THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 25

Record No. 2018 421

Whelan J.
Costello J
Kennedy J.

BETWEEN/

CATALIN PETECEL

(SUING THROUGH HIS LEGAL GUARDIAN MARIA PETECAL)

APPELLANTS/APPLICANTS

- AND–

MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 6th day of February 2019

1. This is an appeal by the appellants against the judgment of Barrett J. delivered on the 4th May 2018 ([2018] IEHC 238) dismissing the appellants' application for judicial review. The proceedings relate to the first appellant's application for disability allowance under the Social Welfare Consolidation Act 2005 and a decision refusing that application on the 9th June 2017.

Factual background
2. The first named appellant ("the appellant") is a national of Romania. For a period of four years he was resident in the United Arab Emirates. He moved to the State on the 1st April 2008 and he worked in Ireland between the 1st May 2008 and the 15th July 2011. He enrolled in a course at the Athlone Institute of Technology for the academic year 2010/2011 but was withdrawn from the course from the 1st October 2011.

3. On the 28th November 2011 the appellant travelled to Romania for medical treatment where he was diagnosed with multiple sclerosis. He returned to Ireland on the 20th February 2012. He was unable to access the medical treatment he required in Ireland and so he returned to Romania on the 20th April 2012. His condition deteriorated significantly, to the point that he requires 24 hour care and is physically unresponsive. It is common case that the appellant has been in Romania since the 20th April 2012 in the care of his mother, the second named appellant. On the 13th December 2015 the second named appellant was appointed the legal guardian to the appellant.

The application for disability allowance
4. On the 15th September 2016 the appellant applied for disability allowance under the Social Welfare Consolidation Act, 2005 ("the 2005 Act"). The application was refused by a decision dated the 7th November, 2016 on the grounds that the appellant was not resident in this State. By letter dated the 24th January, 2017 the appellant sought a review of the decision under s. 301 of the 2005 Act. The appellant made two further submissions to the first named respondent on the 23rd March, 2017 and 25th April, 2017. The appellant argued that he had not transferred his habitual residence to Romania, he asserted that his absences from the State were for medical treatment and that this was permitted under the provisions of Articles 1 (k), 19(1) and 20 (1) of Regulation 883/2004. Finally, he asserted that disability allowance was incorrectly categorised in Regulation 883/2004 by this State as a special non-contributory cash benefit in Annex X of the Regulation rather than as a sickness benefit. The significance of this distinction is that if it is classified as a sickness benefit it is exportable, meaning it is payable to the appellant in Romania, whereas it is not if it is listed in Annex X of the Regulation.

5. On the 9th June, 2017 the appellant's application for a review of the decision of the 7th November, 2016 was rejected. It was decided that he was not eligible for disability allowance for the following reasons:-

> (i) He had not demonstrated a right to reside in the State under Statutory Instrument No. 548 of 2015 European Communities (Free Movement of Persons) Regulations 2015 as he had not been continuously resident in the State since the 20th April 2012. A person who does not have a right to reside in the State cannot be habitually resident for Social Welfare purposes.
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> (ii) The length and continuity of residence in the State does not provide for HRC approval as he had left the State on the 20th April 2012.
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> (iii) He had no employment record in the State since 2011.
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> (iv) He lived most of his life outside the State and had been living outside the State since the 20th April 2012.
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> (v) His main centre of interests is outside the State as he lives with his family (parents) in Romania.

(vi) He holds a bank account outside the State.

(vii) The evidence available did not substantiate habitual residence within the State.

Disability allowance – legislative framework
6. Before considering the issues raised in this appeal it is useful to consider the legislative basis for disability allowance and the appeal process set out in the 2005 Act.

