

Casebase Number: G0066

Title of Payment: Child Benefit



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Date of Final Decision:
17/10/2014

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Keywords: Child Benefit – ordinarily resident – guardianship - appeal - allowed

Organisation who represented the Claimant: CLM Northside

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Case Summary:

The Appellant is a mother of one child and has power of attorney over her niece who lives with and is cared for by the Appellant. The Appellant is in receipt of Child Benefit in respect of her own child and she applied for Child Benefit in respect of her niece on 26 September 2012.

On 7 November 2012 the Department of Social Protection disallowed her claim for Child Benefit on the grounds that her niece was “*not ordinarily resident*” in the State and was here for educational purposes only.

The Appellant appealed the decision of the Deciding Officer with assistance from Citizens Information Service Northside. The Appeal was disallowed by way of summary decision (no oral hearing) on 13 June 2013. The Appeals Officer found that the Appellant was not entitled to Child Benefit in respect of her niece on the grounds that her niece was in Ireland for educational purposes only, and that the child was not therefore “*ordinarily resident*” in Ireland.

CLM Northside made written submissions on behalf of the Appellant on 13 September 2013 and on 25 August 2014, requesting that the Chief Appeals Officer review the decision of the Appeals Officer in accordance with sections 317 and 318 of the Social Welfare (Consolidation) Act 2005.

On 17 October 2014 the Appeals Officer issued a revised decision, allowing the appeal in light of the submission made on behalf of the Appellant.

Summary of Benefit(s) Received:

Child Benefit, is governed by Part IV of the Social Welfare Consolidation Act 2005 (as amended) -, “the Principal Act”. One of the provisions governing the award of Child Benefit is that a “qualified child” must be regarded as “ordinarily resident in the State”, s.219 [1][c] of the Social Welfare Consolidation Act 2005 provides.

Key Arguments:

- The Respondent argued that the Appellant's niece was not ordinarily resident in the State therefore the Appellant was not entitled to Child Benefit;
- The Respondent asserted that the child was in the State for educational purposes only and could not therefore be described as ordinarily resident in Ireland;
- The Respondent asserted that the Appellant did not have "full" guardianship of the child in question and therefore was not entitled to the payment;
- The Appellant argued that she is in fact the guardian to her niece, and in any event that there is no statutory provision that precludes the award of Child Benefit on the basis that a claimant does not have full guardianship of a child;
- The Appellant contended that the child is ordinarily resident in the State and rejected the claim that the child was here for educational purposes only. She stated that the child lives in Ireland and is part of her (the claimant's) family.

Background:

The Appellant is Latvian and has one son, and has been the primary carer of her niece since 7 July 2012. She applied for Child Benefit in respect of her niece on 26 September 2012.

The Appellant stated on the application form that she is the guardian of her niece and furnished documentation in support of her application including: a letter from the child's school confirming attendance; a letter from the GP confirming the child's attendance at surgery; copy of birth certificate; copy of child's passport and a letter from the Appellant's employer confirming her employment.

On 1 November 2012, the Department of Social Protection requested more information from the Appellant and requested that she complete a form that provided questions in respect of the Appellant's niece.

On 7 November 2012 the Deciding Officer disallowed the claim for Child Benefit and in his letter to the Appellant stated that the decision was made on the basis that her niece "*is not ordinarily resident in the State*". An internal record of the decision, also dated 7 November 2012, refers: "*she is here for educational purposes only, legal guardian only for being in Ireland*"

On 7 November 2012 the Appellant appealed the decision, asserting that she has official guardianship of her niece and that her niece "*will continue to live with me until she is 18 years old. Her father has abandoned her and her mother is not capable to take care of her*". She also asked to be informed of "*what extra evidence could be needed*".

Date of Appeals Officer's Decision: 13/06/2013

The appeal is disallowed

Appeals Officer's reasoning and conclusions:

In order that Child Benefit may be paid, the child in question must be ordinarily resident in the State. This requirement is set out in Social Welfare legislation. Having examined the evidence carefully in this case, I have concluded that it has not been established that this condition is met by the child for whom the payment is claimed. By the appellant's own admission, the child is here for educational purposes only and will remain here until she is 18 only. The appellant has been given the Power of Attorney over the child but does not have full guardianship of the child and custody of the child is still with the child's mother. In the circumstances, I regret that the appeal cannot succeed.

The report of the Appeals Officer further stated that "[I]t would seem that the appellant has not understood the disallowance or the term Ordinarily resident"

Submission of CLM Northside to the Chief Appeals Officer requesting a review under s. 317 and s. 318 of the Social Welfare (Consolidation) Act 2005, as amended: 25/08/2014

CLM Northside, on behalf of the Appellant, submitted that the AO erred in fact and law in his decision of 13 June 2013, and further asserted that the AO's decision was made on a summary basis with the effect that the Appellant was denied the opportunity to submit oral evidence, evidence which would establish both as a matter of fact and law that her niece was indeed ordinarily resident in Ireland.

