Casebase Number: G0101

Title of Payment: Child Benefit

Community Law and Mediation Northside

Northside Civic Centre

Bunratty Road

Coolock

Dublin 17

Date of Final Decision**: February 2014**

Title of Payment: Child Benefit

Date of Final Decision: 27th of February 2014

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

Organisation who represented the Claimant: Free Legal Advice Centre (FLAC)

Casebase no: G0101 (please refer to case no: G0102 as applies to High Court proceedings)

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 Child Benefit (CB) prior to the 1st May 2012. It was determined that the Appellant could not satisfy the habitual residence condition (HRC) prior to this date as she had no legal right of residence in the State. Reference is made in the case summary to the Appellant's legal status only as applies to the question of her entitlement to Child Benefit.

The Appellant and her husband arrived in Ireland in January 2006 and claimed asylum. The application was refused and in March 2007 the Refugee Appeals Tribunal confirmed this decision. On 22nd of May 2007 the Appellant sought to challenge the decision of the Refugee Appeals Tribunal by way of Judicial Review proceedings. These proceedings were subsequently struck out by consent in February 2009. The Appellant applied for readmission to the asylum process and this was refused on 11th December 2009.

In 2007 a separate application was made for leave to remain on humanitarian grounds and subsidiary protection. Subsidiary protection was granted by way of letter from the Irish Naturalisation and Immigration Service (INIS) on the 1st of May 2012.

Throughout the period the Appellant, her husband, and her child (born in 2007) lived in direct provision accommodation.

The Appellant's son was born on the 31st of December 2007. The Appellant applied for Child Benefit in February 2008. The claim was refused by a DO on the 17th of May 2008 on the grounds that the Appellant's legal right of residence had not been determined and therefore she could not be found to be habitually resident in the State. A second application for Child Benefit was made in October 2008. This was also refused by letter in February 2009. The Appellant appealed this decision to the Social Welfare Appeals Office. By way of decision dated 7th September 2009 the AO disallowed the appeal on the grounds that the Appellant's application to be declared a refugee had been refused, and therefore "the appellant may not be deemed to be habitually resident for the purpose of her Child Benefit claim at [that] time.

In 2012 the Appellant made representations to the Social Welfare Appeals Office requesting that the AO decision be reviewed by the Chief Appeal Officer pursuant to s 318 of the Social Welfare Consolidation Act 2005 (as amended) - ("the Principal Act"). It was the Appellant's position that the Appeals Officer has erred in law. This request was refused on the grounds of delay, some two and a half years had lapsed since the date of the Appeals Officer's decision. The Appellant was invited to make a new application for Child Benefit.

In February 2013 the Appellant made her third application for Child Benefit. This application was granted with effect from 1st of May 2012, the date the Appellant was granted leave to remain.

The Appeal to the Social Welfare Appeals Office.

On the 8th of July 2013 the Appellant appealed the decision to grant Child Benefit with effect from 1st May 2012. The Appellant was represented by the Free Legal Advice Centres (FLAC) who submitted on her behalf that CB should be awarded from the date her child was born in 2007 or the date of her first application for CB in 2008.

It was submitted on the Appellant's behalf that the granting of subsidiary protection status in May 2012 was declaratory of her pre-existing status. The letter issued by INIS in May 2012 merely acted so as to confirm that the Appellant's claim that she was in need of subsidiary protection must be regarded as having persisted from the date the facts first supported this claim. As authority to ground this assertion reference was made to *D (a minor) v. the Refugee Applications Commissioner* in which Cooke J held:

> An asylum seeker is a refugee as and when the circumstances defined in the Geneva Convention arise and apply. The determination of the asylum application is purely declaratory of a re-existing status.[1]

Further, it was submitted that pursuant to Directive 2004/83/EC refugees and persons eligible for subsidiary protection are "recognised" and there is no distinction between these categories as regards the date from which status should take effect.

Accordingly, as the Applicant's status may be regarded as having taken effect from the date of her application for asylum/subsidiary protection, she may be regarded as being habitually resident in the State shortly thereafter.

By way of decision dated the 27th February 2014 an Appeals Officer refused the appeal by way of summary decision; that is, without an oral hearing. The AO determined having regard to the issues involved and the extensive legal submissions made on behalf of the Appellant that an oral hearing was not required and that the case could be properly determined on the documentary evidence.

This case proceeded to the High Court by way of judicial review proceedings. Please see Casebase report **G0102** for full report on the final decision.

Key Conclusions:

By way of letter dated 27th of February 2014, the AO disallowed the Appellant's appeal. The letter stated that;

> "The appeal is disallowed. The Appellant is not entitled to Child Benefit prior to the 1st of May 2012 on the grounds she could not be regarded as a habitual resident until that date…….The Deciding Officer in commenting on the grounds of appeal did not consider the Cooke judgement was relevant as the appellant had not been granted refugee status. The Deciding Officer also referred to section 246(7)(b) of the Social Welfare Consolidation Act 2005. This provides that persons who have made an application to the Minister for Justice are not habitual residents where a determination on their application is pending…Equally section 246 (8) (c) provides that where a person is granted permission to enter and reside in

[1] [2011] IEHC 33, at para 58.

> the State under Regulation (4) of the European Communities (Eligibility for Protection) Regulations 2006, S.I. 518/2006 he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration was granted…I consider I am bound by the provisions of section 246 (7) (b) and 246 (8) (c). ”

The AO further stated that he did not think it was open to him to make a determination requiring consideration of the constitutionality of the relevant legislative provisions. He further stated that if the Appellant wished to challenge the authority of the legislation that this was a matter for the superior courts.

