Neutral Citation Number: [2012] IEHC 27

THE HIGH COURT

2011 406 MCA

IN THE MATTER OF SECTION 327 OF THE

SOCIAL WELFARE CONSOLIDATION ACT 2005

BETWEEN

PAULA MAY GLADYS DOUGLAS

APPELLANT

AND

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Mr. Justice Charleton delivered ex tempore on the 6th day of February 2012.

1. This is an appeal under s.327 of the Social Welfare Consolidation Act 2005 against two refusals of social welfare relief which have been made against the appellant. These decisions relate to a jobseekers allowance application and relate also to a supplementary welfare allowance application. The appellant is a law graduate from London. The appellant came to Ireland from England on the 26th of September last, having lived in Great Britain all her life, but having been unemployed since July 2006. Almost immediately on landing in Dublin, the appellant applied for social welfare. These applications were refused and she appealed to the appeals officer. On the 7th December, 2012, the appeals office rejected an appeal in respect of jobseekers allowance from the appellant, Ms. Douglas. On the 2nd December, 2011, the appeals officer rejected an appeal in respect of supplementary welfare allowance from Ms. Douglas.

2. I will now synopsise what this case is not about. The appellant says that she has been hurt by the attitude of various officers of the defendant towards her and has told the Court that she feels like an illegal immigrant. I see no reason for that feeling. The appellant is not an illegal immigrant; she is a citizen of Great Britain. She happens to be of Jamaican origin. I do not believe from what I have seen and heard that anyone has thought any more of her or any less of her because of her citizenship or because of her original ethnic origin. I certainly do not, quite the opposite; she has presented her case very well. There is a certain amount of emotional overlay, however, in relation to this appeal which is, perhaps, not beneficial. The appellant is of course welcome in Ireland as a citizen of the European Union. The issue before me is whether or not she is entitled to social welfare. More specifically the appeal jurisdiction which I am exercising is one which is limited to the High Court examining the original decision and deciding whether or not it is undermined by a serious and significant error or a series of errors which together amount to such an error. That is what the appeal before me is all about; Manorcastle Ltd v Commission for Aviation Regulation [2009] 3 IR 495. The appellant says that she decided in coming to Ireland on the 26th of September 2011 to remain here in order to settle permanently. Whether this is so or not is a question of fact and I am looking at whether the decisions made by the appeals officers are vitiated by error in the sense outlined.

3. The appellant claims that she is being discriminated against; that the fact that she made a firm a decision to move to Ireland has been ignored. The facts, she says, support her having made a decision to move to Ireland. In making what she calls that firm decision, she claims that she made certain private arrangements including making a removal contract to move her furniture, letting go of her flat in England, and entering into a long-term lease here in Ireland. She intends, she says, to study for a diploma in law in Dublin Institute of Technology in order to qualify for either the King's Inns or the Law Society of Ireland examinations. She has registered a phone here, registered at a doctor's surgery and attends a church in north Dublin city, she asserts. All of that is done on a particular basis of permanent settlement in Ireland and it is said that in those circumstances the High Court on appeal should see her as being someone qualified for social welfare.

4. I turn therefore to the entitlement for social welfare. The entitlement for social welfare arises under a set of provisions which together, in effect, amend themselves. Section 246 of the Social Welfare Consolidation Act 2005, provides for special treatment for persons coming from Great Britain, defined as the common travel area, namely the United Kingdom, the Channel Islands and the Isle of Man. It is provided for in s.246(1) of the Act of 2005 that for the purposes of each provision of the Social Welfare Consolidation Act 2005, it is to be presumed until the contrary is shown that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has been present in Ireland or any other part of the common travel area for a continual period of two years ending on the date: the date referable, I am satisfied, is the date when the person seeks social welfare.

5. In the case of the appellant, those dates are the 26th September, 2011, and the 6th October, 2011; being the dates on which she applied for the two forms of social welfare. Perhaps because of a need to guard against welfare tourism, which I am certainly not in any sense implying that the appellant ever thought about, s.246 of the Principal Act was amended by s. 30 of the Social Welfare and Pensions Act 2007, and that in effect overturns subs. 1 of s.246 of the Act of 2005 by adding in a new subs.4. This provides that a deciding officer, when determining whether a person is habitually resident in the State (which exclusively means Ireland but not the common travel area), shall take into consideration all the circumstances of the case including and, in particular, I quote:-

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

6. In addition to the application for jobseekers allowance, the appellant applied for supplementary welfare allowance. There something occurred which is perhaps upsetting for the appellant but there is nothing before me to indicate that there was any malicious intention, rather it seems to me a word was used in circumstances where it could be wrongly interpreted; she was offered money to help her return to England.

7. Section 189 of the Social Welfare Consolidation Act 2005, says that every person in the State whose means are insufficient to meet his or her needs shall be entitled to supplementary welfare allowance. It also provides under s. 201 that the deciding officer may, having regard to all the circumstances of the case, determine or decide whether a supplementary welfare allowance shall be paid to a person by way of a single payment to meet an exceptional need. I note, in that regard, that what occurred here on the 14th November, 2011, was that on applying for supplementary welfare allowance it was refused; on the basis which I will now quote:-

> "You have been disqualified for basic supplementary welfare allowance on habitual residence grounds. You have been disqualified on SDA and HRC grounds. Exceptional needs payments are discretionary and not an entitlement. You were advised that you would not be considered for further payment, other than the cost to be repatriated to Britain."

