Casebase Number: G0110

Title of Payment: Disability Allowance

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Date of Final Decision: 15 July 2020

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Organisation who assisted claimant: N/A

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Case summary:
This is one of two judgments delivered by the Supreme Court in the case of *Petecel* concerning the refusal of an application for Disability Allowance under the *Social Welfare Consolidation Act 2005*. This particular judgment deals with the substantive issue of the legal classification of Disability Allowance, as opposed to the appellant's entitlement to seek judicial review. The procedural issue is addressed in the earlier judgment and is detailed in Casebase Report No. G0109.

The appellant was Catalin Petecel, a Romanian national who lawfully lived and worked in Ireland from 2008-11. He was diagnosed with MS (multiple sclerosis) in 2011 and travelled to Romania for treatment. He returned to the State briefly from February to April 2012 but otherwise has remained in Romania ever since. While there, his condition deteriorated to the point that he was physically unresponsive and being cared for full-time by his mother.

In 2016, Mr. Petecel applied through his legal guardian for Disability Allowance pursuant to section 210(1) of the 2005 Act. The deciding officer refused his application on the basis that he was not resident in the State. The appellant's solicitors sought a review of that decision pursuant to section 301 submitting that Mr. Petecel was still habitually resident in the State, as his absences were for the purpose of receiving medical care. Furthermore, it was argued that Disability Allowance was a "sickness benefit" for the purpose of Article 3(1)(a) of EU Regulation 883/2004 and therefore "exportable". The request for a revision was refused by a second deciding officer on 9th June 2017.

Mr. Petecel sought to challenge the said refusal by way of judicial review seeking to quash the relevant decisions and obtain additional declaratory relief. The appellant grounded his leave application on two points. First, he submitted that the deciding officer had erred in finding the appellant was not habitually resident in Ireland. Second, he contended that the State had incorrectly categorised Disability Benefit as a non-exportable "special non-contributory benefit" and sought a preliminary reference to the Court of Justice of the European Union on that basis.

When the matter came before the Supreme Court, and having determined the procedural issue, O'Malley J. invited the parties to make further written submissions on the classification issue. She was particularly interested in two issues, namely the "rehabilitative work" aspect of the earnings disregard that applied in the means test for

Disability Allowance and the relevant disqualification criteria. O'Malley J. was of the view that there were elements of sections 210 and 212 of the 2005 Act that possibly indicated there may have been a medical purpose to the overall conditions of eligibility attached to Disability Allowance at the time of Mr. Petecel's claim and sought supplemental submissions on that basis.

The Supreme Court concluded that Disability Allowance was a form of social assistance payment properly classified as a non-exportable "special non-contributory cash payment" within the meaning of Article 70(2) of Regulation 883/2004. The payment was not linked to any medical purpose. Accordingly, Mr. Petecel was not entitled to Disability Allowance and his appeal was dismissed.

Key Conclusion:
Disability Allowance is not governed by the rules relating to the exportability of social welfare benefits and is subject to the ordinary habitual residency requirements.

Arguments on behalf of the Appellant:
Mr. Petecel argued Disability Allowance covered the same "risks" as sickness benefits and/or invalidity benefits as set out in Article 3 of Regulation 883/2004. Further, Disability Allowance could not be equated to any form of social benefit linked to an incapacity to work as one may take up rehabilitative employment without losing their entitlement to this payment. Reliance was placed analogously on *Commission v. Parliament and Council* wherein the equivalent Swedish payment was deemed a sickness benefit aimed at improving the health and quality of life of its recipients. The appellant highlighted that one's entitlement to Disability Allowance is based on an objective assessment of legally defined criteria which includes a means assessment.

Insofar as the earnings disregard was to be considered, the appellant argued that the rehabilitative purpose of Disability Allowance could be found in the fact that until 2019 it was possible for a recipient to obtain an additional allowance where they were engaged in a training scheme geared towards the employment of disabled persons. Further, under the current statutory regime, section 212(2) of the 2005 Act and Article 147 of SI 142/2007 stipulated that a recipient would not be disqualified from receiving Disability Allowance by virtue of having engaged in such training. It was submitted that where social assistance has the purpose or effect of improving the state of health or quality of life of a recipient, then it was to be considered an exportable sickness benefit: *Advocate General in Commission v. Parliament and Council* and *Jauch v. Pensionsversicherungsanstalt der Arbeiter*. Disability Allowance could not be described as a minimum subsistence payment given that recipients were not only permitted but encouraged to work.

Mr. Petecel relied on the cases *Heinze v.Landesvericherungsanstalt Rheinprovinz* and *Jordens-Vosters v. Bedijsvereiniging voor de Leder en Lederwerkende Industrie* in addressing the question of the disqualification criteria and demonstrate the "medical function" underpinning Disability Allowance.

