[2019] IEHC 337

**THE HIGH COURT**

**Record No. 2018/263JR**

**BETWEEN**

**MARCEL DINU**

**APPLICANT**

**AND**

**CHIEF APPEALS OFFICER**

**SOCIAL WELFARE APPEALS OFFICE**

**MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Binchy delivered on the 7th day of May, 2019**

1. The applicant is a national of Romania who came to this country in 1996 and was resident here until 2013. On his arrival here initially, the applicant made application for asylum. Between 2000 and 2007, the applicant was employed, but became unemployed in 2007 following which he received job seekers benefit. When his entitlement to that benefit ceased, he became entitled to job seekers allowance and remained in receipt of that benefit until 2013.

2. In 2013, he returned to Romania to care for his father who had become terminally ill. He remained in Romania for that purpose, until his father died in 2016. Following upon the death of his father, he returned to Ireland in 2017, and on 10th January, 2017, he made an application for supplementary welfare allowance. This application was refused on 8th February, 2017, on the basis that the applicant was not habitually resident in the State. The applicant appealed that decision on 20th February, 2017. This appeal was rejected by the Appeals Officer on 30th May, 2017, on the basis that *"the appellant may not be deemed to meet the habitual residence condition and he has not disclosed his means to allow for assessment for the purposes of his supplementary welfare allowance claim of 10th January, 2017".*

3. By letter of 13th June, 2017, the applicant asked that his appeal be reopened and sought an oral hearing. He also submitted additional information. The request for an oral hearing was granted. However, his appeal was again unsuccessful and he was notified of this by the Social Welfare Appeals Office by letter of 15th November, 2017.

4. By this time, the applicant was receiving assistance from Crosscare, a voluntary housing and welfare organisation. Crosscare made a detailed written submission to the first named respondent by letter dated 20th December, 2017, and on the basis of the issues raised therein (which included matters of fact and law) requested that the first named respondent revise the applicant's appeal, and allow the appeal on the basis that the applicant was habitually resident in the State as of the date of his claim. Again, however, the applicant was unsuccessful. The first named respondent affirmed the decision of the Appeals Officer, and the applicant was so informed by letter dated 3rd January, 2018, issued on behalf of the first named respondent.

5. By letter of 11th January, 2018, Crosscare made additional submissions arising out of the decision of the first named respondent of 13th January, 2018. The first named respondent replied to that letter by a further letter dated 18th January, 2018, addressing the further issues raised on behalf of the applicant, but again affirming the decision of the Appeals Officer.

6. There matters rested until 8th March, 2018, when solicitors for the applicant wrote to the first named respondent. They made brief submissions as regards matters of fact and law and again invited the first named respondent to reconsider her decision. In the alternative, they invited the first named respondent to make a preliminary reference to the Court of Justice of the European Union, asserting that the case raised important points of EU law. However, they did not specify any matters or questions of EU law which they claimed are raised by the case. They went on to state:-

> "We would strongly assert that the Social Welfare Appeals Office appears to be fettering its discretion by persistently refusing to make such references to the Court of Justice and would, therefore, call upon (sic) to fully consider this point."

7. They concluded the letter by stating that unless the first named respondent reversed the decision or made a preliminary reference to the CJEU then the applicant would seek judicial review in the matter without further notice.

8. This letter in turn gave rise to a reply from the first named respondent dated 23rd March, 2018. In this letter, while pointing out that the process provided for appeals and review of decisions pursuant to the Social Welfare Consolidation Act 2005 was concluded, the first named respondent said that she had taken the opportunity to examine the file again in the light of the further correspondence received from the solicitors for the applicant. She said that having done so, she was satisfied that the conclusion that she had reached in the review that she had conducted under s. 318 of the Act of 2005 was correct, and that there were no grounds for revising the decision of the Appeals officer. In relation to the request to make a reference to the CJEU, the first named respondent stated:-

> "With regard to your request that this office make a preliminary reference to the Court of Justice, I wish to advise that the role of the Social Welfare Appeals Office is to determine appeals against decisions of deciding officers and/or designated persons of the Department of Employment Affairs and Social Protection. The legislation governing the appeals process is contained in Part 10 of the Social Welfare Consolidation Act 2005 (as amended) and the Social Welfare (Appeals) Regulations 1998 (S.I. No. 108 of 1998) (as amended).
>
> While s. 306 of the Social Welfare Consolidation Act 2005 provides that:-
>
> > 'The Chief Appeals Officer may, where he or she considers it appropriate, refer any question which has been referred to an Appeals Officer, other than a question to which s. 320 applies, for the decision of the High Court'
>
> I consider that the governing legislation does not confer any power in this office to refer matters to the European Court of Justice.

> Accordingly, and in addition to the above points, there is no question pending before this Office from which there could be any possible question of a reference to the European Court of Justice. You have, however, the right to refer the matter to the office of the Ombudsman ..."

