THE HIGH COURT

[2024] IEHC 386

[Record No. 2022/343 JR]

BETWEEN

ELENA DRUTU

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 27th day of June 2024

1. The applicant seeks *certiorari* of a decision of the Department of Social Protection, dated 1 February 2022, refusing her application for arrears of unpaid child benefit in respect of her and a declaration that the relevant social welfare legislation must be disapplied as contrary to EU law in not allowing the family member of a migrant worker to apply for child benefit. The applicant had originally sought reliefs pursuant to the Constitution and the ECHR but did not pursue those at hearing.

2. For the reasons set out below, I am refusing this application.

Background

3. The applicant was born on 28 March 1994 and is currently 30 years of age. She came to Ireland from Romania as a child and resided with her parents and brother in Carlow where her father had already been living for some years previously. Her father had unsuccessfully applied for child benefit on a number of occasions and was refused, initially, because he did not have a work permit and, later, because the application had to be made by the applicant's mother. The applicant's mother applied in 2007 and again in 2009 and was refused because

it was asserted that Ireland was not her habitual residence. The legality of the decisions on the applicant's parents' applications for child benefit are not before this court.

4. The applicant has averred to the financial difficulties the lack of child benefit caused for her family during her childhood and that she had to take on part time employment to contribute to the family's expenses, which impacted negatively on her studies. However, she does not claim any failure by her parents to support her during her minority. The applicant turned 18 in March 2012 and any entitlement her parents had to child benefit ended at that time, but they retained, and still retain, the right to apply for any arrears of child benefit not paid to them during their child's minority. The applicant's mother left the family home in 2012 and moved to Germany and the applicant said she has had no contact with her since. The applicant continued to reside with, and was supported by, her father. In June 2021, the applicant's father made an application for arrears of child benefit, which was refused on the basis that the application should be made by the mother in the household, i.e., the applicant's mother. Thereafter, the applicant's solicitor applied on behalf of the applicant by letter dated 23 September 2021. The Department responded by letter dated 20 October 2021 stating that the applicant's father could not apply as the mother was the person with the entitlement to do so, but the letter did not mention the applicant's application on her own behalf. Further correspondence from the Department dated 24 November 2021 confirmed that the applicant had to fill out her own application form for child benefit, which she did, and the completed form was furnished to the Department on 14 January 2022. The Department furnished a decision dated 1 February 2022 disallowing the applicant's claim on the grounds that she was not a qualified person to make it.

Time

5. The application for leave was not opened before this court until 27 May 2022 and the applicant's solicitor cites the applicant's personal circumstances during the COVID-19 pandemic to explain the delay in finalising the papers. There was a further delay of less than one month in counsel making the application in court to stop the clock (as was required at that time when lodging papers in the Central Office did not serve to stop time running against an applicant for judicial review). The applicant asked the court to exercise its discretion to extend time and referred to the complex, novel and potentially far-reaching nature of her claim.

6. The Minister contends that grounds for the application, as per O. 84, first arose before February 2022 and as far back as 2007 when applications were made for child benefit by the applicant's parents and also asserts that the applicant first applied when her solicitor wrote to the Department on her behalf in September 2021, which was refused on 20 October 2021.

7. The impugned decision here is that of 1 February 2022. The Minister's previous correspondence, including the letter of 20 October 2021, only addressed the applicant's parents' application as the Department's correspondence did when responding to all previous applications going back to 2007 all of which were made by the applicant's parents and not by the applicant. The applicant's own application was not addressed by the Department until its decision of 1 February 2022 and so the time runs from that date. It was approximately four months before the required application to stop time was made to the court, a requirement that has now been replaced by the lodging of papers in the Central Office. The applicant's solicitor has explained the delay on affidavit. It is not the most compelling of explanations but, given the short period of time outside of the three months allowed by O. 84 (of approximately 25 days), it was not a period of any significant delay. As confirmed by Baker J. in *Keon v. Gibbs & Private Rental Tenancies Board* [2015] IEHC 812 *"a short delay can relatively easily be excused"* (at para. 49). Similarly, in *de Roiste v. Minister for Defence & ors*, [2001] IESC 4 Fennelly J. in the Supreme Court said that *"a short delay might require only slight explanation."* Interestingly, he went on to note that *"[e]xplicable delays have usually been a matter of months…"*. Here, the delay was a short period of less than one month.

8. The subject matter of the proceedings is not of the type that might need to be dealt with expeditiously, such as applied in the family law proceedings at issue in *L.M. v. Judge O'Donnabhainn* [2009] IEHC 167 where a party to a decision made in family law proceedings was eight days late in seeking to quash an order made by the Circuit Court. Different interests of justice apply here where the applicant seeks to challenge a decision made by the Department of Social Protection relating to a claim for arrears of child benefit dating back to pre-2012. There is no suggestion that the Minister has suffered any tangible prejudice by virtue of the applicant's delay of approximately 25 days in bringing her claim challenging a decision on an application that can, in principle, be brought at any time after arrears of unpaid child benefit have accrued.

