

Casebase Number: G0100

Title of Payment: Child Benefit



Community Law and Mediation Northside

Northside Civic Centre

Bunratty Road

Coolock

Dublin 17

Date of Final Decision: April 2018

Title of Payment: Child Benefit / Arrears

Date of Final Decision: April 2018

Keywords: Child Benefit – Habitual Residence Condition – Right to Reside – Judicial Review -

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

Casebase no: G0100

Case Summary:

This case concerns an appeal regarding a decision by a Decision Officer (**DO**) to terminate the Appellant's entitlement to Child Benefit (**CB**) for the period that her spouse, a Romanian citizen, was considered not to have a lawful right to reside in the State. It was determined by a DO that the Appellant was not entitled to CB payments after her husband's self-employment ceased in November 2008 on the basis that she was not habitually resident in the State.

The Appellant is a Romanian citizen who moved to Ireland with her four children in February 2007 to join her spouse. The Appellant's husband was self-employed between May 2007 and November 2008, after which he was no longer self-employed due to the economic downturn. The Appellant applied for CB in April 2008 and the Department of Employment Affairs and Social Protection (the **Department**) responded in April 2009 stating that she was entitled to CB for the period from May 2007. CB payments were made up to November 2008 when her husband ceased working in a self-employed capacity. The Appellant's fifth child was born in Ireland in July 2009.

The Appellant sought a review of the decision of the DO. In making this request the Appellant submitted evidence to support the issuing of a revised decision. This included documentary evidence of her children's school attendance and a statement confirming that she and her spouse intended to purchase a house in Ireland. On 25 May 2009 the DO refused to overturn the earlier decision asserting that no new evidence had been provided to warrant making a revised decision.

The Appellant lodged an appeal with Social Welfare Appeals Office (**SWAO**). An oral hearing date was scheduled for September 2010 but this was subsequently adjourned. The Appellant's spouse first attended CLM in June 2010. The Appellant attended CLM sometime after June 2010. CLM came on record for the Appellant and requested her file under the Freedom of Information Acts.

- The Appellant's case is interlinked with that of her spouse on the basis that her entitlement to CB was terminated on the grounds that she no longer satisfied the habitual residency condition as and from the date that her husband had ceased working in a self-employed capacity in November 2008. Please see Casebase Report **G0099** for a full report on this case. The Appellant's spouse, a Romanian citizen, was refused social welfare benefits on the basis that once his self-employment ceased he no longer had a right to reside in the State. This matter was the subject of Judicial Review proceedings which commenced in October 2010.

By way of background, by decision dated 28 August 2009 the Appellant's spouse was refused Jobseekers Allowance (**JA**) on the basis that he was a Romanian Citizen who failed to fulfil the requirements for JA. The DO held that the Appellant was not permitted to claim JA as he did not have a work permit for twelve consecutive months since 1 January 2006 and was therefore not available for full time work. This decision also had the effect of preventing the Appellant's spouse from receiving Supplementary Welfare Allowance (SWA) and Rent Supplement (RS).

The Appellant's spouse resided and worked in Ireland since 2004. When he first came to the State he was not aware of the requirement to have a work permit in order to work. Between September 2006 and April 2007 he worked as an insured employee and tax and PRSI was paid to the Revenue Commissioners by his employers. From May 2007 to November 2008 he worked in a self-employed capacity paying all the requisite VAT, Income Tax and PRSI to the Revenue Commissioners. He lost his employment due to the economic downturn in November 2008.

Due to the financial circumstances of the Appellant and her spouse and family, CLM initiated interlocutory proceedings in October 2010 seeking orders from the Court to compel the Minister for Social Protection and the Health Services Executive to reinstate the SWA and RS payments until the matter had been decided by way of judicial review proceedings or pending the exhaustion of the appeals process. This step was taken based on the fact that the Appellant husband's only source of income had been stopped. The Appellant, her spouse and six children had to rely on the charity of friends and charity organisations such as St. Vincent de Paul in order to survive and to ensure that they were not at risk of homelessness.

