Casebase Number: G0 108

Title of Payment: Child Benefit

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Date of Final Decision**: 21 November 2019**

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Organisation who represented the Claimant: N/A

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Case Summary:
This is a joint decision in respect of two cases that both address the question of when a parent of as of yet undetermined immigration status is entitled to a child benefit payment in respect of a child who either is an Irish citizen or holds refugee status.

Ms. Agha and Osagie each applied for child benefit while living in Direct Provision as they awaited the outcome of their respective requests for permission to remain in the State, The said applications were refused on the basis that absent a legal right to reside in the State they were not considered "habitually resident" for the purposes of s.220 of the Social Welfare Consolidation Act 2005. Following the regularisation of their immigration status, further applications for child benefit were made by both applicants which the Department of Social Protection acceded to and backdated to the date they were granted permission to remain. They then sought to have child benefit further backdated to the date that the relevant child became a "qualified child" under s.219 of the 2005 Act. The Department refused to do so.

The applicants, on behalf of their children, challenged the decision not to backdate the child benefit on the basis that it breached the equality provisions under Article 40.1 of the Constitution and EU Law.

In the High Court, both cases were unsuccessful with White J. holding that the restricting of child benefit to parents who were habitually resident in the State was not unconstitutional or contrary to EU law because it applies equally to Irish citizens and non-Irish citizens and the equality guarantee in the Constitution does not require identical treatment for all persons without recognition of difference of circumstances. Although for the benefit of children, child benefit was paid to parents, and the distinction between people lawfully in the State and people without permission to be here was a valid one that the Oireachtas was entitled to make.

The decision at first instance was overturned in the Court of Appeal. Hogan J. found that the State had not provided objective justification for withholding child benefit in respect of an Irish citizen regardless of Ms. Osagie's immigration status and that constitutional equality was breached in the refusal to backdate payments. Insofar Ms. Agha's application

related to a child who was granted refugee status, child benefit entitlements accrued from the date that the relevant child became entitled to reside in the State. There could be no basis for withholding child benefit in respect of a qualified child simply because the person applying for the benefit on the child's behalf did not have a regularised immigration status. To do so would be to disproportionately deny parents a payment designed for the benefit of children.

The State was ultimately successful in its appeal before the Supreme Court. Dunne J. held that the Court of Appeal had fallen into error by focusing on the children rather than considering the positions of their respective parents as the claimants of child benefit. The Court held that there was no requirement in EU law to backdate child benefit payments in the manner claimed and that the equality provisions were not breached in circumstances where the habitual residency requirements applied to all prospective applicants equally.

Key conclusions:
Child benefit is not a right of the child but rather a payment to someone *in loco parentis* made in respect of them. In the case of an asylum seeker or someone with irregular immigration status, presuming all other criteria are met, child benefit is only payable from the date the applicant-parent is granted leave to remain in the State.

Summary of Benefits Received:
Child benefit is a non-means-tested payment to the parents or guardians of children under the age of 16, and children under the age of 18 in certain circumstances. Non-EU/EEA citizens must be habitually resident in Ireland to quality for child benefit.

Child benefit is governed by Part IV of the Social Welfare Consolidation Act 2005. Section 220 of the 2005 Act provides:

> (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 246 of the 2005 Act (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; …

At the material time, section 246(8)(c) provided 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, 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.

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.

A claim made within twelve months of becoming a qualified person will therefore be backdated to the date on which the claimant became eligible. Under section 241(4) of the Act of 2005, even a late claim can be backdated where there is good cause for the delay in making the claim.

Decision:
While agreeing to hear the two cases together, the Supreme Court noted that there were material factual distinctions between them. The *Agha* case concerned four children of Afghan parents, the youngest of whom was granted refugee status in January 2015. The mother`s initial claim for child benefit in respect of all four children was refused but upon the family being granted permission to remain on reunification grounds in September 2015, a further application was made which was successful. The mother was entitled to child benefit backdated to the date she was granted permission to remain in September 2015. The mother however sought child benefit in respect of the youngest child from the date he was declared a refugee in January 2015.

The *Osinuga* case concerned an Irish citizen born of her naturalised father (from whom she derives her citizenship) and a Nigerian mother seeking asylum in Ireland (who is her sole custodian). In January 2016, Ms. Osagie was granted permission to remain for three years as her parent pursuant to *Zambrano*. Prior to that permission being granted, the mother had made a child benefit application which was refused due to her not being habitually resident. Ms. Osagie was thereafter found to be entitled to child benefit from the date she was granted permission to remain in January 2016 (having applied in September 2015). Nevertheless, she sought child benefit in respect of her daughter from her date of birth in December 2014.

