

**THE HIGH COURT
JUDICIAL REVIEW**

2009 1156 JR

BETWEEN/

MICHAEL SHEEHAN

APPLICANT

AND

THE MINISTER FOR SOCIAL AND FAMILY AFFAIRS AND HEALTH SERVICE EXECUTIVE

RESPONDENTS

JUDGMENT of Mr. Justice John MacMenamin dated the 14th day of January, 2010

1. The applicant in these proceedings (who, assisted by a "MacKenzie friend", represents himself) seeks:

- i) a declaration that the "practices, rules and regulations and procedures" already applied by both respondents violated the applicant's constitutional rights, his right to due process and fair procedure and his rights under natural justice;
 - ii) an order of *certiorari* quashing decisions already made and directed at the applicant by both respondents;
 - iii) an order of mandamus to compel both respondents to implement practices, rules, regulations and procedures that comply with the applicant's constitutional rights, his right to due process and fair procedure and rights pursuant to natural justice,
- insofar as such rights apply to his alleged entitlement to Jobseekers Allowance and Supplementary Welfare Allowance.

2. The application arises in the following way.

3. Mr. Sheehan resides in Co. Kerry. He gives his address in the application for leave to seek judicial review as being 92, St. Brendan's Park, Tralee. He is a single man. He is unemployed. He has a seven year old daughter. His daughter resides in Glencar, Co. Kerry, with her mother. This, obviously, is in a residence separate from that of the applicant. The applicant accepts that he plays a significant part in his daughter's upbringing.

4. I mention this matter explicitly at the outset, because it appears that the fundamental issue which gives rise to this application is whether the applicant has furnished the requisite information to the respondents' officials as to whether he is part of a "couple", defined under s. 142 (4) (a) of the Social Welfare Consolidation Act as meaning:

"A married couple who are living together or a man and woman who are not married to each other but are cohabiting as husband and wife."

By way of further preface also I should state that by virtue of S.I. No. 142/2007 (Social Welfare (Consolidated Claims, Payments and Control) Regulations), an applicant for social welfare is *required* to give certain information when making a claim. By Regulation 181 it is stipulated:

"181. (1) Every claimant shall furnish such certificates, documents, information and evidence as may be *required* by an officer of the Minister, for the purposes of deciding the claim and in any particular class of case, shall, for the purposes of making any such claim, attend at such office or place as an officer of the Minister may direct."
(Emphasis added)

5. On 1st April, 2009, the Jobseekers Allowance of €204.30 per week being paid by the Minister to the applicant was stopped. The applicant seeks judicial review of the decision made by the Minister officially dated 27th April, 2009 terminating this payment. This payment to the applicant was in respect of Jobseekers Allowance within the meaning of Part III, Ch. II of the Social Welfare Consolidation Act 2005 (as amended) (The "2005 Act").

6. The applicant also seeks judicial review against the second respondent, ("the H.S.E.") in relation to a decision made on 22nd September, 2009, refusing an application for supplementary welfare allowance. These will be considered in turn.

The Jobseeker's Allowance

7. With regard to the first claim, a replying affidavit on behalf of the Minister was sworn by Brian Kearney, Special Investigation Unit Manager with the Department of Social and Family Affairs for the region of Cork, Kerry and Limerick.

8. He says that the applicant was informed of the decision to refuse the Jobseekers Allowance and that the reason given was that the applicant had "failed to provide confirmation of current address". The address which the applicant had provided was 92, St. Brendan's Park, Tralee, Co. Kerry.

9. Mr. Kearney states that on 4th August, 2009, Mr. Sheehan exercised his statutory right to refer the decision to an appeals officer for review pursuant to s. 311 of the Social Welfare Consolidation Act 2005. This provides that where a person is dissatisfied with the decision given by a deciding officer, the question shall, on notice of appeal being given to the chief appeals officer within the prescribed time, be referred to an appeals officer.

10. The appeal mechanism may work in two ways. It may either be considered by the appeals officer, or alternatively the matter may, pursuant to s. 301 of the Act of 2005 be referred back to the deciding officer for review or revision. Such revision may take place where it appears to a deciding officer that the original decision was erroneous in the light of new evidence or of new facts which have been brought to the notice of the deciding officer since the date upon which it was made or whether there was some mistake made in relation to law or facts. (See s. 301 (1)(a).) In the instant case, the deciding officer confirmed he did not wish to revise the decision and the appeal was transmitted to the social welfare appeals office on 7th September, 2009, for determination of the Appeal.