Following upon this, the applicant then made an application seeking leave to issue these proceedings by way of judicial review and obtained leave by way of an order of Noonan J. made on 9th April, 2018. The applicant then issued these proceedings by way of notice of motion dated 12th April, 2018, seeking, *inter alia*, the following reliefs:-

> "(i) An order of *certiorari*, quashing the decision of the first named respondent of 23rd March, 2018, wherein, and insofar as, it was determined that the Social Welfare Appeals Office had no power to make a preliminary reference to the Court of Justice and insofar as any exercise of discretion was purportedly exercised.
>
> (ii) A declaration that the first named respondent erred in law in the decision of 23rd March, 2018, wherein, and insofar as, it was determined that the Social Welfare Appeals Office had no power to make a preliminary reference to the Court of Justice in the premises that the Social Welfare Appeals Office constitutes a tribunal for the purpose of Article 267 of the Treaty on the Functioning of the European Union and, as such, is empowered to make a preliminary reference to the Court of Justice.
>
> (iii) If necessary, an order pursuant to O. 84, r. 27(4) of the Rules of the Superior Courts remitting the matter to the respondent with a direction to reconsider it and reach a decision in accordance with the findings of this Honourable Court."

9. The applicant seeks these reliefs on the following grounds (as set forth in his amended statement of grounds):-

> "(i) the first named respondent has erred in law and has fettered her discretion in adopting the position that the Social Welfare Appeals Office must be empowered by domestic legislation to make a reference to the CJEU. The Social Welfare Appeals Office meets the criteria of a "*court or tribunal*" for the purposes of making such a reference;
>
> (ii) the first named respondent, and her predecessors, has never made a preliminary reference to the CJEU since the establishment of the Social Welfare Appeals Office by statute in 1990;
>
> (iii) insofar as the first named respondent stated in her letter of 23rd March, 2018, that there is "*no question pending before this office from which there could be any possible question of a reference to the European Court of Justice"*, this cannot be construed as the proper lawful and adequate exercise of the discretion afforded to courts and tribunals to make preliminary references in circumstances where the first named respondent had already erred in law by predetermining that she does not have the power to make a preliminary reference to the CJEU;
>
> (iv) the effect of the position of the first and second named respondent that the Social Welfare Appeals Office is not empowered to make preliminary references to the CJEU is such as to unlawfully fetter the discretion of all of the Appeals Officers and to prohibit the important and crucial function of a tribunal such as that office of referring appropriate cases directly to the CJEU."

10. It is apparent from the summary of the proceedings above that the applicant is not seeking any relief in relation to the decision of the first named respondent, or the earlier decisions of the deciding officer or the Appeals Officer in relation to his application for supplementary welfare allowance. The applicant accepts that, if successful with these proceedings, the only benefit that the applicant can hope to get is a reconsideration on the part of the first named respondent as to whether or not a preliminary reference should be made to the CJEU. In his written submissions, counsel for the applicant states that the sole question arising for decision by this Court is whether or not the Social Welfare Appeals Office is a "*tribunal*" for the purposes of Article 267 of the Treaty on the functioning of European Union (the "TFEU")? It is submitted on behalf of the applicant that the answer to this question is of fundamental and systemic importance, because the determination of Social Welfare claims made by EU citizens in this State has become increasingly complex and Appeals Officers are sometimes faced with complex legal issues which require determination by the CJEU. Notwithstanding this, the second named respondent has never, since its inception on 1st January, 1991, made a preliminary reference.

11. It is further submitted that appellants who are often impecunious are unnecessarily forced to issue proceedings by reason of the refusal of the second named respondent to make references to the CJEU, as a result of which such appellants suffer years of delay and risk enormous expense, before securing a preliminary reference and a final determination of their rights. The position adopted by the second named respondent also gives rise to a significant waste of taxpayers' money and scarce court time.

12. It is also submitted that the second named respondent cannot, on the one hand state categorically that the second named respondent does not have the power to make preliminary references, and at the same time consider properly the question as to whether or not a preliminary reference is warranted.

13. Counsel for the appellant also made comprehensive submissions on the question as to whether or not the second named respondent constitutes a tribunal for the purposes of Article 267 of the TFEU. However, it is the position of the respondents that these proceedings should be dismissed (without addressing that question) on the basis that they are either (a) a collateral attack on the earlier decisions to refuse the applicant supplementary welfare allowance, or (b) entirely misconceived as there is no substantive question that is required to be referred to the CJEU, and the proceedings are therefore academic in nature. It is submitted that there is no necessity for the court to address the question as to whether or not the Chief Appeals Officer or the Social Welfare Appeals Office is a "*court or tribunal*" for the purposes of Article 267 of the TFEU because no substantive question of law requiring a reference has been identified. Nor does the applicant, by these proceedings, ask the Court to refer any question to the CJEU.