It was stated that the Appellant, who is Latvian, had been living and working in the State for 7 years, and is in receipt of Child Benefit in respect of her son. CLM Northside contended that the Appellant's niece normally resides with the Appellant and was therefore "*ordinarily resident in the State*" at the time of the application for Child Benefit.

The Appellant's assertion was supported by more detail with respect to the facts of the case. It was submitted that the child's mother lives in Latvia and has a drug problem and is unable to care for her child. She was arrested and charged with a number of drug related offences and it was anticipated that she would be sentenced to a term of imprisonment, although this had not yet occurred. The child's father has abandoned the child and has no contact with her save for an occasional call on Skype. If the child remained in Latvia, it was submitted that there was a significant risk that she would be taken into care by the authorities.

The child's parents asked the Appellant to raise their child, and the Appellant was given "Power of Attorney" in respect of her niece. A certified translation of this document, along with written submissions was submitted in evidence. The Power of Attorney authorised the

Appellant to “*accompany our daughter ..., when travelling outside the Republic of Latvia with all rights and obligations of the guardian, including:- to have full responsibility for my daughter representing the interests in all trips, as well as to sort all the formalities related to the above mentioned tasks.*” This is valid until 8 February 2026, the date on which the child turns 18.

It was stated that the child has been living with the Appellant since 7 July 2012 and since that time the Appellant has been making all of the major decisions in relation to the child, such as where she attends school and whether she will be baptised. CLM Northside stated that the Appellant has been taking care of and providing for all the needs of her niece including food, clothing, health (including consent to medical treatment), safety, social, educational and emotional needs.

CLM Northside contended that on the basis of the facts the Appeals Officer erred in his finding that the Appellant is in the State for educational purposes only. It was submitted that this finding was inaccurate as the child’s home is for all practical and emotional purposes with the Appellant; Ireland being the country where the child’s main centre of interest lies for the foreseeable future.

Furthermore, contrary to the findings of the Appeals Officer, it was submitted that the Appellant never “*admitted*” that her niece is here “*for educational purposes only and will remain here until she is 18 only*”. Question 1 of the letter dated 1 November 2012 from the Department of Social Protection seeking further information, asked “*Is... here for educational purposes?*” The question as written could only elicit a yes or no response, the Appellant answered yes. The question was not framed so as to allow an Appeals Officer to conclude that the Appellant was here for educational purposes only; the question was not – “*Is the child here only for education purposes?*”. Additionally, the context had to be examined; that is, *educational purposes* in this case referred to part of the whole package of care that the Appellant is responsible for providing to her niece. Therefore, it was asserted that the Appeals Officer attributed an incorrect meaning to the question and the answer provided by the Appellant.

CLM Northside also disputed the Deciding Officer’s interpretation of the Appellant’s statement “*I have full guardianship of my niece who has come to live with me for the last 8 months she will continue to live with me until she is 18 years old.*” It was asserted that it was incorrect to interpret this statement as meaning that the child will only continue to live with the Appellant until she is 18, and furthermore any reference to this statement should not be construed as meaning that the Appellant is only here for educational purposes, and therefore not ordinarily resident.

It was also argued that it was neither factually nor legally correct to state that the “*custody of child is still with the child’s mother*” CLM Northside referred to the deed, the “*Power of Attorney*”, entered into by the Appellant which authorises her to have “*all of the rights and obligations of the guardian*” when the child is outside of Latvia. It was noted that the fact

that guardianship rights are limited to travelling outside of Latvia does not negate the fact that the Appellant is in fact acting *in loco parentis* with full guardianship responsibilities in respect of her niece.

In relation to the statute, and the requirement that a child be “*ordinarily*” resident in the State, CLM Northside asserted that there is no definition of “*ordinarily resident*” in any of the relevant legislation pertaining to Child Benefit. S. 219 (1) (c) of the Social Welfare (Consolidation) Act 2005 provides:

he or she is ordinarily resident in the State

Furthermore, it was stated that there is no explicit provision in the statute that requires a claimant to be the Guardian of the child or have legal custody of the child.

In these circumstances it was asserted that the term “*ordinarily*” resident should be understood to have its plain meaning. CLM Northside cited both Irish and UK case law which supported the point that the term “*ordinarily resident*” should be given its natural and ordinary meaning and that it should be construed with reference to the statute in which it is found. It was emphasized that the Appellant’s niece is clearly resident in the State in the ordinary sense.

It was submitted that while there is no definition of “*ordinarily*” resident, the statute does define what is meant by “*normal residence*”, and the question of a child’s normal residence is in fact a condition of entitlement. In this regard, it was noted that S.I. 859 of 2007 expressly allows for the payment of Child Benefit to a foster parent.