7. A disability allowance is created by Part 3, Chapter 10 of the 2005 Act. The allowance may be paid to a person pursuant to s. 210(1):-

> *(a) who has attained the age of 16 years but has not attained pensionable age;*
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> *(b) who is by reason of a specified disability substantially restricted in undertaking employment (in this Chapter referred to as "suitable employment") of a kind which, if the person was not suffering from that disability would be suited to that person's age, experience and qualifications, whether or not the person is availing of a service for the training of disabled persons under s. 68 of the Health Act 1970 and*
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> *(c) whose weekly means, subject to sub section (2) do not exceed the amount of disability allowance, (including any increases of that allowance) which would be payable to the person under this Chapter if that person has no means."*

8. In addition, applicants for disability allowance must have a right to reside in the State (subs. (5)) and must be habitually resident in the State. Section 210(9) of the 2005 Act precludes the payment of disability allowance to any person unless the person is habitually resident in the State. Habitual residence is defined by s. 246(1) of the 2005 Act and the criteria for the assessment of habitual residence in ss. 4. Those criteria are:-

> (a) the length and continuity of residence in the State or in any other particular country;
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> (b) the length and purpose of any absence from the State;
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> (c) the nature and pattern of the person's employment;
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> (d) the person's main centre of interests, and
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> (e) the future intentions of the person concerned as they appear from all the circumstances.

The statutory appeals process
9. Part 10 of the 2005 Act provides a comprehensive appeal mechanism against decisions of a Deciding Officer or against a refusal to revise a decision of a Deciding Officer under the 2005 Act. Section 311 enables any person to appeal a decision of a Deciding Officer to an Appeals Officer. That appeal is a full *de novo* appeal on the facts and the law. Section 318 of the 2005 Act enables the Chief Appeals Officer to revise an appeal decision where it appears that the decision was erroneous by reason of a mistake as to the law or the facts. Section 327 of the 2005 Act provides that any person who is dissatisfied with the decision of the Appeals Officer or the revised decision of the Chief Appeals Officer may appeal to the High Court "on any question of law". In addition to these appeals, the Chief Appeals Officer may refer any question which has been referred to the Appeals Officer, other than in question to which section the 320 applies, for decision of the High Court pursuant to s. 306 of the Act.

The appellant's case
10. The appellant did not appeal the revised decision of the Deciding Officer to an Appeals Officer pursuant to s. 311. Obviously he did not therefore rely upon the further provisions of the appeals code. Instead, on the 17th July, 2017 the appellant applied for leave to seek judicial review for an order of *certiorari* quashing the decision of the 9th June, 2017 and certain declaratory reliefs including, if necessary, a reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the functioning of the European Union addressing issues of European Union Law raised in the proceedings.

11. The respondents opposed the application for judicial review *inter alia* on the preliminary ground that the appellant had failed to exhaust alternative remedies, as well as on substantive grounds.

Decision of the High Court
12. The trial judge declined to consider any of the issues raised by the appellant on the basis that he had failed to exhaust alternative remedies before coming to court. He outlined the comprehensive appeal mechanism established by Part 10 of the 2005 Act. He noted that the Oireachtas has designed and at public expense established a comprehensive appeals mechanism to enable the review of decisions taking under the 2005 Act including providing for an appeal on a point of law to the High Court and a mechanism for the referral of issues to the High Court. He said that while the application was both honestly motivated and honestly brought, the appellant could not be allowed, in effect, to side step the Social Welfare appeals process on the basis that he alleged that he was unable to address certain weighty legal issues in that process. Barrett J. expressly rejected the contention that the issues raised by the appellant could not be addressed if he adhered to the statutory scheme. He held that the appellant had failed to put forward a good reason why he elected to ignore the appeal framework and to commence judicial review proceedings. He accepted the observations of Barron J. in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497, 509, that:-

> *"It is not just a question whether an alternative remedy exists or whether the Applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness…"*

13. Barrett J. concluded that in the context of a Social Welfare appeals process the appellant had an adequate alternative remedy that could properly consider all of the issues raised in those proceedings which included a facility whereby the matter could be referred to the High Court. On that basis he dismissed the application and made no order as to costs.