The Supreme Court began its substantive discussion by noting that while child benefit exists as a payment made to “qualified persons” in respect of a “qualified child” to assist in meeting some of costs associated with child rearing, there is no requirement that the money be spent in any particular manner. A qualified child is not entitled to receive the payment of child benefit or, indeed, receive the exclusive benefit of same. The Court of Appeal was found to have erred insofar as it conflated child benefit with other classes of social welfare payments which may be owed to a child as distinct from those owing to a parent in respect of a child.

Dunne J. held that the determining feature of an application for child benefit is not the status of the child but rather that of the applicant. In order to be considered a "qualified person", the criterion that must be fulfilled is that of habitual residence. The habitual residency requirement applied equally to all applicants for child benefit and was considered "neutral" in that sense. There was no difference in treatment between any class of qualified person regardless of the basis for their entitlement to reside in the State whether it derived from their citizenship, refugee status, or having otherwise obtained permission to reside. Further, no addition benefits attached to an Irish citizen over any other class of child that qualified.

The facts of this case were distinguished from those in the decision of the European Court of Human Rights in *Niedzwiecki* because it concerned child benefit legislation which discriminated between those with temporary rights of residence and those with permanent rights of residence. In contrast, the applicants herein did not initially have any rights of residence and did not meet the habitual residence criterion until they were granted same. The Supreme Court found the 2005 Act served a legitimate public policy in imposing measures designed to prevent "unlimited migration" and regulate the way in which it provides for those whose immigration status has yet to be determined. As such, Dunne J held that nothing in the legislation could give rise to a breach of Article 40.1.of the Constitution or Article 28 of the Qualifications Directive. In his concurring judgment, O'Donnell J. commented that even if it were accepted that the policy could have been different, more generous, or its application more nuanced that was insufficient to ground a claim of disproportionate discrimination.

The Supreme Court ruled that there ought to be no distinction between the treatment of the two mothers insofar as the backdating of the child benefit payments was concerned. Dunne J. considered it inappropriate to backdate payments beyond the date that Ms. Osagie and Ms. Agha were granted permission to remain i.e. to the dates their children qualified as a citizen and refugee respectively. The Court re-iterated that the applicants were the qualified persons which the 2005 Act chiefly concerned itself with. While they were entitled to apply for permission to remain, it was not a *fait accompli*. The Minister must be satisfied that it would be appropriate to grant permission to reside notwithstanding and there may be circumstances in which such permission will be refused even if the applicant is a parent to an Irish citizen or someone with refugee status. Dunne J. further noted that any delay between an application for permission to reside being made and the issuing of a decision in this case was not such as to amount to a breach of the quality provisions or EU Law.

The Court concluded by examining the *Osinuga* case in respect of the rights arising from *Zambrano*. Dunne J. held that such a breach could only arise in such circumstances where the absence of a payment of child benefit on a backdated basis compelled Ms. Osagie and her EU citizen child to leave the territory of the EU. No such financial compulsion was evident in this case. Further, while backdating was permissible in certain circumstances it did not extend beyond the date upon which a person became entitled to the payment in question. Ms. Osagie only became entitled to child benefit upon being granted permission to remain in January 2016 rather than on the birth of her child in December 2014 as had been argued. The applicant's case could be distinguished from that of *K.A.* in that there was no bar or "entry ban" that prevented her from claiming a right of residence. Having

received Ms. Osagie's application for permission to remain in September 2015, the Minister was entitled to consider her application in full and any delay in awaiting an outcome was negligible.

Observations:
This case illustrates that asylum seekers or others who do not fulfil the habitual residence condition are not entitled to child benefit even where the child in question is an Irish citizen or has refugee status. The beneficiaries of international protection — refugees and people granted subsidiary protection — are only habitually resident from the date their status is granted or recognised, and as such child benefit in respect of their children cannot be backdated in the normal way. Instead, it is backdated to the date the applicant was granted the said status irrespective of the basis on which they claimed that status or when they became entitled to do so.

In determining such applications, the critical factor is the status of the applicant for child benefit and not the child in respect of whom it is to be paid. Given that applicants are treated equally in determining whether they are "qualified persons" and no distinct is drawn between classes of "qualified person", the policy is not considered impermissibly discriminatory towards qualified children.

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