



Community Law & Mediation

Title of Payment: Disability Allowance

Date of Final Decision: 29 May 2020

Keywords: Disability Allowance; EU Citizenship Directive; Right to Reside; Dependant;
Family Member; Habitual Residence Condition

Organisation who represented the Claimant: KOD Lyons

Casebase No. G0113

Case Summary

This case concerned judicial review proceedings brought following a decision of a Chief Appeals Officer refusing an application for disability allowance – *Georgeta Voican v. Chief Appeals Officer, Social Welfare Appeals Office, Minister for Employment Affairs and Social Protection, Ireland and the Attorney General* [2019] No.748 J.R.

The applicant was a Romanian national, Ms. Voican, who had been living in Ireland since 2017. Ms. Voican lived with her daughter, a dual Irish and Romanian citizen. Ms. Voican had the right to live in Ireland under the EU Citizenship Directive (the “**Directive**”) as she was a dependant relative of an EU worker (her daughter). Ms. Voican applied for disability allowance and her application was refused on the basis that her right to reside in the State was predicated on her continued dependence upon her daughter. This decision was subsequently upheld on appeal and Ms. Voican brought judicial review proceedings before the High Court.

The State argued that Ms. Voican had established her right to reside in Ireland on the basis of her dependence on her daughter. Further, the State argued that this dependence needed to be continuing in order for this right of residence to continue. The State sought to make the case that if Ms. Voican received disability allowance, she would no longer be dependent upon her daughter and as a result she would no longer fulfil the requirements of the Directive. The State noted that the domestic legislation provided that the right of residence afforded to EU citizens under the Directive was conditional on the relevant person not becoming an “unreasonable burden on the social assistance system of the State” and contended that Ms. Voican being granted disability allowance would represent such a burden.

Ms. Voican argued that the European Communities (Free Movement of Persons) Regulations 2015¹ (the “**Domestic Regulations**”), which transposed the Directive into Irish law, were inconsistent with the Directive on the basis that it did not impose a condition that a family member of a migrant worker be self-sufficient. As such, Ms. Voican argued that the domestic regulations were an unlawful transposition of the Directive. Ms. Voican also argued that the refusal of her claim for disability allowance was inconsistent with the equal treatment imperatives under the Irish Constitution and the European Convention on Human Rights as the decision to refuse her claim for disability allowance discriminates against her on the basis of her nationality.

The Court rejected the State’s arguments and quashed the decision of the Chief Appeals Officer to refuse Ms. Voican’s claim for disability allowance.

The Court ordered the Chief Appeals Officer to reconsider Ms. Voican’s claim which was to be carried out within 6 weeks of the perfection of the High Court Order. The Court made its decision based solely on interpretation of the Directive and did not need to consider Ms. Voican’s additional argument in relation to the principles of equal treatment contained in the Irish Constitution and the European Convention on Human Rights. The Court’s reasoning largely turned on the definition of “family member” under Article 2(2)(d) of the Directive and whether this article required that “ongoing and continuing dependency”.

Key Conclusions

There is no self-sufficiency requirement under the Directive in respect of a dependent family member of a migrant worker who is lawfully resident in the State for a period of more than three months to reside in an EU Member State. Under the Directive the person claiming social assistance has an entitlement to equal treatment in their own right.

Summary of Benefit Received

Disability allowance is a weekly allowance paid to people with a disability. It is a means tested payment for those aged between 16 and 66 and only payable to a person who is habitually resident in the state.

Section 210 of the Social Welfare Consolidation Act 2005 can be summarised as providing that, in order to be eligible for disability allowance, a claimant must meet the following qualifying criteria.

- (i). A claimant must have attained the age of 16 years, but not yet have attained pensionable age;
- (ii). A claimant must be substantially restricted in undertaking suitable employment (as defined) by reason of a specified disability; and

¹ S.I. 548 of 2015

- (iii). the claimant's weekly means must not exceed the amount of disability allowance (including any increases of that allowance) which would be payable to the person if that person had no means.

Section 210(9) of the Social Welfare Consolidation Act (the "Act") provides that a person must be habitually resident in the State in order to claim disability allowance. The definition of habitually resident is set out in section 246(1) of the Act and provides that a person, who is a family member of a worker or a self-employed person from an EU Member State residing in the State pursuant to Article 7 of the Citizenship Directive, meets the requirement of being habitually resident in the State.

Decision:

In deciding the case, the Court noted that the case largely turned on the issue of whether Ms. Voican met the definition of "family member" set out under article 2(2)(d) of the Directive and thus had a right of residence under article 7 of the Directive and retained this right under article 14 of the Directive .

In establishing an EU citizens right to residence in another EU country, the Court noted that the Directive draws a distinction between (i) residence for an initial period of less than three months, (ii) residence for a period of longer than three months and (iii) permanent residence. The Court further noted that the Directive distinguishes between (i) economically active citizens, (ii) economically inactive citizens and (iii) students, and that different conditions apply to each category with regard to their right of residence in Ireland for a period of more than three months. As Ms. Voican's daughter was working in Ireland the provisions of article 7(1)(a) and article 14 of the Directive applied.

The Court then sought to examine whether Ms. Voican qualified as a family member of a worker pursuant to article 7(1)(d) and when and where material support must exist in order for a family member to be deemed to be a dependant family member in the ascending line as provided for in article 2(2)(d). The Court looked to the *Reyes* case² which established that in order to establish dependency the material support must exist in the family member's State of Origin at the time of applying to join the EU citizen. The Court noted that the fact that an EU citizen is regularly paying a sum of money to the family member for a significant period is enough to establish material support. Accordingly, it was found (and not disputed) that Ms. Voican's daughter had been providing such support to her at the time when Ms. Voican was resident in Romania and subsequently came to Ireland. The Court also noted that once dependence is established in the State of Origin at the time a right of residence is derived, the provision of social assistance after this point does not affect the right of residence.

