

**Casebase Number: G0096**

**Title of Payment: Child Benefit**



Community Law and Mediation Northside

Northside Civic Centre

Bunratty Road

Coolock

Dublin 17

Date of Final Decision: **3<sup>rd</sup> November 2015**

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**Keywords:** Child Benefit / Arrears / Section 318 Review / Habitual Residence Condition / Right to Reside / Effective date of Award

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

**Casebase no:** G0096 (Please see related cases G0095 and G0097)

**Case Summary:**

This case relates to a decision of the Chief Appeals Officer (CAO) pursuant to a review under Section 318 of the Social Welfare Consolidation Act 2005 as amended (the 2005 Act) to uphold the decision of the Appeals Officer. The CAO determined that the Appeals Officer by way of decision dated 22<sup>nd</sup> January 2014 had not erred in law or in relation to the facts in determining the effective date of award of Child Benefit to the Appellant payable in respect of her three children.

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. 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 She sought a Judicial Review to challenge this decision but this was withdrawn in March 2012 in favour of an application for leave to remain. The Appellant applied for leave to remain based on the fact that as the carer of an EU citizen child she derives a right of residence under EU Law. The Appellant was granted temporary leave to remain by the Irish Naturalisation and Immigration Service (INIS) on 23 July 2013 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 way of 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 habitual residence condition (HRC) and did not have a right to reside in the State at the time of her claim. This decision was upheld by an Appeals Officer on the 4 September 2013 by summary decision.

The Appellant reapplied for Child Benefit in September 2013. Child Benefit was awarded in November 2013 payable with effect from July 2013, the date that the INIS notified the Appellant that she had been granted temporary leave to remain.

Further to representations from CLM the Appeals Officer's decision of September 2013 was set aside and the Appeal was reopened by way of oral hearing on the 5 December 2013.

At appeal CLM asserted that Child Benefit should have been payable from the date of the Appellant's application in March 2013. Further, a correct application of the law allowed Child Benefit to be awarded from the date of birth of the Appellant's youngest child in January 2012. It was asserted that the Appellant derives a right of residence in the State based upon EU law provided for under Articles 20 and 21 of the Treaty on the Functioning of the European Union (the TFEU) as confirmed by a ruling of the Court of Justice of the European Union (the CJEU) in the *Ruiz Zambrano* case.

The appeal was disallowed on the 22<sup>nd</sup> January 2014. **Please see Casebase report G0095 in respect of the decision of the Appeals Officer.**

CLM requested a review of the Appeals Officer's decision under s 318 of the 2005 Act, on the grounds that the Appeals Officer had made a mistake in regard to the law and on the facts. Section 318 of the 2005 Act provides that the Chief Appeals Officer (CAO) may revise the decision of an Appeals Officer where it appears to the CAO that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.

CLM submitted that the Appeals Officer's decision was flawed in its reasoning and application of the law. This submission was based on three grounds; namely,

1. that the Appeals Officer (AO) applied an arbitrary date in respect of the Appellant's entitlement to Child Benefit,
2. that the AO failed to provide a reasoned basis for failing to consider the Appellant's rights and those of her children under EU law and the relevant sections of the 2005 Act,
3. and the failure of the AO to consider the merits of awarding Child Benefit from a date earlier than the date of her application.

By letter dated 3 November 2015 the CAO upheld the decision of the Appeals Officer. The CAO concluded that until such time as a declaration granting leave to remain was issued to the Appellant, she could not be regarded as habitually resident for the purposes of the 2005 Act. Therefore it was determined that the Appeals Officer had given appropriate consideration to all the facts and applicable legislation in determining the Appellant's entitlement to Child Benefit. Accordingly, there was no mistake as to the law or the facts in the Appeals Officer's decision.