14. In relation to the second of these points, the respondent submits that the applicant has not identified any issue that requires consideration by the CJEU. The question as to whether there should be a reference to the CJEU was raised only after the final decision of the Chief Appeals Officer of 3rd January, 2018. In fact, it was not even raised in the correspondence that immediately followed that decision, and was raised for the first time when the applicant's solicitors wrote to the first named respondent on 8th March, 2018. But while, in that letter, the solicitors for the applicant made arguments of a generalised nature as regards the application of EU law, the request for a preliminary reference is vague and the letter does not identify a specific question or issue that requires to be referred to the CJEU.

15. Accordingly, it is submitted that the proceedings should be dismissed by reason of the absence of any substantive dispute

between the parties in relation to a question of EU law, or a conflict between EU law and national law. In this regard, the respondents rely on the decision in the case of *McNamara v. An Bord Pleanála* [1998] 3 I.R. 453, which it is contended establishes the principle that the preliminary reference procedure can only apply where a decision is pending before a court or tribunal, and there is no jurisdiction for such a reference when judgment has already been given. In that case the High Court (Barr J.) stated at p. 457:-

> "In the light of the wording of Article 177 I am satisfied that a ruling of the Court of Justice, being for the benefit of a national court, must be made while the case in question is pending before the latter, i.e. prior to its final judgment."

The Supreme Court affirmed the decision of Barr J. in this regard stating at p. 466:-

> "The purpose of the procedure is to enable a national court to obtain any guidance as to European Union law which it may require in order to decide the case pending before it. When the national court has given judgment, there is no case pending in respect of which any such question can be referred."

The Supreme Court further stated:-

> "There is a further difficulty in the path of the applicant. I am satisfied that no question of European law has been identified in the present case which could, in any event, have properly been the subject of a reference, either by the High Court or this Court., for a preliminary ruling pursuant to Article 177."

16. It is submitted that the preliminary reference procedure is a mechanism to enable national courts or tribunals to request clarification from the CJEU of specific points of European law in the context of a decision that is under active consideration by that Court or tribunal. The procedure does not exist for the purpose of providing an extra layer of appeal to a decision making process and in the absence of a specific dispute relating to the interpretation or application of European Union law, there is no need for a reference under Article 267 of TFEU. It is submitted that in the circumstances of this case, any question relating to the entitlement of the first named respondent to refer questions to the CJEU is entirely academic and/or theoretical and in those circumstances ought not to be determined by the Superior Courts at this time. The question before the Court is in the form of a moot which should not be determined having regard to well-established principles, and the respondent refers to the decision of the Supreme Court in the case of *Lofinmakin (a minor) & ors v. Minister for Justice, Equality and Law Reform* [2013] IESC 49.

17. In my view, the respondents are correct in their submissions as summarised above. It would be an altogether different proposition if, during the course of the appeals process, a submission had been made by or on behalf of the applicant, to the effect that the respondents had failed to apply specific provisions of EU law correctly, and requested the respondents to refer a question on that particular point of EU law as it applied to the applicant's circumstances, for determination by the CJEU. But while general references to EU law were made in submissions made on behalf of the applicant, they fall very far short of identifying a question to put to the CJEU. Nowhere, whether in the correspondence leading up to these proceedings or in these proceedings has the applicant identified the point of law that he would like to see determined by the CJEU and nor does the applicant seek a reference to the CJEU as a relief in these proceedings. The question that the applicant wants the court to answer in these proceedings is whether or not the second named respondent is a "*tribunal*" for the purpose of Article 267 of the TFEU.

18. It is true that if this question is answered in the affirmative, the applicant also seeks an order remitting the matter to the respondents with a direction to reconsider a reference to the CJEU, but in circumstances where the applicant himself has failed to identify any issue to be referred to that court, it is difficult to see how this can benefit the applicant in any way.

19. While it is submitted on behalf of the applicant that this question is one of systemic importance and frequently arises, I have no evidence of this and am not persuaded that this is so. The very fact that it has arisen in a case in which no question for determination by the CJEU has been identified would tend to suggest otherwise. But even if that is the case, then it must surely also be the case that the matter will arise at some point in time in the future in a case where a relevant question is identified, at which point in time the question now presented to this Court may fall due for determination in the context of a real dispute, and not in the moot or academic context in which it arises in this case.

20. In my opinion, the respondents are correct in their arguments that the Court is being asked to address an academic question the answer to which can be of no benefit to the applicant. There is no substantive dispute between the parties on any question of EU law, and the question before the Court has at all times been moot as between the parties. The case of *McNamara v. An Bord Pleanála* is very much in point.

21. For these reasons, the application must be dismissed.