Casebase Number: G0109

Title of Payment: Disability Allowance

Community Law and Mediation Northside
Northside Civic Centre
Bunratty Road
Coolock
Dublin 17

Date of Final Decision: 14th May 2020

Title of payment: Disability Allowance

Date of decision: 14 May 2020

Keywords: Exportability of payments – point of EU law – jurisdiction of Social Welfare Appeals Officer – judicial review – Disability Allowance – sickness benefits– means test.

Organisation who assisted claimant: N/A

Casebase No.: G0109

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 decision deals with the procedural issue as to the appellant's entitlement to seek judicial review in the absence of having exhausted the statutory appeals process. The substantive issue of the legal classification of Disability Allowance is dealt with in a later judgment as detailed in Casebase Report No. G0110.

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.

Despite all aspects of the case being fully argued in the High Court, Barrett J. declined to consider the substantive issue raised in circumstances where Mr. Petecel has failed to exhaust the statutory appeals process. He found that the 2005 Act contained adequate remedies in the form of a *de novo* appeal to an appeals officer (section 311), a revision by the Chief Appeals Officer (section 318), and an appeal on a point of the law to the High

Court (section 327). Even if it was inevitable that the case would end up in the High Court in some shape or form, Barrett J. was of the opinion that it should do so at the end of the appeals process.

The Court of Appeal was prepared to accept that judicial review was not preconditioned on engaging in a futile or pointless appeals process. Costello J. was of the view, however, that the issues of EU law raised by Mr. Petecel could be dealt by way of a reference to the High Court by the Chief Appeals Officer pursuant to section 306 of the 2005 Act or an ordinary appeal on a point of law. The Court was influenced by the fact that the High Court would have a broader jurisdiction in the context of a statutory appeal than in judicial review to find that the appellant was entitled to Disability Allowance.

Ultimately, the Supreme Court determined that the appellant was entitled to bring judicial review proceedings in circumstances where the question of the classification of Disability Allowance was not one which could be properly ventilated through the statutory appeals process. Further, it would not have been appropriate to bring an appeal on a point of law as the High Court's jurisdiction in such matters is confined to the interpretation of statute. Acknowledging that the habitual residence might have been more appropriately addressed within the Departmental process, O'Malley J. held that this did not act as a barrier to judicial review.

Key Conclusion:
Applicants for judicial review are not required to bear the additional costs or burdens associated with splitting up the issues and pursuing different forms of litigation simply because one of the remedies sought falls outside of the jurisdiction of the statutory appeals process.

Arguments on behalf of the Appellant:
On the procedural issue of entitlement to judicial review:
The appellant submitted that the appeals officer was caught in a Catch-22 in that they were not entitled to disapply EU law and yet could not make enforceable decisions in respect of the categorisation of Disability Allowance. Accordingly, as per *EMI v. The Data Protection Commissioner* [2013] IESC 34, where a decision maker lacks the jurisdiction to grant one the relief sought then it was appropriate to seek judicial review rather than pursue a statutory appeal. The Social Welfare Appeals Office did not have a broad enough jurisdiction to consider Mr. Petecel's complaints about the original decision or to provide an appropriate remedy: *Fitzgibbon v. Law Society* [2014] IESC 48. While section 306 permits the Chief Appeals Officer to refer a question of law to the High Court, it is not an avenue for challenging the validity of legislation. It was argued that an appeal on a point of law to the High Court was limited to the question of whether the decision under appeal was correct in law as distinct from any question of validity.

On the substantive issue of Disability Allowance`s classification:
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.

Arguments on behalf of the State:

On the procedural issue of entitlement to judicial review:

The respondent submitted that the Social Welfare Appeals Office is adequately enabled to hear the appellant`s complaint in that the 2005 Act empowers it to deal with all issues both factual and legal. The State contended that it was "unsustainable" to suggest that the High Court's jurisdiction in an appeal on a point of law was so limited as to preclude the consideration of the validity of the classification of Disability Allowance. Further, the High Court could only grant relief in the context of a statutory appeal if it considered there to be a serious and significant series of errors which warranted the setting aside of the original decision.

The respondent contended that there was no basis for suggesting that a matter which comes before the High Court by way of an appeal on a point of law cannot be subject to a preliminary reference to the CJEU. The State's default position was that the classification issue was *acte claire* but argued that were the Supreme Court to determine otherwise the matter ought to be remitted to the High Court for consideration.