**Key Conclusions:**

The Chief Appeals Officer upheld the decision of the Appeals Officer, finding:

"...The situation was finally resolved in July 2013 when INIS granted her temporary leave to remain for 3 years. However the fact remains that until such time as a declaration granting leave to remain was issued [Ms X] could not be regarded as habitually resident for the purposes of the Social Welfare Consolidation Act 2005. I have not considered the issue of "just cause" in this case as I am satisfied that payment of Child Benefit could not have been made for any period earlier than July 2013. Having reviewed the file I am satisfied that the Appeals Officer gave appropriate consideration to all the facts and applicable legislation in determining [Ms.X's] entitlement to Child Benefit. I am satisfied that the Appeals Officer was not erroneous by reason of a mistake as to the law or the facts and in the circumstances I must decline to revise the decision"

**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<sup>1</sup>:**

Section 246 of the Social Welfare (Consolidation) Act 2005 (as amended) sets out the rules on habitual residence. These include under section 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:

- (a) the length and continuity of residence in the State or in any other particular country;
- (b) the length and purpose of any absence from the State;
- (c) the nature and pattern of the person's employment;
- (d) the person's main centre of interest; and
- (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-

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<sup>1</sup> 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.

(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 2005 Act 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.

Section 318 of the 2005 Act provides:

318.—The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.

#### **Arguments on behalf of the Appellant:**

CLM on behalf of the Appellant contended that the Appeals Officer erred in law by determining that the Appellant’s right to reside in the State for the purposes of Child Benefit commenced on the 23 July 2013 when INIS wrote to the Appellant confirming her right of residence.

It was submitted that the date, 23 of July 2013, was arbitrary insofar as it has no meaningful attachment to the facts and related only to the date of a letter. This date merely corresponds to the completion of an administrative process. The process confirming the Appellant’s pre-existing right of residence under EU Law not the date when that right of residence first commenced. Accordingly, in relying on that date the Appeals Officer had erred in law in regard to the application of Section 246 (8) of the 2005 Act.

It was submitted that as the Appellant is the primary carer of an Irish and EU citizen child her right of residence is derived from EU Law as confirmed by the decision of the CJEU in the *Ruiz Zambrano*

case. The letter issued by the INIS simply confirmed that right of residence as opposed to conferring it.

- It was submitted that the Appellant's right of residence was not dependant upon the State recognising that right nor could the exercise of that right be subject to arbitrary interference by a State authority. This submission was supported by the decision of the High Court in *Decsi v Minister for Justice, Equality and Law Reform* High Court 30<sup>th</sup> July 2010. As highlighted by the reasoning of the High Court in *Decsi* it was submitted that the letter from the INIS dated 23 July 2013 did no more than recognise an existing right. It was submitted that the INIS does not confer or deny a right of residence which is conferred directly by EU Law.
- In terms of the effective date of the award it was submitted in the first instance that Child Benefit should have been awarded from the date the Appellant acquired a Right of Residence under EU Law, that date being 6 January 2012 when the Appellant became the carer of an EU citizen child. It was conceded that while this was a claim made outside the prescribed time an Appeals Officer has the authority to backdate a claim where the Appellant can demonstrate that there was "good cause" for the delay in making the claim.<sup>2</sup> It was submitted that given the Appellant's circumstances she had discharged the burden as regards demonstrating "good cause" for the delay in making the claim.
- It was further submitted that consideration should have been given to awarding Child Benefit from 2007 when the Appellant's second child was born. It was asserted that the law applicable in 2007 allowed for the award of Child Benefit in circumstances such as those of the Appellant providing that a decision maker was satisfied, on the basis of the facts, that the claimant in question was habitually resident in the State on the relevant date. At the

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<sup>2</sup> In the case of Child Benefit, the prescribed time for making a claim is provided by Article 182(k) of the Social Welfare (Consolidated, Claims, Payments and Control) Regulations 2007 (as amended):  
in the case of child benefit, the period of twelve months from the day on which, apart from satisfying the condition of making a claim, the claimant becomes a qualified person within the meaning of section 220

The statutory authority for an Appeals Officer to award Child Benefit from a date earlier than the date of the claim, where the claim is made outside the prescribed time, is provided by s. S. 241(4) of the Act:

A person who fails to make a claim for child benefit within the prescribed time shall be disqualified for payment in respect of any day before the date on which the claim is made unless a deciding officer or appeals officer is satisfied that there was good cause for delay in making the claim, in which case, child benefit shall be payable from the first day of the month following that in which the claimant became a qualified person within the meaning of section 220.

time the statutory provisions did not require that a claimant demonstrate that their right of residence had been determined.<sup>3</sup>

- It was submitted that the fact that the Appellant did not make a claim in 2007 should not run against her children. As persons without legal capacity, it is arguably unlawful to impose a “prescribed” time limit that has the effect of depriving the children of a benefit. Such an effect is repugnant to the Constitution, and incompatible with the Charter of Fundamental Rights and the European Convention on Human Rights.

