justice of the European Union (CJEU) in the case of *Ruiz Zambrano v Office national de l'emploi* in this regard.

It was submitted that the Deciding Officer had erred in fact and law when rejecting the Appellant's claim by way of decision dated 13th May 2013, for the reason that the Appellant's "status [lawful residence] remains undecided". Further, referring to the decision dated 12 November 2013, CLM submitted that the Deciding Officer erred in law when finding that the Appellant was not legally resident in the State prior to 23rd July 2013 and therefore not entitled to Child Benefit prior to that date.

It was submitted by CLM that at the time of making the decision in May 2013 the Appellant did have a right to reside in the State by virtue of her Irish citizen children, and the granting of the Stamp 4 in July 2013 was in recognition of that right.

CLM submitted that the Appellant's application was not considered in its entirety and no meaningful examination of the Appellant's circumstances were carried out in accordance with the correct application of the five statutory habitual residence factors. This assertion was supported by a document on file dated 19th June 2013 in which it was stated that "the five factors need not be considered until the right of residence has been established." CLM submitted that as the Appellant did in law have a right of residence her case should have been examined in light of the five factors to determine whether she satisfied the habitual residence condition.

It was submitted that if the correct examination of the five factors had been carried out the Appellant would have satisfied same. In this regard it was submitted that the Appellant had been in the State for seven years on a continuous basis. It was further submitted that the Appellant had made significant connections with the State in particular through her children who are attending national school and have many friends and are involved in many after school activities. The Appellant has been involved in many groups and activities in the State through such organisations as One Family and has completed many courses to upskill herself and to enable her to find employment.

The appeal was disallowed by way of an Appeals Officer's decision dated the 23rd January 2014.

Key Conclusions:

By way of letter dated 23 January 2014, the Appeals Officer disallowed the Appellant's appeal.

> "Child Benefit is paid according to certain rules which are set out in social welfare legislation and they determine who may receive payment. One rule, amongst others, is that the person must be considered to be habitually resident at the date of making application. (S.246 (5) Social Welfare (Consolidation) Act 2005 as amended by S 15 of Social Welfare and Pensions (No 2) Act of 2009). Central to the condition is that the person must be legally in the state. In this case the Appellant has been an Asylum seeker since 2006 and the process has yet to be completed. In the circumstances the Appellant does not have a legal right to reside and consequently cannot be considered for habitual residence. Accordingly, and having considered the evidence carefully, I have concluded that the decision in this case is correct and I regret that the appeal cannot succeed."

Summary of Benefit(s) Received:

Child Benefit, is governed by Part IV of the Social Welfare Consolidation Act 2005 (as amended) -, "the 2005 Act".

The legal basis on which the Appellant's right of residence is based upon is derived directly from EU Law as set out under Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU).

Article 20 of TFEU provides:-

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have inter alia:
   (a) the right to move and reside freely within the territory of the Member States;…….

Article 21 of the TFEU provides-

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

Habitual Residence and Child Benefit[1]:

[1] Section 246 of the Social Welfare (Consolidation) Act 2005 (as amended) was further amended by the Social Welfare and Pensions Act 2014 and the Social Welfare Act 2016. The law as stated is that which applied at the time the appeal was decided.

Section 246 of the Social Welfare (Consolidation) Act 2005 (as amended) sets out the rules on habitual residence. These include under s 246(4) Social Welfare (Consolidation) Act 2005 (as amended) which states;

> "Notwithstanding the presumption in subsection (1), a deciding officer or the Executive, when determining whether a person is habitually resident in the State, shall take into consideration all the circumstances of the case including, in particular, the following:
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> (a) the length and continuity of residence in the State or in any other particular country;
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> (b) the length and purpose of any absence from the State;
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> (c) the nature and pattern of the person's employment;
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> (d) the person's main centre of interest; and
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> (e) the future intentions of the person concerned as they appear from all the circumstances."

Section 246(5) of the Social Welfare (Consolidation) 2005 Act (as amended) provides:

> "a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State."

Section 246(6) sets out a list of persons who shall be taken to have a right to reside in the State for the purpose of section 246(5). This includes section 246(6)(b) which states that:

> "a person who has a right to enter and reside in the State under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977) or the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997);"

Section 246(8) of the Social Welfare (Consolidation) Act 2005 provides:

> *(8) For the purpose of this Act, where a person-*
>
> *(a) is given a declaration that he or she is a refugee under section 17 of the Act of 1996,*
>
> *(b) is granted permission to enter and remain in the State under section 18(3)(a) or 18(4)(a) of the Act of 1996,*
>
> *(c) is granted permission to remain in the State under Regulation 4(4) of the Regulations of 2006,*
>
> *(d) is granted permission to enter and reside in the State under Regulation 16(3) (a) or 16(4)(a) of the Regulations of 2006, or*
>
> *(e) Is granted permission to remain in the State under and in accordance with the Immigration Act 2004,*

he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration referred to in paragraph (a) was given or the permission referred to in paragraph (b), (c),(d) or (e) was granted.