Heinze concerned a German law mandating that insurance schemes cover medical treatment for tuberculosis and pay a temporary allowance to an insured person or any of their family members who contracted the disease. Insofar as the law sought to aid in

recovery of tuberculosis patients, it was deemed to be a "sickness benefit" for the purposes of Community Law due to its remedial nature. In *Jordens-Vosters* the Court of Justice held benefits relating to the health care, regardless of the type of social legislation or the nature of the benefits were to be considered "sickness benefits" for the purposes of Community Law. As such, the appellant argued that he was not bound the habitual residency requirement as Disability Allowance amounted to a sickness benefit capable of being exported.

Arguments on behalf of the State:
The respondent noted that Disability Allowance conformed to the definition of a special non-contributory benefit as set out in Article 70(2) of Regulation 883/2004 in that it was a form of supplementary, means-tested payment which guaranteed a minimum level of subsistence. It is not a sickness benefit intended to improve one's health or quality of life but rather aimed towards meeting the economic and social circumstances of the recipient. The respondent notes that the fact Disability Allowance is payable by reference to objective criteria set out in in statute is not a point that should be "over-emphasised". The State submitted that the Disability Allowance scheme had no rehabilitative element. A distinction was drawn between rehabilitation payments and services and maintenance allowances. The respondent emphasised that the now-defunct training allowance had been paid by the HSE and was unrelated to Disability Allowance. Further, the payment was not contingent on an assessment of an individual's care needs. Insofar as the earnings disregard was concerned, it did not take account of any additional costs associated with a person's condition. While the means test did take account of the income of a spouse or partner, the respondent noted that a partial disregard applies in respect of that income.

The State described the allowance as "an income support scheme that provides a minimum level of subsistence while not preventing recipients from accessing the labour market if they can". While the respondent was willing to accept that all work has general social benefits there was no statutory requirement that a recipient engaged in work of a medical rehabilitative nature.

The State's position on the disqualification criteria was that the regulations only provides for disqualification for those who failed to attend a medical examination as distinction from those who failed to attend medical treatment. of the payment`s relation to improvement of health, the State submitted that the payment is made irrespective of care needs. The said regulations were not aimed at improving a receipt's state of health or quality of life but rather to facilitate a medical examination as part of an ongoing control mechanism designed to monitor a person's eligibility for the allowance.

On these grounds, the State argued that Disability Allowance did not fulfil the criteria of a "sickness benefit" and hence would not be exportable.

Decision of O`Malley J at Supreme Court:
The Supreme Court began its analysis by summarising the key features of Disability Allowance. O'Malley J. noted that it was available to any person of working age who, by reason of a specified disability, is substantially restricted in undertaking employment. The payment was not contingent on insurance contributions, but rather a means test which included an employment earnings disregard up to a prescribed amount. While previously

the legislation required that the work engaged in be, of a "rehabilitative nature" this term was never defined in statute and it was never a requirement that the work be conducive to medical rehabilitation. One's eligibility to receive Disability Allowance is not affected by their engaging in any training schemes for persons with disabilities or taking up residence in a state-owned care facility. The Act permits the Minister to make regulations providing for the disqualification from receipt of Disability Allowance where a recipient fails to comply with a requirement to attend a medical examination. A claimant must, however, be habitually resident in the State in order to receive the allowance.

In concluding that Disability Allowance amounted to a non-exportable "special non-contributory cash payment" as per Article 70(2) of Regulation 883/2004, O'Malley J. considered that the purpose of the payment could only be described as improving one's quality of life to the extent that it protected against poverty. It did not distinguish between those whose conditions were permanent and those who were capable of making some recovery in the future. She was particularly swayed by the fact that Disability Allowance was calculated by the statutory formulae that applied to other social assistance payments without reference to the case needs of the recipient. Accordingly, it was not a sickness benefit for the purposes of Regulation 883/2004.

While O'Malley J. had some misgivings about the requirement under section 212 and the fact that a person may be potentially disqualified from receiving Disability Allowance for failing to adhere to medical instructions from someone who is not their doctor, she reserved her position on the matter and acknowledged it was primarily a control mechanism to ensure ongoing eligibility.
The Supreme Court was of the view that the effect of the earnings disregard was to remove financial disincentives to take up employment that might improve their overall well-being. It does not have a medical rehabilitative purpose *per se*.

Accordingly, O'Malley J. dismissed Mr. Petecel's appeal on the basis Disability Allowance was not a "sickness benefit". Having concurred with legal classification suggested by the State with reference to the relevant case law, the Supreme Court was not minded to refer the question to the CJEU.

Observations:
This case illustrates that an applicant must satisfy the statutory habitual residency requirements in order to qualify and receive Disability Allowance. It is not "exportable" for the purposes of Regulation 883/2004. It confirms that someone who travels to another Member State for the purposes of obtaining long-term medical treatment may not claim Disability Allowance they would otherwise be entitled to.

In light of the comments made by O'Malley J., the disqualification criteria *vís-a-vís* medical examination and treatment may form the basis of a challenge in another more fact-appropriate case.

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