In response to the Respondent's argument by reference to the *Lebon*³ case that such material support or dependence must be ongoing or continuing. Further the Respondents sought to

² (Case C – 423/12).

³ The *Lebon* case (Case C -316/85) concerned the derived right of residence of a dependent in the descending line and the interaction of this status with the provision of social assistance after the dependent had attained the age of 21.

argue that *Lebon* was not relevant to Ms. Voican's case as it concerned a dependent in the descending line and not a dependent in the ascending line⁴. In addressing these arguments the Court found that there was nothing in *Lebon* which supported the proposition that the requirement for dependency be continuing or ongoing in the host Member State. The fact that the case concerned a dependent in the descending line did not affect the ability of a dependent in the ascending line. The Court rejected further arguments brought by the Respondents that *Lebon* could be distinguished on the basis that the social assistance in that case differed from the disability allowance that Ms. Voican sought and that *Lebon* had to be read in the context of the then legislation.⁵

Considering the Domestic Regulations, the Court found that they define a "qualifying family member" under regulation 3(5) and that this definition includes "a dependent direct relative in the ascending line of the Union Citizen". No definition of dependence is provided in this context. It was noted that the Domestic Regulations do, however, provide a definition of dependence in the context of family members who derive their right of residence from a student in regulation 11 of the Domestic Regulations. This definition of dependence provided that the support given to a family member must be ongoing and continuing in the host State and the Respondents sought to argue that this definition should apply in Ms. Voican's case. On this point, the Court noted that the Directive specifically distinguished between the requirements for dependence of a family member of an economically inactive citizen and the requirements for a family member of an economically active citizen⁶. As such, the Court found that the requirement for continuing support in the context of dependents of a student did not apply in the case of a dependent of a worker. The Court stated that to extend this requirement to family members of workers would be contrary to the Directive.

The Court also considered Ms. Voican's eligibility for disability allowance under Social Welfare Consolidation Act 2005 (the "Act") (which was the applicable legislation at the time of the Chief Appeals Officer's decision). Section 210(9) of the Act provides that a person shall not be entitled to disability allowance unless they are habitually resident in the State. Section 246(1) provides that a person who is a family member of a worker or self-employed person from an EU Member State residing in the State pursuant to article 7 of the Directive meets the requirement of being habitually resident. By virtue of the Court's acceptance that the applicant had a right of residence under the Directive it was held that Ms. Voican fulfilled the requirements of section 246(1) of the Social Welfare Consolidation Act 2005.

The Court drew attention to article 24 of the Directive which ensures that Union citizens residing in another member state are entitled to equal treatment with the nationals of the host State. It noted that in *Dano* the Court of Justice held that the principle of non-discrimination laid down in article 18 TFEU is given more specific expression in Article 24 of the Directive. Accordingly, the Court found that if Ms. Voican was denied access to disability

⁴ This was rejected based on the Irish case of *V.K v Minister for Justice and Law Reform* [2019] IECA 232 confirmed that the same principles apply to dependents in the ascendant line.

⁵ The *Lebon* case concerned Regulation 1612/68 on freedom of movement for workers within the community which has since been replaced in part by the EU Citizenship Directive.

⁶ The *Dano* case (C-333/13) noted that the Directive explicitly makes a distinction between economically active and economically inactive citizens and that the requirements for dependent family members gaining residence differ accordingly.

allowance in circumstances where she met the criteria set out in the Directive and under the Act, this would undermine the equal treatment accorded to a migrant worker and their dependents under article 24 of the Directive.

Following this analysis the Court found that the Chief Appeals Officer's reasoning in rejecting Ms. Voican's application for disability allowance which relied on the provisions of regulation 11 of the Domestic Regulations was inconsistent with the Directive. It was inconsistent with the Directive to impose a requirement of self-sufficiency upon dependent family members of a migrant worker who are lawfully resident in the State for a period of more than three months.

The Court noted that Ms. Voican had a right of residence within the State based on article 7(1)(d) and article 14 of the Directive. It further noted that by virtue of the fact that Ms. Voican had been financially dependent on her daughter prior to joining her daughter in Ireland she fulfilled the criteria for dependency under article 2(2)(d) of the Directive. The Court stated that the Respondents were not entitled to impose a self-sufficiency requirement on Ms. Voican or deny her equal treatment in the context of her application for disability allowance. It stated that it was clear that the EU legislature provided that it was an unreasonable burden for a Member State to allow the dependent family members of a migrant worker a right to equal treatment in respect of social assistance.

The Court made an order of *certiorari* quashing the decision of the Chief Appeals Officer and remitted the matter to the Chief Appeals Officer with a direction to reconsider their decision and reach a decision in accordance with the Court's findings. The Court also proposed to make a declaration that regulation 11 of the Domestic Regulations is inconsistent with the requirements of the Directive. As the Court had resolved the issue by reference to the Directive it was not necessary to consider the alternative grounds of challenge by reference to the Constitution of Ireland and European Convention on Human Rights.

Observations:

This case illustrates that once a migrant worker and their qualifying family members establish a right to residence for a period greater than 3 months in another EU Member State pursuant to the Directive they are entitled to equal treatment with Irish citizens. This right to equal treatment extends to the provision of social assistance payments such as disability allowance as in the above case.

In determining whether a family member in the ascending line is a dependent family member for the purposes of the Directive, the Court will look to whether material assistance in the form of ongoing payments from the migrant worker were ongoing at the time the family member seeks to join the migrant worker. There is no requirement for this material assistance to be ongoing and continuing after the family member joins the migrant worker. The case is under appeal by the Respondents as of 2021.