8. Now it seems to me that the emotional overlay in this case comes from that. I don't believe anything wrongful was intended by it and if the choice of words was repatriation to Finland, Greece or France, perhaps circumstances would dictate that no offence was taken but offence has been taken here. What matters, however, as an issue of law is whether or not the appellant is available for work and whether or not the appellant has habitual residence; the two grounds of refusal set out in the letter quoted as "SDA and HCR".

9. On availability for work; the appellant in her affidavit and in making submission to me today has indicated that her intention was do a post-graduate diploma in law, with view to equipping herself to take FE-1 examinations in the Law Society of Ireland and also that she explored the possibility of studying at the Kings Inns. As I understand it, the Dublin Institute of Technology was so interested in receiving the appellant as a student that they gave her a grant in order to assist her in that regard of some €1,500. Studying for a law diploma and being available for work are not necessarily incompatible, one can work in one's spare time, but the appellant made it perfectly clear in applying for any benefits to the social welfare authorities what work she would be able to do; this would be work which was not inconsistent with perhaps eleven hours of lectures per week. A refusal on those grounds does not seem to me to constitute a serious error. The appellant was not available in the ordinary course for all but occasional work during the week; employers are entitled to demand more and in fact do so.

10. Turning to the allowance that was refused in respect of what is, in effect, now unemployment assistance, or as it is now called jobseekers allowance, the situation there is that it was found as a fact by the appeals officer that she was not habitually resident in the State.

11. The appellant says that by virtue of a combination of circumstances to which reference has already been made, she is entitled to be regarded as habitually resident as of the date of application for welfare, and if she is not, that refusal must be considered as discrimination and as a breach of European Union law. The appellant had not worked in England since July 2006, as I said earlier, and on coming here made the applications for social welfare I have mentioned and sought to be registered with Dublin City Council for housing. In the meantime the appellant stayed in a bed and breakfast accommodation in an establishment called 'The Elvis Presley'.

12. Is there any serious and significant error on the issue of habitual residence? It is said by the appellant that the issue of habitual residence is one which has been misconstrued by the deciding authorities. The relevant European Union law forbids discrimination and what is said on behalf of the respondent minister in relation to the appellant's situation is that habitual residence in the State applies to persons who are citizens of Ireland who, for example, have gone to Canada for some years and then come back after an absence, it applies to persons from Greece, from France and it applies to persons from Britain. If it were the case that what was happening was that a law was passed by Ireland which was based exclusively on Irish citizenship a case of breach of the European treaty would be more easily made out. In *Brian Francis Collins v. The Secretary of State for Work and Pensions* (Case C138/02) [2004] E.C.R. I – 02703, Mr. Collins, having been working in the United States and in Africa but not in the United Kingdom and being an Irish citizen, claimed that a bar to social welfare based on residence in the United Kingdom was contrary to European law as being discriminatory. The European Court held at para. 66 of their judgment that a residence requirement of that kind can be justified only if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions. The court also held that it was legitimate for the national legislature to wish to ensure that there was a genuine link between an appellant for an allowance in the nature of the social advantage and the geographic employment market in question. The court held that such a link might be determined a genuine link between the person seeking work and the employment market of the State if that person was adjudged to have genuinely sought work in the member state in question. In such circumstances the entitlement of the United Kingdom to require a connection between persons who claim an entitlement and its employment market might be displaced.

13. In the case of *Robin Swaddling v. Adjudication Officer* (case C90/97) [1999] E.C.R. I-01075 the issue which arose was what, for the purposes of establishing a link with the employment market in a member state, was habitual residence? It is to be noted that case was decided in 1999 and that the amendment to which I have referred - namely the exclusion of Great Britain from the negative presumption through the amendment of the section - occurred much later by virtue of the Social Welfare and Pensions Act 2007, s.30. In the course of that decision it was noted under previous directives that a payment of benefit such as income support is conditional upon the claimant residing in the territory of the member state and that the operative phrase in the Regulation founding this branch of European law, Article 10a of Regulation 1408/71, was required to mean habitual residence. At para. 29 the court went on to elicit an number of guidelines stating:-

> "The phrase 'the member state in which they reside' in Article 10a of Regulation No. 1408/71 refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where that is the case) that he is in stable employment; and his intention as it appears from all the circumstances."

Comparing those criteria with the criteria set out which is now s. 246(4) of the Social Welfare Consolidation Act 2005, as amended by the Social Welfare and Pensions Act 2007, one will find that they are effectively the same.

14. Now it is also argued by the appellant that in the circumstances of this case there is a discrimination on the ground of nationality and reference is made to the case of Rudy Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve(case C184 1999) [2002] E.C.R. I-06193. From that decision of the European Court it is clear that a provision in Belgian law allowing an entitlement to what may, in effect, be described as minimum support was inconsistent with European law, if that entitlement was based solely on

the grounds on Belgian nationality; and I have regards to para. 29 through to para. 40 of that judgment.

15. The entitlement to social welfare here, in contrast to that Belgian provision, can operate against the appellant, against an Irish citizen, against a French citizen, on precisely the same ground of habitual residence which is applied in Ireland based on the length and continuity of residence, the nature and pattern of employment, where the main centre of interest of the person is and the future intentions of the person concerned. Given those wide criteria and given the background of the appellant living all her 49 years in the United Kingdom, prior to coming to Ireland four months and two weeks ago, the date on which she applied, her intentions as they appear, her main centre of interest, the nature and pattern of her employment and above all the length and continuity of her residence in the State, I cannot see that there has been any serious and significant error which would entitle me to interfere with the decisions made in this case.

16. In the result, the appeal is dismissed.