Section 220 of the Social Welfare (Consolidation) Act 2005 provides:

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 qualified person".

(3) A qualified person, other than a person to whom section 219(2)(a), (b) or (c) applies, shall not be qualified for child benefit under this section unless he or she is habitually resident in the State at the date of the making of the application for child benefit.

Arguments made on behalf of the Appellant:

- CLM submitted that the Appellant had a right of residence in the State which was derived from EU law under Articles 20 and 21 of the TFEU which created the rights to move and reside freely within the territory of the Member States. It was further submitted that third country nationals upon whom EU citizen minor children are dependent, have a right to reside in the Member State of the dependent children's nationality and residence.

- CLM further submitted that this right was confirmed by a decision of the CJEU in the case of *Ruiz Zambrano*. In that case the Grand Chamber held that:

  > "Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

- According to the decision in *Zambrano* the Court held that an EU citizen child had the right to the company of his or her parents in order to exercise his or her right of residence. Accordingly it was argued by CLM that the Appellant and her children were exercising their legal rights as provided for under Articles 20 and 21 and confirmed by the CJEU in the above decision.

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- CLM, on behalf of the Appellant, contended that the date of 23 July 2013 (as asserted by DEASP) was not in fact the date on which the Appellant's right of residence was "legally conferred" as this date merely confirmed a pre-existing legal right, which was in fact conferred upon the Appellant on 6 January 2012 on the birth of her child who is an EU citizen. It was argued that the Appellant, by reason of the judgment of the CJEU in the *Zambrano* case derived her right of residence in the State as and from 6 January 2012 and should therefore have been awarded Child Benefit from that date.

- It was further submitted that the Appellant as her son's primary carer became lawfully resident in the State as and from 6 January 2012 regardless of whether this was recognised at the time by the Minister for Justice. Therefore the granting of the stamp 4 residence permission to the Appellant in July 2013 was simply recognition of a pre-existing right of residence which commenced in January 2012.

- CLM further argued that the Appellant did satisfy the habitual residency conditions for the following reasons:

    - The Appellant had not left the State since her arrival in 2006 and her intentions were to continue residing in Ireland and that Ireland was her centre of interest.
    - By applying for refugee status the Appellant sought complete dislocation from her country of origin. She asserted that she was at risk of persecution there and could not return there. Her centre of interest clearly became her country of refuge, Ireland.
    - The Appellant had attended numerous courses while living in Ireland, including the completion of a special needs assistant course and a pre-nursery course in order to ensure that she has the skills to obtain employment.
    - All three of the Appellants children have established strong connections with the State through their involvement in school, friends and various activities. It was submitted that through these connections the Appellant has very strong connections with the State and her future intentions have been and are to remain in the State.

Arguments on behalf of DEASP :

The Appellant's application for Child Benefit which was made in March 2013 was refused by way of decision dated 13th of May 2013. A Deciding Officer refused this application on the grounds that she was not habitually resident in the State and her status in Ireland was undecided at the time of her claim. A notice of appeal was lodged and the appeal was disallowed by way of a summary decision.

The Appellant made a further application for Child Benefit in September 2013. This claim was allowed on 12/11/2013 however arrears were only granted from the 23 July 2013 on the basis that the Appellant not have a right to reside in Ireland prior to this date and could not therefore establish that she was habitually resident in the State.

Date of Oral Hearing: 5th December 2013

Date of Final Decision : 23rd January 2013

Appeals Officer's reasoning and conclusions

The Appeals Officer disallowed the appeal for the following reasons:

> "Child Benefit is paid according to certain rules which are set out in social welfare legislation and they determine who may receive payment. One rule, amongst others, is that the person must be considered to be habitually resident at the date of making application. *(S.246 (5)*

Social Welfare (Consolidation) Act 2005 as amended b S 15 of Social Welfare and Pensions (No 2) Act of 2009). Central to the condition is that the person must be legally in the State. In this case the Appellant has been an asylum seeker since 2006 and the process has yet to be completed. In the circumstances the Appellant does not have a legal right to reside and consequently cannot be considered for habitual residence. Accordingly, and having considered the evidence carefully, I have concluded that the decision in this case is correct and I regret that the appeal cannot succeed."

For further information:

http://www.welfare.ie/en/Pages/Child-related-payments.aspx

http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx

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

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

Community Law and Mediation Centre, Northside

Northside Civic Centre, Bunratty Road, Coolock, Dublin 17

E:info@communitylawandmediation.ie | W: www.communitylawandmediation.ie

T: 01 847 7804