In light of the fact that the reason for refusing the Appellant's CB was inextricably linked to her husband's employment situation and his right of residence within the State, both sets of High Court proceedings (interlocutory and judicial review proceedings) were issued on behalf of the Appellant's spouse (the first named Applicant) and the Appellant (the second named Applicant).

In November 2010, Mr. Justice Charleton heard the interlocutory proceedings in the High Court over two days and refused the application. By way of an Order from the High Court dated the 16th November 2010 all orders seeking to re-instate the SWA payments as sought by the Appellants were refused. The matter then proceeded to a full judicial review hearing which was heard before Ms. Justice Dunne in March 2011.

The judicial review proceedings were heard before Ms. Justice Dunne in the High Court over three days in March 2011. In June 2011 Dunne J issued her judgment refusing to grant any reliefs. Dunne J ruled that the Appellant was only entitled to reside in Ireland as a self-employed person, and as he was no longer a self-employed person (since November 2008) he did not retain a right of residence within the State. She further held that he was not entitled to seek employment as a jobseeker as he did not have a work permit and therefore was not available for employment. Accordingly, Dunne J held that as the Appellant was not available for employment, a statutory requirement to receive JA, he was not entitled to receive JA or any other social welfare benefits.

The CB part of the claim was not considered by the Court. It was held that judicial review proceedings had not been instituted within the relevant time limit.

CLM were instructed to appeal the decision of Dunne J to the Supreme Court and an appeal was lodged in July 2011.

The Appellant's spouse re-registered as self-employed in June 2011 and the Appellant reapplied for CB. There was significant delay in the Department responding and eventually they confirmed in June 2012 that the Appellant was entitled to CB from June 2011 (the date the Appellant's spouse re-registered as self-employed).

Before the CB payments were confirmed, CLM made a freedom of information (**FOI**) request on behalf of the Appellant to the Department on 9 May 2012. On 28 May 2012 the Appellant's file was released. There was an internal memo released which confirmed that the guidelines regarding the Habitual Residence Conditions (**HRC**) were amended in June 2011. The amended HRC guidelines provided that HRC is only to be reviewed at the date of application for social welfare payments and could not be reviewed at a later date (for example, when a migrant worker loses their employment status). It was therefore asserted by CLM that the Appellant was entitled to CB payments from December 2008 onwards as the Department was not entitled to review her HRC when her spouse was no longer self-employed.¹

The Department did not change their position with respect to the Appellant's claim.

The Appellant spouse's appeal to the Supreme Court was not listed for hearing until March 2018. Prior to this date judgment was delivered by the Court of Justice of the European Union (CJEU) in a factually similar case, *Gusa v Minister for Social Protection*.²

This judgment was issued following a preliminary reference being made by the Irish Court of Appeal under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The request to the CJUE concerned the interpretation EU Directive 2004/38/EC regarding the right of citizens of the European Union and their family members to move and reside freely within the territory of Member States.

The CJEU held that Article 7(3)(b) of Directive 2004/38 could not be interpreted as applying only to persons who have worked as employed persons thereby excluding self – employed persons. Such an interpretation would run against the purpose of the provision; that is, a safeguard with respect to citizens right of residence. Further, it would have the effect of creating an unjustified difference in treatment between two categories of persons.³

- The full judgment of the CJEU is available at:
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=198063&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=140935>

¹ This position has since changed. A claimant's HRC status can be reviewed any time after a social welfare claim has been made and not just when the initial application is submitted as per section 11 of the Social Welfare and Pensions Act 2014.

² Case C-442/16 *Gusa v. Minister for Social Protection, Ireland, and the Attorney General* ECLI:EU:C:2017:1004.

³ *Ibid.*, at paragraphs 41-43.

As a consequence of the *Gusa* judgment the case before the Supreme Court was settled before the hearing date. This is detailed in Casebase No. G0099. The Appellant's claim in respect of CB and the refusal of the Department to issue the CB owed to her was addressed as part of the settlement agreement.