Summary of Benefits Received (the law as applicable on the date of application):

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

Section 246 of the Social Welfare (Consolidation) Act 2005 (as amended) provides the rules as apply to the question of habitual residence.

Section 246 (7) provides:

> The following persons shall not be regarded as being habitually resident in the State for the purpose of this Act:
>
> > (a) a person who has made an application under section 8 of the Act of 1996 and where the Minister for Justice, Equality and Law Reform has not yet made a decision as to whether a declaration under section 17 of the Act of 1996 will be given in respect of such application;
> >
> > (b) a person in respect of whom an application for subsidiary protection has been made under Regulation 4 of the Regulations of 2006 and where a determination under that Regulation has not yet been made in respect of such application; …

Section 246(8)(c) provides that where a person is granted permission to enter and reside in the State under Regulation 4(4) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No.518/2006), he or she shall not be regarded as being habitually resident in the State for any other period before the date on which the declaration 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.

Arrears/Timeframe

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), which provides:

> 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 Principal Act which provides:

> 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.

Arguments on behalf of the Appellant

FLAC lodged a submission dated July 2013 on behalf of the Appellant setting out the following arguments:-

- It was contended on behalf of the Appellant that her situation is comparable to that of persons granted refugee/asylum status in accordance with the judgment of Cooke J in *D (a minor) v. Refugee Applications Commissioner & Ors* when he held that the determination of the asylum application "is purely declaratory of a re-existing status". [2]

- FLAC submitted that in a reported case an AO accepted this principle when citing with approval the judgment of Cooke J. [3] In the case referred the AO held that the Appellant should be considered to have satisfied the HRC at the date of the birth of her child in August 2006 four months after she had arrived in Ireland.

- It was submitted EU Council Directive 2004/83/EC, establishing an obligation on all EU member states to provide international protection, provides that subsidiary protection is complementary to refugee status and is linked with that status throughout the Directive. Accordingly, recognition of someone as qualifying for subsidiary protection should have the same effect as recognition as a refugee unless otherwise stated. On this basis it was submitted that the Appellant had a right to reside in the State which should date from when she arrived in the State and applied for asylum or "international protection".

- FLAC submitted that if it had been accepted that the Appellant's status from when she arrived in the State was that of a person eligible for and qualifying for subsidiary protection, and that the Minister is required to grant leave to remain to such persons, then she should have had a right to reside from this date. On this basis it could not be argued that her status was "undecided".

- FLAC submitted that any entitlements that result from recognition that a person is in need of subsidiary protection should apply from the date when the original application was made

[2] [2011] IEHC 33, at para 58.
[3] Appeals Office Annual Report 2011, at page 33.

and the circumstances that led to the ultimate decision first persisted. On this basis the Applicant would have had a right to reside at the time of her application for Child Benefit.

- FLAC also sought to rely on Article 20.5 of the EU Directive 2004/83/EC which obliges member states to consider the best interests of the child, and Article 24.1 of the Charter of Fundamental Rights of the European Union which states that "Children shall have the right to such protection and care as is necessary for their well-being". Further, Article 24.2 of the Charter provides that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".

- It was highlighted by FLAC that while Child Benefit is payable to a parent of the child in question it is clearly intended for the support and well-being of the child and therefore the child's best interests must be a primary consideration in any decision as to whether CB should be paid in a particular case. It was submitted that no account appears to have been taken of the interests of the Appellant's son in the various decisions made by the Deciding Officers and the Appeals Officers. It was further submitted that in the balancing exercise in deciding whether someone satisfies HRC the terms of the Directive and Charter require that in relation to the entitlement to CB the rights of the child must be taken into account.

Arguments on behalf of the Department/the Decision of the Social Welfare Appeals Officer

The Deciding Officer in commenting on the grounds of appeal did not consider that the Cooke judgement was relevant as the Appellant had not been granted refugee status.

The Deciding Officer also found that Section 246 (7) (b) of the Principal Act applied which provides that persons who have made an application for subsidiary protection under the 2006 Regulations, and where a determination on their application is pending, that person shall not be regarded as being habitually resident in the State for the purposes of the Act.

The Appeals Officer upheld these findings and by way of decision, dated 27th February 2014 held:

> "The appeal is disallowed. The Appellant is not entitled to Child Benefit prior to the 1st of May 2012 on the grounds she could not be regarded as a habitual resident until that date…….The Deciding Officer in commenting on the grounds of appeal did not consider the Cooke judgement was relevant as the appellant had not been granted refugee status. The Deciding Officer also referred to section 246(7)(b) of the Social Welfare Consolidation Act 2005. This provides that persons who have made an application to the Minister for Justice are not habitual residents where a determination on their application is pending…Equally section 246 (8) (c) provides that where a person is granted permission to enter and reside in the State under Regulation (4) of the European Communities (Eligibility for Protection) Regulations 2006, S.I. 518/2006 he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration was granted…I consider I am bound by the provisions of section 246 (7) (b) and 246 (8) (c). "

The AO further stated that he did not think it was open to him to make a determination requiring consideration of the constitutionality of the relevant legislative provisions. He further stated that if the Appellant wished to challenge the authority of the legislation that this was a matter for the superior courts.

Date of Oral Hearing: N/A – Summary decision.

Date of Final Decision: 27th of February 2014 & 3rd of February 2017 (date of judgement in the High Court).

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

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