The arguments on appeal

14. The appellant argued that the trial judge erred in holding that he was required to exhaust the alternative remedies available under the 2005 Act prior to coming to court. He said Barrett J. misapplied the test established by Barron J. in *McGoldrick's* case. The appropriate remedy in this case was judicial review in the High Court, as he could not obtain the remedy he claimed under the statutory scheme. It was submitted that the Appeals Officer could not treat the appellant as habitually resident in Ireland on the facts and the law as they currently stand in Ireland. The essence of the appellant's case is that disability allowance is not correctly listed in Annex X of Regulation 883/2004 as a special non-contributory cash benefit (and thus not exportable). This categorisation is binding on the Appeals Officer and the Chief Appeals Officer. This can only be changed by either a declaration of the High Court or, in the alternative, by the CJEU pursuant a reference by the High Court on this point. The case inevitably must come before the High Court (as Appeals Officers do not make references to the CJEU as a matter of practice). It is more appropriate that it does so by way of judicial review than on an appeal to the High Court on a point of law for three reasons.

15. First, the relief sought within the proceedings gives rise to very complex legal issues relating to European and social welfare law. Counsel submitted on his behalf that the Superior Courts have generally accepted that complex matters pertaining to the interaction of European law and national law, such as those raised in these proceedings, are appropriately dealt with before the courts rather than by the Social Welfare appeals office.

16. Secondly, counsel submitted that the jurisdiction of the High Court on an appeal on a point of law under the 2005 Act was limited to the High Court examining the original decision and deciding whether or not the Appeals Officer based the decision on an identifiable error of law or a finding of fact that was not sustainable. He compared the scope of the appeal on a point of law before the High Court unfavourably with that of the High Court in an application for judicial review.

17. Thirdly, he said that the Appeals Officer lacked subject matter jurisdiction to address the issues raised in the proceedings and could not determine the issues that would arise in an appeal brought by the appellant.

18. It was submitted therefore, that the High Court misapplied the test in McGoldrick and ought to have identified the appropriate remedy as being a judicial review in the circumstances of the appellant's case.

Discussion
19. In *Hrisca v. Minister for Social Protection* (unreported, High Court, White J. 16th February, 2012) White J. delivered an ex tempore judgment on an application for an injunction in judicial review proceedings relating to the refusal of the respondent to pay the applicants supplementary welfare allowance and rent supplement allowance and secondly seeking a reference to the CJEU under article 267 of TFEU. At paras. 3 and 5 of the judgment he said:-

> *"…[T]he decision to refuse allowances was based on legal considerations, on the interpretation of the EC (Free Movement of Persons)(No.2)Regulations 2006, and the distinction between those who are in employment and those who are self-employed. I approve of the submissions made on behalf of the applicants that judicial review is the more appropriate remedy, in that the applicant's case gives rise to complex questions of European law. …*
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> *It is self-evident, in respect of the issues which have been argued before this court, which are quite complex in their nature, that on appeal, any Appeals Tribunal would have to follow the reasoning of Mr Reddy in accordance with the stated regulations and the High Court judgment referred to in the decision. The applicants did not have to exhaust their right of appeal through the social welfare system before taking judicial review proceedings."*

This was the authority relied upon by counsel for the appellant to support his first proposition.

20. I do not accept that it is a statement of principle that judicial review is the appropriate remedy in cases involving complex issues of European law and that they constitute exceptions to the obligation on a litigant to exhaust a statutory appeals mechanism before seeking judicial review. It is not clear whether the provisions of s. 306 and s. 327 of the 2005 Act were opened to White J. Certainly, he does not refer to either section in his judgment. In my opinion this lessens the precedent value of the decision, as these sections are essential to an overall view of the statutory scheme. There is force in the argument that a party should not be required to engage in a pointless appeals process which could never confer the benefit sought as a precondition to bringing an application for judicial review. White J., on the facts of the case before him, formed the view that the appeals process in that case could not result in a successful outcome for the applicants. In this case I am satisfied that this is not so. The Appeals Officer could refer the points of law raised by the appellant to the High Court under s. 306 or the appellant, if dissatisfied with the decision, could appeal to the High Court on a point of law under s. 327.