Legal Framework

In order to receive a social welfare payment a person must have a right of residence in the State. Further, with respect to certain payments (including JA, SWA and CB) a claimant must also satisfy the Department that they are habitually resident in the State. An EU national and their dependants may rely directly on the provisions of EU law in order to assert their right of residence in the state. Further, an EU national who becomes involuntarily unemployed and is registered as a jobseeker may retain their right of residence under EU Law. These former workers may be entitled to certain classes of income support without the necessity of establishing habitual residence. The Department interpret this to mean entitled to SWA.

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.

National Law – the Social Welfare Consolidation Act 2005 (as amended) – (2005 Act).

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

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".

Section 220(3) of the Act provides:

“A qualified person, other than a person to whom section 219(2)(a), (b) and (c) applies, shall not be qualified 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.”⁴

Section 246 of the 2005 Act sets out the rules on habitual residence and rights of residence. Section 246(4) provides that:

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 in the 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 2005 Act 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 purposes 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 2005 Act⁵ of the 2005 Act 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 Regulations 16(3)(a) or 16(4)(a) of the Regulations of 2006, or

⁴ This section was amended by s 11 of the Social Welfare and Pensions Act 2014. Specifically, s 230 (3)(as amended) now provides: “A qualified person, [...], shall not be qualified under this section unless he or she is habitually resident in the State.”

⁵ Section 246(8) of the 2005 Act was further amended by section 18 of the Social Welfare Act 2016. The law as stated is that which applied at the time the case was decided.

(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.

Key Issues in the case

Whether the Appellant, a Romanian citizen, was entitled to receive CB payments pursuant to the relevant provisions of the 2005 Act and the various provisions under European Union Law.

Arguments made on behalf of the Appellant

It was submitted that the Appellant did satisfy the relevant statutory provisions as regards habitual residency as set out in the 2005 Act given that she had resided in Ireland since 2007, Ireland constituting her centre of interest.

In evidence to support this claim the Appellant furnished letters from schools that her children attended and pointed to the fact that she had her husband intended to purchase a house. It was further submitted that in light of the fact that the reason for refusing the Appellant CB was inextricably linked to her husband's employment situation and his right of residence within the State, that an adjournment was sought of her appeal pending before the SWAO on the basis that both sets of High Court proceedings (interlocutory and judicial review proceedings) were issued on behalf of the Appellant's spouse (the first named Applicant) and the Appellant the (the second named Applicant) and therefore this case should be determined first.

Arguments on behalf of the Department

The DO argued that the Appellant was not habitually resident for the following reasons:

1. The Appellant was not and is not employed in Ireland;
2. Prior to January 2007, the Appellant's spouse did not have a certificate of registration;
3. Since January 2007, the Appellant's spouse did not have a work permit; accordingly, any employment, other than self-employment, was illegal;
4. The Appellant's centre of interest was not Ireland; and
5. From evidence produced to date there was nothing to substantiate that the Appellant was habitually resident in the State.

The DO stated that:

"The nature and purpose of the appellant's residence in Ireland is not viable without state benefits and as such does not provide for Habitual Residence Approval.

As a result, I consider that her future intentions were unclear, and her centre of interest has not been established as being in Ireland. There are no close family ties to Ireland. There are no new facts or fresh evidence which would warrant a reversal of my original decision in this case."

Date of Oral Hearing:

14 September 2010. This hearing was adjourned pending the full hearing of the Appellant's case before the High Court.

Conclusion

The decision of the CJEU in *Gusa*, clarified the position that an EU citizen who has worked in a Member State in a self-employed capacity for more than a year and has registered as a jobseeker with the relevant employment authorities is considered to be “in duly recorded involuntary unemployment” as per the provisions of Article 7 (3) (b) of Directive 2004/38 and therefore retains the status of worker and a corresponding right of residence in that Member State. On this point the decision of Ms. Justice Dunne of June 2011 was incorrect.

On foot of the decision in *Gusa* decision, the appeal by the Appellant’s spouse and the Appellant which was pending before the Supreme Court was struck out in April 2018 and the case was settled including the CB claim of the Appellant by agreement between the Appellants and the Respondents.

For further information:

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

http://www.welfare.ie/en/Pages/Habitual-Residence-Condition_holder.aspx

<http://www.welfare.ie/en/Pages/foirequests.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