As the Appeals Officer was silent on the question of treating the Appellant’s claim as a late claim, it was submitted that in the absence of any reasoning or findings on this matter, the Appeals Officer fettered her discretion. The Appeals Officer had acted irrationally and/or acted in breach of fair procedures by failing to consider the full grounds of the Appellant’s appeal and the relevant statutory provisions at that time.

#### **Appeals Officer’s findings:**

“At the date of making application, i.e. March 2013 the legislation stated was the governing legislation and consequently the appellant could not have been considered to be habitually resident prior to 23 July 2013, when the decision to revoke the deportation order was made and leave to remain issued for a three year period to July 2016. Although it is argued that the appellant had a right to reside due to the birth of her children in the State, the fact is that the determination of an entitlement to Child Benefit is based on the applicant’s status upon making application. The decision to confer a right to reside lies with the Minister for Justice and Equality and that right was legally conferred on 23 July 2013. As such the provisions of s. 246 [8] apply and the appellant can only be deemed to be habitually resident from that date. “

**Date of final decision of Chief Appeal’s Officer:** 3 November 2015

**Decision:** The Chief Appeals Officer upheld the decision of the Appeals Officer.

#### **Chief Appeals Officer’s Reasoning and Conclusion:**

The Chief Appeals Officer determined that s 246(8) of the 2005 Act provides that a person cannot be regarded to be habitually resident for any period prior to the issuing of a declaration by the immigration services in relation to a person’s right of residence. It was stated that the statutory provisions have been in force since 2009 and must therefore be applied to the Child Benefit claim made in March 2013.

The Chief Appeals Officer then determined two issues in regard to back dating the claim to 2007 and 2012 . In regard to backdating to 2007 the CAO stated that the child born in 2007 was not an Irish citizen child at that time not being naturalised until 2013. Accordingly the *Zambrano* judgment would not be applicable as EU citizenship flows from being a national of a Member State. It was

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<sup>3</sup> On the 21<sup>st</sup> December 2009, by virtue of Section 15 of the Social Welfare and Pensions [No. 2] Act, s. 246 of Social Welfare Consolidation Act 2005 was amended so as preclude certain persons from being regarded as habitually resident in the state until such time as the question of their right of residence had been determined.

stated that the legislation applicable at the time required that the claimant be habitually resident in the State. Nevertheless and notwithstanding the Appellants intentions, it was the case that a deportation order was issued in respect of the family and this remained in force until withdrawn in July 2013. Given these circumstances a positive decision in relation to habitual residence would not have been possible in respect of an award from 2007.

In regard to backdating the claim to the birth of the Appellants third child in 2012 it was stated that the birth of her third child changed the situation for the Appellant and opened up other possible avenues to regularising her position in Ireland. That situation was finally resolved in July 2013 when INIS granted the Appellant temporary leave to remain for three years. However, it was determined that until such time as a declaration granting leave to remain was issued the Appellant could not be regarded as habitually resident for the purposes of the Social Welfare Consolidation Act 2005.

The Chief Appeals Officer was satisfied that the Appeals Officer gave appropriate consideration to all the facts and applicable legislation in determining if the Appellant was entitled to Child Benefit from an earlier date. Accordingly, the CAO upheld the Appeals Officer's decision, finding that there had been not mistake in the law or the facts.

**For further information:**

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

[http://www.citizensinformation.ie/en/social\\_welfare/social\\_welfare\\_payments/social\\_welfare\\_payments\\_to\\_families\\_and\\_children/child\\_benefit.html](http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/social_welfare_payments_to_families_and_children/child_benefit.html)

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

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