With respect to the question of the normal residence of the child, s. 220 of the 2005 Act provides that:

a person with whom a qualified child normally resides shall be qualified for child benefit in respect of that child... A qualified child shall not be regarded as normally residing with more than one person ...

The Act provides that the meaning of “*normal residence*” shall be set down in regulation; specifically, Article 159 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (as amended).

CLM Northside asserted that as the Appellant’s niece is not resident with either her mother or father, the provisions of Article 159 (1), (2) and (3) were not applicable, and while ordinarily the ‘default’ position is that payment should be made to the mother in circumstances where the mother is alive (Article 159 (4))¹, this provision does not apply in

¹ *A qualified child, who is resident elsewhere than with a parent or step-parent and whose mother is alive, shall, where his or her mother is entitled to his or her custody, whether solely*

this case as the Appellant has both de facto and legal custody of her niece and is her guardian.

In addition as neither of the child's parents contribute financially or otherwise to the support and welfare of the Appellant's niece, and have to all intents and purposes abandoned the child, the question of the child's normal residence falls to be decided in accordance with Article 159 (7) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007:

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

Rule 6 provides:

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

Finally, CLM Northside asserted that the decisions of the Deciding Officer and the Appeals Officer were arguably at odds with the relevant provisions of the Equal Status Acts 2000-2011 and the Racial Equality Directive (2000/43/EC), both of which preclude direct and indirect discrimination.

Indirect discrimination is defined in the Racial Equality Directive to occur when an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

It was submitted that the provisions of the Social Welfare Consolidation Act 2005, and in particular those that apply to the award of Child Benefit, must be interpreted and applied in such a way so as to comply with the principles as set down in the Racial Equality Directive. In this regard it was submitted that if the Appellant was an Irish national, who had been given the care and custody of her niece by her sister, the Department of Social Protection would not have issued a further letter containing a question asking whether her niece is "*here for*

or jointly with any other person, be regarded as normally residing with his or her mother and no other person.

educational purposes". Further, it would not have interpreted a positive answer to such a question to mean that her niece was here only for educational purposes and to conclude that her niece was not ordinarily resident here.

In summary, CLM Northside stated that the Appellant has care and charge of her niece and her niece is normally a member of the Appellant's household. The parents of the Appellant's niece do not contribute to her support in any way. The Appellant's niece therefore must be regarded as normally residing with the Appellant. On the basis of the facts, it was evident that the Appellant's niece did not come to Ireland to attend a particular school or course 'only'; rather, she came here to be cared for and reared by the Appellant, and part of this arrangement would naturally include sending the child to school. These circumstances were wholly consistent with a finding that the child, the Appellant's niece, was ordinarily resident in the State.

Date of final Decision: 17/10/2014

The Appeal is allowed.

Appeals Officers Reasoning and conclusions:

In order that Child Benefit may be paid, the child in question must be ordinarily resident in the State. This requirement is set out in Social Welfare legislation. Having reviewed my earlier negative decision in this case, as a result of the recent submission received on behalf of the appellant, I have concluded that the child,..., is habitually resident in the State and that the appellant, for all intents and purposes, is the child's guardian and has full responsibility for her care & welfare. In the circumstances, the appeal must succeed.

Observations:

Crucial to this case was the need to determine the facts with respect to the care of the Appellant's niece. In order to ascertain these facts, the Department of Social Protection should not have relied on a very limited questionnaire to determine the merits of the Appellant's claim, it would have been more appropriate that the matter be referred to a Social Welfare Inspector (SWI) for investigation. In this case the Appellant was particularly disadvantaged by the fact that English was not her first language, therefore an interview with a SWI might have elicited the pertinent facts at claim stage.

The fact that the Appeals Officer initially disallowed the Appeal on a summary basis is of concern as the Appellant was denied the opportunity to give crucial testimony as to the facts in this case. Given the limited nature of the Department's questionnaire and the consequential restriction on the ability to ascertain evidence from same, it is submitted that a fair and equitable decision could not have been made without holding an oral hearing.

This Appellant had access to representation following the summary decision by the Appeals Officer to disallow her appeal. We suggest that an Appellant without such assistance is unlikely to have challenged the decision of the Appeals Officer. This emphasises the importance of oral hearings where testimony can provide crucial evidence to the Appeals Officer adjudicating on the matter, particularly where detailed written submissions outlining the law and facts are not made due to an absence of representation.

It is also a matter of concern that both the Deciding and Appeals Officer failed to properly apply the relevant statute, and attributed incorrect meaning to limited statements made by the Appellant.

For further information:

Child Benefit:

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/Child-Benefit.aspx>

Racial Equality Directive (2000/43/EC):

<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32000L0043>

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

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