On the substantive issue of Disability Allowance`s classification:

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".

Decision:

At the outset of her judgment, O'Malley J. noted that certain matters had been accepted by the parties to the proceedings. First, neither the statutory appeal process nor any national court either by way of judicial review or an appeal on a point of law had jurisdiction to declare Regulation 833/2004 invalid insofar as it adopted a classification system for certain payments. This was a matter that was solely within the remit of the CJEU. Second, none of the Departmental officials operating within the appellate machinery set out in the 2005 Act had the power to refer a question to the CJEU by way of a preliminary reference as they did not constitute a "tribunal" exercising judicial functions. The role of Departmental officials was limited to the administration of the statutory social welfare code and nothing more.

On the procedural issue of entitlement to judicial review:

The Supreme Court emphasised that it was well-established that the existence of a right of appeal did not automatically disentitle anyone to seek to judicially review the decision

of a decision maker. It is merely a weighty factor to be taken into consideration by a High Court judge in the exercise of their discretion.

Departmental officials were obliged to act on the basis that the legislation was valid and did not have jurisdiction to consider the constitutionality or validity of legislation. A distinction can be drawn where an appeals officer is asked to disapply a national provision on the basis of its incompatibility with EU Law as that does not invalidate the underlying legislation itself. Similarly, the sole power to declare an EU measure to be invalid rests with the CJEU. It is not a power that can be exercised by an appeals officer in the course of their administrative functions.

An applicant for judicial review would not be expected to exhaust the statutory appeals for the purposes of having the issue determined by way of an appeal on a point of law where they seek to impugn the constitutionality of a given piece of legislation. The same reasoning applies to the validity of an EU instrument.

While Mr. Petecel could have dealt with the habitual residency point on its own by way the statutory appeals process, the same could not be said of the classification of Disability Allowance as to its exportability. The Departmental officials were bound to apply the legislation and the appellant had no lawful means in which to obtain a favourable decision on the classification issue within the statutory structure.

O'Malley J. noted that, in determining whether judicial review at the end of the statutory appeals process constituted an adequate remedy, consideration had to be given to the fact that an appeal on a point of law was the narrowest of avenues available. The High Court's jurisdiction is linked to that of the decision-maker and cannot go beyond what they could have determined. Accordingly, an appeal on a point of law is limited to whether the decision-maker was correct in their interpretation and application of the relevant legislation.

The Supreme Court recognised that even if Mr. Petecel had proceeded with a statutory appeal, he would not have achieved a different outcome in circumstances where there was no basis upon which he could challenge the validity of the legislation being applied as to the classification of Disability Allowance. He was not required to pursue the habitual residency point in one forum and the classification point in another. The rules pertaining to the administration of justice existed to assist litigants and not to erect barriers. As such, the case fell into **an exceptional category** and Mr. Petecel was entitled to bring judicial review proceedings. Any attempt to "sidestep" the statutory appeals process by asserting frivolous points of law in judicial review proceedings was better dealt with on a case-by-case basis than adopting an overall dogmatic approach.

On the substantive issue of Disability Allowance`s classification:
Although the Supreme Court noted that the definition of Disability Allowance in the 2005 Act appeared to support the respondent's position, no definitive decision was made on the substantive issue in the judgment of 14th May 2020. Instead O'Malley J. invited the parties to make further submissions on the rehabilitative work aspect of the "earnings disregard" that formed part of the means test for Disability Allowance and the relevant "disqualification criteria".

Observations:
This case illustrates that failure to exhaust the appeals process set out in the 2005 Act will not necessarily be fatal to judicial review proceedings. It highlights the incredibly narrow jurisdiction conferred on the High Court when dealing with a statutory appeal on a point of law, indicating that it may not be as adequate a remedy as previously thought. It confirms that neither domestic legislation nor EU instruments may be challenged through the statutory appeals process. Crucially, an applicant may advance all of their complaints by way of judicial review even where the statutory appeals process provides an ostensible adequate remedy for some of the issues, but not all. One does not need to split the issues based on the remedies available. Nevertheless, an applicant should be cautious that similar exceptional circumstances arise, such as were present in this case.

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