21. Further, even if counsel is correct in his submission that the case is authority for the proposition that applicants do not have to exhaust their right of appeal under the social welfare system before taking judicial review proceedings which raise complex issues of European law, with the greatest of respect to the trial judge, I cannot agree. Insofar as there are two conflicting decisions of the High Court on this point, I prefer the judgment of Barrett J. in this case, for the reasons I have set out. I do not accept that the Superior Courts have *generally* accepted that complex matters pertaining to the interaction of European and national law are more appropriately dealt with by the courts than by the Social Welfare appeals office. The scheme is capable of dealing with the legal issues the applicant seeks to raise, if needs be by references or appeals to the High Court or, thereafter, by a reference to the CJEU.

22. The appellant argued that the jurisdiction of the High Court on an appeal under s.327 to deal with the issues the appellant wished to raise was somehow less than that enjoyed by the High Court in judicial review proceedings. It is correct to say that the High Court is limited to deciding whether the decision of the Appeals Officer or Chief Appeals Officer was based on an identifiable error of law or a finding of fact that was not sustainable. He did not produce any authority that the High Court could not refer an issue of law to CJEU under Article 267. He had no authority to support his submission that on a statutory appeal the High Court could not declare that the State had erred in its categorisation of disability allowance for the purposes of Regulation 883/2004. I cannot accept the argument. Indeed, the contrary is the case. As was submitted by counsel for the respondent, the jurisdiction of the court is greater on a statutory appeal than on judicial review, as the court may make a decision on the appellant's application for disability allowance in his favour, which it could not do in judicial review proceedings.

23. Finally, the appellant argued that judicial review was the more appropriate remedy because the Appeals Officer lacked subject matter jurisdiction in this case. He relied upon the decisions in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 and *EMI Records (Ireland) Ltd v. The Data Protection Commissioner* [2013] 2 IR 669.

24. In *Koczan*, Hogan J. said that the Financial Services Ombudsman lacked subject matter jurisdiction where the complaint related to a financial institution acting as a vendor of property, rather than as a provider of financial services. This cannot apply by analogy to an appeal by the appellant in this case to the Appeals Officer, as the case relates to the provision of disability allowance, and thus is

a matter to be dealt with by an Appeals Officer under the 2005 Act.

25. The decision of Clarke J. in *EMI* is relevant. At paras. 41 and 42 of the judgment he stated:-

> *"41. Thus the overall approach is clear. The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan, that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned.*
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> *42. However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such circumstances is not necessarily closed. However, the principal areas of exception have been identified. In some cases an appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision. As pointed out by Hogan J. in Koczan, that may be so because of constitutional difficulties or other circumstances where the body to whom the statutory appeal lies would not have jurisdiction to deal with all the issues. Likewise, there may be cases where, in all the circumstances, the allegation of the aggrieved party is that they were deprived of the reality of a proper consideration of the issues such that confining them to an appeal would be in truth depriving them of their entitlement to two hearings."*

Were it not for the provisions of s. 306 and s. 327 of the Act of 2005, the appellant might well rely upon this passage to support his arguments. But those sections apply to his case and distinguish his case from the exceptions mentioned by Clarke J. in the passage. I do not accept that the appellant could not adequately ventilate the basis of his complaint in the statutory appeals process set out in the 2005 Act, which include a right of appeal on a point of law to the High Court and a right of the Chief Appeals Officer to refer a point of law to the High Court for its determination.

Conclusion

26. It follows that I find no error in the manner in which the trial judge exercised his discretion in this case. I refuse the appeal.