9. In those circumstances, I exercise my discretion to extend the time as the applicant has established good and sufficient reasons for doing so.

Child benefit in Irish law

10. Section 220(1) of the Social Welfare Consolidation Act 2005, which is impugned in the within proceedings as contrary to European law, limits the persons qualified for child benefit to *"a person with whom a qualified child normally resides"*. That limitation was put beyond doubt by the Supreme Court in its decision in *Michael (a minor) & ors v. Minister for Social Protection* [2021] 3 IR 528 where Dunne J. confirmed (at para. 79) *"[t]he child is not entitled to receive the payment of child benefit."* The applicant does not dispute the clear position in Irish law that she is not qualified to apply for or receive child benefit. Rather, relying on specific *dicta* from decisions of the CJEU she contends that she is entitled to apply for child benefit for herself as a child of migrant workers who have exercised their rights of free movement within the EU. She says this court must disapply the contrary national law or, in the alternative, should refer this discreet legal issue to the CJEU.

11. Irish law may require to be disapplied if EU law gives rise to a contrary right on which a person is entitled to rely before a national court such as this court is. The question, therefore, is whether the applicant does have a right in EU law to be paid child benefit directly.

Relevant EU law

Social security Regulations

12. The applicant relies on Regulation 1408/71 up to 31 April 2010 and, thereafter, from 1 May 2010, on Regulation 883/2004, both of which cover child benefit as a family benefit that is paid by a Member State. Where migrating workers choose to exercise their right to free movement, they should not lose social security advantages guaranteed to them by the laws of a Member State as *"[s]uch a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom…"* (at para. 27 of the court's decision in *van Munster,* Case C-165/91). Therefore, each Member State shall prevent the interpretation of its legislation *"from being such as to discourage a migrant worker from actually exercising his right to freedom of movement"* (at para. 35).

13. However, social security systems still remain largely creatures of national law as there is no Community harmonisation in this field, which means that *"the conditions*

governing the right or obligation to become a member of a social security scheme are a matter to be determined by the legislation of each Member State" (at para. 36 of the court's decision in *Engelbrecht,* Case C-262/97). This approach of the CJEU is consistent with the express provisions of Regulation 883/2004 which refers to the primary role of national social security legislation. Recital 4 provides *"[i]t is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination."* Article 4 goes on to provide:

> *"Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof."*

Thereafter, the Regulation repeatedly cites the entitlement of the individual as that which is conferred by national legislation, a principle that is entwined within almost every Article in the Regulations. Article 67 continues that theme in relation to family benefit in providing:

> *"A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his/her pension."*

14. The applicant cites Article 68a of the Regulation in her submission (albeit not pleaded in her statement of grounds) which she asserts contradicts the limits that Irish law places on the persons to whom child benefit is payable. Article 68a refers to family benefit being provided to *"the natural or legal person in fact maintaining the members of family"*. That may well go further than Irish law which does not expressly require child benefit to be used in the support of the qualified child. It is arguable that a parent with whom the child resides, or the person in *loco parentis* to that child, who is the person qualified to receive child benefit in Irish law, can be assumed to be providing at least some financial support to the child and that there is no clear contradiction between Article 68a and s. 220(1) of the 2005 Act. However, that is not something that this court is required to decide. Firstly, the applicant has never sought to make the case that she was not supported by either or both of her parents up to her eighteenth birthday, albeit she does say that she had to work part time in order to contribute to the family expenses (at para. 6 of her affidavit). Neither does she suggest that the arrears of child benefit she now seeks will be used to discharge debts

incurred in supporting her during her childhood but avers to her intention to use that money to *"assist"* her in a university course she had planned to commence in September 2022. Therefore, there is no factual basis or even a claim asserted that the person qualified in Irish law to claim child benefit for the applicant as a qualified child failed in their duty to support and maintain the applicant during her childhood and/or that the State's refusal to pay child benefit to either her mother or her father in respect of her caused or contributed to any such failure. Secondly even if that case was made out, as a matter of law, Article 68a does not create a stand-alone right for the child of a family for whom national legislation confers a right to payment of child benefit to a different family member, to be paid that benefit directly either during their minority or subsequently. There is nothing in the Regulations that creates an EU entitlement to child benefit above or different to the entitlements created by national law or an entitlement of the child of a migrant worker to a benefit or to conditions of benefits different to, or in addition to, those conferred by national law. The concept that any European entitlement is subject to national social security legislative entitlements is recognised and endorsed by the case law of the CJEU.

