

Casebase Number: G0097

Title of Payment: Child Benefit



Community Law and Mediation Northside

Northside Civic Centre

Bunratty Road

Coolock

Dublin 17

Date of Final Decision: **December 2017**

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Keywords: Child Benefit – Habitual Residence Condition – Zambrano – Right to Reside- Fair Procedures - Maladministration – Office of the Ombudsman

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

Casebase no: G0097 (Please see related reports G0095 & G0096)

Case Summary:

This case relates to a decision of the Office of the Ombudsman regarding a complaint concerning a review by the Chief Appeals Officer (CAO) under Section 318 of the Social Welfare Consolidation Act 2005 as amended (the 2005 Act). The CAO determined by way of decision dated 3 November 2015 that the Appeals Officer had not erred in law or in relation to the facts in determining the effective date of award of Child Benefit to the Appellant. While the Ombudsman requested that the Department of Employment Affairs and Social Protection (the Department) backdate payment to January 2012 in view of the decision in *DN and Anor v Chief Appeals Officer and Ors*¹, the complaint ultimately was not upheld. It is clear from the decision of the Ombudsman that upon receiving the request from the Ombudsman to backdate the payment the Department refused to do so on the basis that s 246 (8) of the 2005 Act removes any discretion to backdate a claim for Child Benefit for periods where a claimant's right of residence has not been declared or permitted.²

The facts grounding the complaint concern an Appellant who 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 She sought to challenge this decision by way of an application for Judicial Review in the High Court but this was withdrawn in March 2012 in favour of an application for leave to remain.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 rejected the claim on the basis that the Appellant was not

¹ [2017] IEHC 52.

² 246 (8) of the 2005 Act provides: "...he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration or permission concerned was given or granted as the case may be and, in the case of a declaration or permission deemed to be given, for any period before the date on which the declaration or permission concerned was originally given. "

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. CLM appealed the decision on the Appellant's behalf.

The Appellant reapplied for Child Benefit in September 2013. By decision dated 12 November 2013 Child Benefit was awarded with effect from 23 July 2013, not the date of the claim or an earlier date.

Following an Oral hearing the appeal was disallowed on the 22nd January 2014, the Appeals Officer finding that Child Benefit could not be awarded for any period before the date of the letter from INIS granting the Appellant leave to remain. That date being the 23 July 2013. **Please see Casebase report G0095 in respect of the decision of the Appeals Officer.**

The S 318 review by the Chief Appeals Officer (CAO):

CLM requested a review 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 any decision of an Appeals Officer where the CAO finds that the decision was erroneous by reason of some mistake having been made in relation to the law or 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 did not 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 that the AO failed to consider the merits of awarding Child Benefit from a date earlier than the date of her application.

In regard to the facts of the review under Sc 318 it was submitted by CLM that the award of child benefit should have been payable from the date of the Appellant's application for Child Benefit in March 2013 and for various reasons as set out in the submission lodged by CLM, payable from the date of birth of her youngest son in January 2012. It was asserted that the Appellant derives a right of residence in the State based upon EU law as 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.

In the alternative it was asserted 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 time the statutory

provisions did not require that a claimant demonstrate that their right of residence had been determined.³

The CAO by way of decision dated 3 November 2015 upheld the decision of the Appeals Officer. **Please see Casebase report G0096 for a full report of the Chief Appeals Officer's decision.**

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 in the State for the purposes of the 2005 Act. The CAO found that the Appeals Officer had given appropriate consideration to all the facts and applicable legislation in determining the Appellant's entitlement to Child Benefit and therefore there was no mistake as to the law or the facts in the Appeals Officer's decision.

Key Conclusions:

By way of letter dated 11th December 2017 the Investigator of the Office of the Ombudsman decided not to uphold the complaint.

“Having carefully considered the matter, and in particular the provisions in section 246(8) and the response of the Department, I have to accept that the legislation does not provide for any discretion for the Department to allow for backdating of claims for Child Benefit (or indeed or other payments) before the declaration granting leave to remain is issued by INIS. In these circumstances and while I appreciate that you may be disappointed with this decision, I am sorry to inform you that I do not see a basis on which the Ombudsman could pursue your individual complaint any further.

That being said, however, I intend to write to both the Department and the INIS highlighting the difficulty in the legislation and the fact that the Department has no discretion to award backdating in cases such as yours. I am doing so in the hope that others in similar situations in the future may not experience the difficulties that you have. I would therefore like to sincerely thank you for bringing this matter to the Ombudsman's attention “

Summary of Benefits 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.

³ On the 21st 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.

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 Benefit⁴:

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:

- (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 ⁵ provides:

⁴ 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.

⁵ Section 246 (8) of the 2005 Act was further amended by s18 of the Social Welfare Act 2016. The law as stated is that which applied at the time the Appeal was decided.