11. It is essential to point out at this stage that this appeal made to the social welfare appeals office had not at the time of this hearing on 21st December, 2009, been determined. In fact the social welfare appeals office indicated that the applicant's appeal will be by way of oral hearing which has been fixed to take place on 18th January, 2010. In ease of the applicant the oral hearing will take place in Tralee.

12. Mr. Kearney states that an appeals officer has a broad discretion pursuant to the Act of 2005 to revise the applicant's claim for Jobseeker's Allowance.

13. Furthermore, even this step does not exhaust the rights of appeal which exist under the Act. (See Ch. 1 and 2 of the Social Welfare Consolidation Act 2005.)

14. The decision of an appeals officer can in turn be revised by the chief appeals officer. The applicant has thereafter a statutory entitlement to appeal the decision of the appeals officer, or the revised decision of the appeals officer, to the High Court on any question of law (s. 327 of the Act).

15. In these circumstances the first respondent contends that the applicant has failed to exhaust remedies provided by statute for the review of decisions made by the deciding officers.

16. The applicant lays considerable reliance on the fact that an appeal *might not be determined within a reasonable time*. In so contending he refers to Regulation 19 of the Social Welfare (Appeals) Regulations 1998. This provides that the decision of the appeals officer shall be in writing, signed by him or her, and shall be sent "as soon as may be" to the chief appeals officer.

17. One can envisage a set of circumstances in which a failure to deal with an appeal within a reasonable time might, potentially, constitute grounds for judicial review. The question that arises is whether there is any indication of a breach of statutory time limit or an unreasonable failure to comply with provisions under the Act?

18. One of the fundamental matters to which the decision-makers must have regard is the question of entitlement to an allowance. This in turn is connected to the means and entitlement to benefit, and also the obligation under Regulation 188 of S.I. No. 142/2007 to notify the Minister of any change in circumstances which affect the right to benefit, or to the receipt thereof, as soon as reasonably practicable thereafter.

Application for Jobseekers Allowance procedure

19. It is a well established precept of judicial review that in general where the law provides for a code, or appeal mechanism prior to resorting to judicial review an applicant should exhaust his rights of appeal, unless want of jurisdiction or breach of fair procedures or error of law can be shown. (See *The State (Abenglen Properties Ltd. v. Dublin Corporation* [1984] I.R. 381, in particular the judgment of O'Higgins C.J. at p. 393; *Stefan v. Minister for Justice, Equality and Law Reform* [2006] 1 I.R. 560.) Failure to exhaust remedies is not necessarily determinative; but will be a significant factor. For the reasons which have been outlined earlier the applicant has not exhausted his rights of appeal. Indeed this judicial review has been brought for hearing at a time and the date for the appeal has been fixed for 18th January, 2010. It has not been shown that there is any want of jurisdiction, breach of fair procedures or error of law. What has occurred is that statutory requirements for information have been made as to entitlement to which Mr. Sheehan takes exception. This is a matter which goes to discretion.

20. With regard to what might transpire on any forthcoming appeal I make no comment, other than to refer to the obligations or requirements which are placed upon those engaged in the decision making process, on the one hand, *and on those who seek to pursue an appeal*, on the other. There is an *entitlement* for the Minister's officials to seek information – the applicant is required to provide the type of information identified. He has not done so. He has not exhausted his remedies. As a matter of discretion I consider this application should be refused on these grounds.

21. The applicant makes a further complaint that is to say that there is an absence of statutory definitions of terms such as "current address" and "weekly means". It has not been shown how he is prejudiced by this. I do not think that these points are of any substance, particularly so in the light of the fact that, it has been clearly identified by counsel for the Minister that in the decision process words will have imparted to them their general and ordinary meaning. This point in my view is misconceived.

Supplementary Welfare Allowance

22. The second aspect of the plaintiff's claim is significantly connected to the first. A claim was brought against the second named respondent ("the H.S.E.") in relation to a decision (following the first decision as to Jobseekers Allowance); made on 22nd September, 2009, refusing an application for supplementary welfare allowance. The second named

respondent states that this refusal was made in accordance with law. Counsel for the H.S.E. says the applicant has not appealed the decision of the appeals officer to the High Court on a question of law, and that the applicant has not sought a revision of the decision of the appeals officer, nor availed of any entitlement to appeal this decision.

23. Alec Weir is an acting superintendent community welfare officer in Tralee. He has sworn an affidavit on behalf of the HSE. By way of background he says that the applicant originally applied for supplementary welfare as far back as 2005.

24. In a form which was submitted in 2005, the applicant was asked to indicate other addresses wherein he had resided during the year previous to the date of application. Another such address was provided. This was at Bride Valley, Glencar, Co. Kerry, the address of Renata Guggenmos, the mother of the applicant's daughter.

