

Between:

**CATALIN PETECEL
(SUING THROUGH HIS LEGAL GUARDIAN MARIA PETECEL)**

APPLICANT

– AND –

MINISTER FOR SOCIAL PROTECTION AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 4th May, 2018.

1. On 15th September, 2016, Mr Petecel made an application for disability allowance under the Social Welfare Consolidation Act 2005. The application was refused by way of decision of 7th November, 2016 on the grounds that Mr Petecel was not resident in Ireland. By letter of 24th January, 2017, Mr Petecel sought a review of that decision under s.301 of the Act of 2005. By decision of 9th June, 2017, it was decided that Mr Petecel was not eligible for disability allowance. By order of the High Court dated 17th July, 2017, Mr Petecel (suing through his legal guardian) was granted leave to apply for judicial review of the decision of 9th June, 2017. In addition, Mr Petecel seeks certain declaratory relief and a reference to the Court of Justice under Art.267 TFEU regarding certain questions of European Union law.

2. The court respectfully declines to consider at this time any of the issues that Mr Petecel has raised in the within application on the basis that he has failed to exhaust alternative remedies before coming to the court. Part 10 of the Act of 2005 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 Act of 2005. Section 311 of the Act of 2005 permits any person to appeal a decision of a deciding officer to an appeals officer. An appeal before an appeals officer involves a full de novo re-hearing. Additionally, s.318 of the Act of 2005 allows the Chief Appeals Officer to revise a decision of an Appeals Officer where *"it appears that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts."* Finally, s.327 of the Act of 2005 provides that any person who is dissatisfied with a decision of an 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 the appellate structure created by the Act of 2005, s.306 of that Act permits the Chief Appeals Officer to *"refer any question which has been referred to an Appeals Officer, other than a question to which Section 320 applies, for the decision of the High Court"*.

3. As the Oireachtas has designed and, at public expense, established a comprehensive appeals mechanism to enable the review of decisions taken under the Act of 2005, including providing for an appeal on a point of law to the High Court and a mechanism whereby issues may be referred to the High Court, that framework should typically be utilised prior to the commencement of judicial review proceedings. Though counsel for the applicant mentioned on a couple of occasions at hearing that, in his experience, the social welfare appeals mechanism works well in practice, he also contended that the weighty legal issues that arise in the within proceedings have the result that in some shape or form this case is bound to end up in the High Court. However, it seems to the court that therein lies the problem: it may be that Mr Petecel's application will end up in some shape or form before the High Court but that shape or form should typically be the shape or form that it has assumed (i) by the time the appeals process, acting as contemplated by its own terms, sees an appeal enter the court process and/or (ii) after an appeal has gone through the entirety of the social welfare appeals process which the Oireachtas has gone to the time and trouble of crafting and used public monies to establish.

4. Additionally, while the within application was both honestly motivated and honestly brought, were Mr Petecel to be allowed in effect to side-step the social welfare appeals process by reference to a contention that the appeals framework, as established, is unable to address certain weighty legal issues (or see such issues addressed by a court) – a contention that is not accepted by the court to hold true – that would be (i) to place Mr Petecel unfairly ahead of those who are going through or have gone through the social welfare appeals process and not rushed to court, and (ii) to encourage those who are less honest than Mr Petecel and his lawyers – and the court makes no aspersion (none) in respect of the honesty or good faith of Mr Petecel and/or his legal team – to contrive at points of law that would see their cases sidestep the established social welfare appeals process and thereby frustrate the objectives of the Oireachtas in establishing, at public cost, a comprehensive social welfare appeals process.

5. As to the point raised by counsel for Mr Petecel in his submissions that the Chief Appeals Officer does not have the power to make preliminary references to the Court of Justice: (i) the court understands from counsel for Mr Petecel that this precise point is the subject of a separate, recently commenced judicial review application, so it remains to be seen whether the point is correct or not as a matter of law; (ii) it seems to the court that as the High Court can in any event be brought into the social welfare appeals process whether as it proceeds and/or in the form of a related judicial review application, then regardless as to the right answer to (i), there is currently a form of mechanism whereby such a reference can ultimately be made, if and as appropriate, by the High Court.

6. Apart from the 'weighty issues' point which the court has addressed above, Mr Petecel has, with respect, failed to put forward a good reason why he elected to ignore the appeal framework established by the Act of 2005 and commence judicial review proceedings. No argument is made that there was a failure to follow fair procedures, still less a failure to provide a fair hearing in the manner contemplated by the Supreme Court in *Stefan v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203. The court accepts the point made by Barron J. in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497, 509, that when determining the issue of appeal versus judicial review: *"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..."*. However, for all of the various reasons aforesaid and in the context of a social welfare appeals process which offers Mr Petecel an adequate alternative remedy that can properly consider all the issues raised in those proceedings including a facility whereby in the course of such proceedings matters can, to use a colloquialism, be 'bounced' to the High Court (or may come in any event in the form of a suitably timed judicial review application) it is appropriate and sensible for the court to dismiss the within application.