(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.

The Complaint to the Office of the Ombudsman

The Office of the Ombudsman (the Ombudsman) examines complaints from people who feel they have been unfairly treated by a public service provider. The Ombudsman can examine complaints against most organisations that deliver public services such as government departments and local authorities. The Ombudsman does not have the power to compel a public service provider to make a particular decision.

In September 2016 the Appellant submitted a complaint to the Office of the Ombudsman regarding the manner in which the Social Welfare Appeals Office, in particular the Chief Appeals Officer, had reviewed her case under s 318 of the 2005 Act. This complaint was grounded in the contention that the CAO had omitted to properly consider the grounds advanced in relation to the award of Child Benefit from an earlier date.

It was submitted in the complaint that the Appellant's right to fair procedures and natural justice had been breached by the CAO in that it was difficult to assess from the CAO's decision the extent to which consideration had been given to the central argument in the Appellant's case; that being,

the application of EU law and in particular the application of the *Zambrano* decision to the facts of the case. It was further submitted that the Appellant's right to a reasoned decision was breached by this omission. It was further asserted that the CAO silence as regards the application of EU Law constituted maladministration.

Summary of the grounds of complaint made on behalf of the Appellant.

- It was submitted that it was difficult to assess from the decision of the CAO the extent to which consideration had been given to the central argument on behalf of the Appellant; that is, the application of EU law and in particular the application of the *Zambrano* decision. It was further submitted that the Appellant's rights of fair procedures and natural justice had been breached in that the Appellant is entitled to have her claim considered in a fair and reasonable manner and that should be reflected in the decision.
- It was argued that the CAO failed to properly consider the application of EU law and also the doctrine of supremacy of EU law and the obligation upon national bodies to interpret national legislation in light of EU law principles.
- It was submitted that as the CAO's decision was silent on the application of EU law to the facts of the case the Appellant's right to a reasoned decision had been infringed.
- It was submitted that the omission by the CAO to properly address the EU law arguments constituted maladministration. In this regard it was submitted that the CAO had attached significant weight to an arbitrary date, the date the letter issued from the INIS, but failed to expressly consider the grounds put forward by CLM regarding this matter.
- It was contended by CLM that the date in question (23 July 2013) corresponds to the completion of an administrative process only and therefore the Department had relied on what was an arbitrary date as regards the commencement of the Appellant's right of residence. It was argued that such reliance was prejudicial to the Appellant as she was adversely affected by delay on the part of the State (INIS) in administering claims.
- It was submitted by CLM that the decision of the CAO dated November 2015 did not comply with the standards of fair and sound administration and the complaint should be upheld and the Ombudsman should consider recommending that the Appellant be offered financial compensation comprising the arrears of Child Benefit to which it was submitted she is legally entitled to.

Date of Hearing; N/A.

Date of Final Decision; 11th December 2017

The Office of the Ombudsman reasoning and conclusions:

Following an investigation the Office of the Ombudsman issued a letter on 11 December 2017 outlining their actions and findings.

The Ombudsman wrote to the Department submitting that the Appellant appeared to have right of residence from the date of birth of her 3rd child in January 2012, and the Applicant was apparently blameless as regards the over 19 month delay in issuing the declaration granting her leave to remain. In view of these circumstances the Ombudsman requested that the Department follow the decision of White J in *DN and Anor v Chief Appeals Officer and Ors*⁶ and make a payment equal to the amount of Child Benefit which should have been paid from January 2012.

In *DN White J* noted that while the Department has no discretion under the legislation to allow for backdating, it may be possible for Irish nationals who qualify for Child Benefit to have a claim backdated to an earlier date if they can show good cause for the delay in making the claim. White J held that although s 246 (8) precludes the Department from backdating claims where a right of residence has yet to be determined “The delay [in making a decision] combined with the effect of s. 246(8), breached the applicants constitutional and E.U. law rights.” The Court in that case determined that the Applicant was entitled to compensation in the form of damages equal to the amount of Child Benefit the applicant would have received if the application for backdating had been successful.

The Department rejected the Ombudsman’s request on the grounds that s 246 (8) does not provide for any discretion to allow for backdating of claims for periods before the declaration granting leave to remain is issued by INIS.

Upon fully considering the matter, the investigator found that the legislation does not provide the Department with the necessary discretion to backdate the Appellant’s Child Benefit claim.

However the Investigator advised that he/she intended to write to both the Department and INIS to highlight the difficulty in the legislation and the fact that the Department had no discretion to award backdated payments in cases similar to the Appellant’s. The Investigator thanked the Appellant for bringing the case to the Ombudsman’s attention.

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.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/17989fe7a3098224802580c90055c98a?OpenDocument>

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⁶ [2017] IEHC 52.