25. What follows is not disputed in affidavit. The file discloses that when Mr. Sheehan was then asked by the community welfare officer about the nature of his work he stated that he had been involved in the building of a house in Glencar for his partner, Renata Guggenmos. Also, in 2005, he was asked to submit accounts and bank statements in support of his application. He never returned; nor did he request the application be progressed further. The application was dealt on 12th July, 2005. As the information was not forthcoming no further steps were taken in the determination.

26. The applicant made a further such application on 23rd April, 2009. For this purpose he lodged a claim form. He provided an address at 92, St. Brendan's Park, Tralee. He indicated that he was single, and made no reference to being in full-time education. He stated that he had been last employed as a builder. The applicant provided a letter with his application dated 21st April, 2009. In the course of that letter the applicant stated, *inter alia* that he had learned that a "social welfare" payment had been suspended and that from a conversation he was told that the officer had called to his address at 92 St. Brendan's Park with a colleague companion two weeks ago without prior notification to himself. He complained that he had not been informed to be present at home when they called. The applicant did not state in that letter why he believed his social welfare payments had been suspended.

27. The matter was dealt with by a community welfare officer, Elizabeth Duffy. She took details from the applicant. The applicant was again required to fill in a form. He indicated there that he then lived with his brother, Pat Sheehan, and that he was paying the E.S.B. bill for a house in Glencar belonging to his ex partner and their child. During the course of the meeting, reference was made to a staff member of the Department of Social Welfare calling to his house on 9th April when he was not home. He had been referred to the community welfare office and had last been paid on 2nd April, 2009. He was advised by the community welfare officer to contact the social welfare officer and to talk to the manager's office. This arose because the reason for the discontinuance of the social welfare allowance was not set out.

28. Mr. Sheehan took no further steps in these matters between 21st April, 2009 and 13th August, 2009. In the application form the applicant had not filled in a section as to his status but indicated that he was in full time education. He indicated that the section dealing with a "spouse/partner" was "not applicable", and indicated in respect of other residence that this section was "not applicable". This section in the form requested information as to who else lived with the applicant apart from a spouse/partner and other child dependents. Part V of the form, dealing with occupation, employment and general information was also marked "not applicable". Mr. Sheehan indicated in Part VI which dealt with "income awaited by an applicant or a spouse/partner" that he was awaiting a social welfare claim for seven weeks. He made reference to the fact that he had a house which was shared between three members of his family and which is on the market for sale as a condition of his late mother's Will. This information was given in response to a question as to whether he or his spouse or partner owned any property. In Part X the other information provided in handwriting dealt with the basis for the application for supplementary allowance and other relevant information. The applicant completed this form as follows:

"Because of social welfare payment being temporarily suspended and no other means of income support".

29. The file indicates that the applicant called again to the HSE offices on 25th August, 2009 and indicated he would proceed to the High Court if no payment was made. He was told it would take three weeks for the claim to be processed.

30. The community welfare officer called to the applicant's stated place of residence on 3rd/4th September, 2009. Ms. Duffy says she noted that there was no self-contained apartment in the house which was a mid-terraced house. She did not consider it appropriate to enter, as the applicant was not present. She made a note requesting that a copy be sought of the applicant's mother's Will from which he derived a share in the house together with a valuation from an auctioneer.

31. The acting superintendent wrote to the applicant on 10th September, 2009 requesting these details. These were submitted and the valuation for 15th September, 2009, received in the HSE offices on 21st September, 2009.

32. On 22nd September, 2009, Mr. Weir, in his capacity as acting superintendent community welfare officer, considered the file. He disallowed the application for supplementary allowance pending the outcome of the appeal against the discontinuation of the Jobseekers Allowance. He concluded the applicant had failed to provide evidence that he did in fact reside on a permanent basis at 92 St. Brendan's Park. In support of his application the applicant had actually submitted correspondence from AXA Insurance and from the E.S.B. with an account in the applicant's name at Dromdarragh, Bride Valley, Glencar, dated 1st September, 2009. His partner, Renata Guggenmos and his child also reside at this address. Following an assessment of the correspondence Mr. Weir concluded that he had not been satisfied as to the applicant's permanent address and disallowed the application. He was advised of his right to appeal.

33. By virtue of s. 196 (2) of the Social Welfare Consolidation Act 2005 it is provided that in calculating the supplementary welfare allowance payable, the aggregated amount of a husband and wife or a man and woman who are not married to each other but are cohabiting as husband and wife shall be regarded as the needs and means of the applicant. From the application provided, Mr. Weir states that it was not possible to determine whether the applicant was resident with his former partner or with his brother. This information was required as a precursor to determining the amount of supplementary welfare allowance payable. Mr. Weir states that he applied the statutory test set out and determined that the evidence submitted was not sufficient to entitle him to a supplementary welfare allowance.