15. The applicant's case is essentially that the decision of the CJEU in *Humer,* Case C-255/99, entitles the child of a migrant worker to directly invoke the entitlement to a family benefit such as Irish child benefit, pursuant to the Regulations in order to apply for the benefit themselves without the intervention of the migrant worker. Before examining the decision to see if it bears such an interpretation, I wish to consider an earlier decision of the CJEU which addressed the entitlement of a family member of a migrant worker to claim social security benefit from the Member State in which the migrant worker was exercising their right to free movement. The case of *Hoever and Zachow,* Joined Cases C-245/94 and C-312/94, involved two parents who sought payment of a family benefit from the Member State where their migrant worker spouses were working and exercising their right of free movement, and the applicants were residing in a different Member State with the children of the marriages. The court concluded, at para. 32, that the purpose of Article 73 of the Regulation (since that time replaced by Article 67 of the 2004 Regulation), was:

> *"…to guarantee members of the family residing in a Member State other than the competent State the grant of the family benefits* ***provided for by the applicable legislation****"* (my emphasis).

16. A similar conclusion in relation to the entitlement of a parent to be paid child benefit by the Member State where the other parent works and resides, arose in *Trapkowski,* Case C-378/14, where the court said (at para. 39):

> *"…it is conceivable that a parent who resides in a Member State other than that required to pay those benefits is the person entitled to receive those benefits,* ***if all the other conditions laid down by national law are also met****"* (my emphasis).

However, the court was very clear in stating, at para. 40, *"[i]t is for the competent national authority to determine the persons who,* ***in accordance with national law****, have a right to family benefits"* (my emphasis). The court said it was irrelevant which parent is regarded under a national law to be the person entitled to receive a family benefit, but carefully qualified that as arising *"where all the conditions for the grant of child benefits have been met and those benefits are actually granted"*. Thus, the CJEU recognised that the conditions for granting a family benefit remain a matter for national law, albeit that those conditions cannot require the parent receiving the benefit to live in the Member State where the other parent is living and working.

17. Unlike *Hoever* and *Trapkowski*, the applicant in *Humer* was the minor child rather than their parent. This arose because Austrian law expressly allowed a child to apply for the entitlement at issue which was maintenance against a non-custodial parent. The minor child's application was refused by the Austrian court of first instance because she was residing in France with her custodial parent. The Austrian Supreme Court made a reference to the CJEU which held, at para. 37, that such a child came *"within the scope ratione personae of Regulation No 1408/71"*. The only reason for her exclusion from the Austrian benefit was because her custodial parent had exercised her right of free movement in moving to reside in France. The court held, at para. 51, that the reasoning applied in *Hoever* could be extended from the spouse of migrant workers to all family members, i.e. including the child of a migrant worker. However, the court qualified that right with two provisos:-

(1) That they are the family member of a worker who fulfilled the conditions laid down by Article 73 of the Regulation; and

(2) The family benefits are provided for family members *"under national legislation"*.

The requirement to qualify for the benefit under national legislation as a precondition to the application of the Regulations was continued by the court, at para. 52, which provided that a minor child, such as Ms. Humer, could directly invoke Articles 73 and 74 of the Regulation:

> *"…in order to apply, without the intervention of the worker himself, for the grant of a family benefit in circumstances where* ***the conditions governing application of those articles are otherwise satisfied****"* (my emphasis).

18. Those findings of the CJEU were premised on the applicant child having the entitlements in Austrian law that they then sought to assert in France. Austrian law expressly conferred the right to claim the benefit in question on a minor child rather than on their parents. Irish law makes no such concession in relation to who can receive child benefit which is unambiguously and emphatically limited to the person with whom a qualified child normally resides and equally unambiguously and emphatically is not conferred on the child themselves, either during their minority or, subsequently, even where their parent or a qualified person with whom they had resided has, for whatever reason, not received the child benefit in respect of them.

19. The decision of the CJEU in *Humer* does not confer a right in EU law on the applicant as the child of a migrant worker who has exercised their right of free movement, to apply for Irish child benefit in their own capacity. The applicant's rights are the same as any child in Irish law, or indeed any adult for whom child benefit was not paid for whatever reason, i.e. that it is only the qualified person with whom they resided during their minority who can apply for current or arrears of child benefit.

20. The applicant's application for arrears of child benefit of February 2022 was refused because she was not the qualified person to claim child benefit pursuant to section 220(1). This is nothing to do with her status as the child of migrant workers and the decision does not discriminate on grounds of her parents' exercise of their right of free movement and is not contrary to EU law. The basis for that refusal of her application for arrears of child benefit is created and permitted by Irish law and does not contravene the applicant's EU rights. There is no basis for this court to disapply s. 220(1) and no need to refer any questions of law to the CJEU for this court to understand and apply the relevant provisions of binding EU law.

21. I refuse this application.

Indicative view on costs

22. As the respondents have succeeded in defending this application and in accordance with s. 169 of the Legal Services Regulation Act 2015, my indicative view on costs is that the respondents are entitled to their costs to be adjudicated upon in default of agreement. I will put the matter in for 10.30am on 11 July 2024 to consider whatever submissions the parties wish to make in relation to final orders including costs.

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Counsel for the respondents: Andrew Fitzpatrick SC, Francis Kieran BL