34. Mr. Weir said that in arriving at this decision, he had regard to the information furnished by Elizabeth Duffy who had also recommended refusal. Ms. Duffy had made her recommendation on the basis that the applicant had no proof that he resided at the address furnished and that he had not provided proof as to how he had supported himself since March

2009. She had noted that the applicant had indicated in his letter to the Department of Social and Family Affairs that he had the use of a "self-contained" apartment on the property. She also noted that he set out that he was staying regularly in Glencar, Co. Kerry in order to mind his child who lives with her mother and that the applicant in support of his application had submitted correspondence from AXA Insurance and the E.S.B. addressed to himself at the Glencar address.

35. The applicant lodged an appeal against this decision. This was determined on 23rd October, 2009, by Ms. Marion Foley, deputy appeals officer. She upheld the decision of the community welfare department on the grounds that the applicant had not provided evidence of his full time residence at the Tralee address. She also suggested he could apply from the Glencar address. To date this has not been done.

36. Mr. Weir says that if the applicant was dissatisfied with this decision, just as in the Jobseekers Allowance, he could appeal it further to the chief appeals officer. If he had wished to do so he had to set out his grounds for appeal in writing and forward them to the address set out within 21 days of the notice of 23rd October, 2009. No appeal has been lodged against this decision.

37. Instead of availing of statutory right of appeal the applicant sought this judicial review. Application for leave was made on 9th November, 2009.

38. One of the grounds relied on by the applicant was his contention that there are no time limits provided for in the statutory instrument.

39. There is no indication that there has been a failure on the part of those entrusted with the decision to deal with the matter expeditiously.

40. It is quite clear that there was a requirement placed upon the respondents to establish the residence of the applicant in order to determine his weekly means. Also, the income and cash of the household must be assessed together with the value of benefits or privileges enjoyed by an applicant.

41. In the light of the fact that the applicant did not exercise his right of appeal to the chief appeals officer I will decline the application for judicial review under this heading on discretionary grounds for the same reasons as indicated earlier, that is of the applicant's failure to exhaust his remedies, and the failure to demonstrate any error of law or breach of fair procedures. The primary onus now is on the applicant to provide the required information.

42. I would also observe that the applicant is entitled at all times to lodge a fresh application and furnish necessary information in order to permit a new decision to be made. In this connection it will be noted, as indicated earlier, that the appeal against a refusal to grant the applicant the Jobseekers Allowance is due to be heard on 18th January, 2010. If the applicant is successful in this appeal then he would not in any event be entitled to receive supplementary welfare allowance.

43. The general requirements for the calculation of supplementary welfare allowance are set out at s. 196 of the Social Welfare Consolidation Act 2005 which include *inter alia* the necessity to determine:

- o the amount by which the applicant's means falls short of his needs;

- o weekly needs of the applicant;

- o in the case of a couple who are cohabiting as husband and wife their needs and means shall be aggregated and shall be regarded as the needs and means of the claimant;

- o in the case of a person with a qualified child, his or her needs shall be taken to include the needs of that qualified child;

- o where the needs of any person are taken into account in determining the entitlement of any other person to supplementary allowance, only that other person shall be entitled to an allowance.

44. Insofar as any issue arises as to the interpretation of particular terms here, I should indicate that it has again been specifically indicated to the applicant that save where there is no statutory definition, words will be given their natural and ordinary meaning for the purposes of any appeal.

45. I am unable to find that there has been a breach of any time limits. No facts were placed before the decision makers which would indicate the need for any urgency. Through lack of endeavour from the applicant matters proceeded quite slowly between the original encounter with Ms. Duffy and the appeal. Again the applicant did not exhaust his remedies under the appeals procedure laid down under the Statute. In those circumstances the Court will decline to grant judicial review under this heading.

Conduct of the applicant

46. A final factor which the Court must bear in mind is the conduct of the applicant. He has not provided information which he was required to provide. He has not exhausted his remedies. His resort to judicial review was precipitate, unjustified, and misconceived. He brought proceedings when he should have procured the necessary information, and could have availed of the appeals procedure. Those who seek to assist lay litigants should ensure that such persons are advised on points such as those which arose here and the fact that in the end in the event of failure, an unsuccessful party faces the risk of an adverse award in costs.

47. The Court will refuse to grant any of the reliefs.

