[2020] IEHC 654

THE HIGH COURT

[No. 2019/168 JR]

IN THE MATTER OF THE CONSTITUTION OF IRELAND

AND

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

BETWEEN

IOAN RAZNEAS, ANISOARA ANGHEL, MARIAN RAZNEAS (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND ANISOARA ANGHEL), AND ANTONIA RAZNEAS (A MINOR SUING BY HER MOTHER AND NEXT FRIEND ANISOARA ANGHEL)

APPLICANTS

AND

THE CHIEF APPEALS OFFICER, THE MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 20th day of November, 2020

Introduction

1. The applicants, parents and two infant children, have maintained proceedings by way of an application for judicial review of the 22nd of March, 2019, seeking various reliefs arising as a consequence of a decision of the first named respondent of the 1st of March, 2019.

2. At the hearing of the within claim the applicants identified the following four issues for consideration, which were accepted by the respondents (the notice party did not partake in the proceedings):

   (a) the Jobseeker's Allowance mentioned in s.141 of the Social Welfare Consolidation Act 2005 (as amended) (hereinafter 'the 2005 Act') is a benefit of a financial nature intended to facilitate access to employment;

   (b) the second named applicant claims that she was a worker while engaged with the Mendicity Institution for a one-month period from in or about the 4th of March, 2018;

   (c) s.246(5) of the 2005 Act is unconstitutional in requiring an applicant for Jobseeker's Allowance to have, at the relevant time, a right to reside in the State for the purposes of EU and national law;

   (d) in the further alternative it is claimed that s.246(5) of the 2005 Act is incompatible with the European Convention on Human Rights Act 2003 (ECHR Act 2003).

3. The respondents have filed a statement of opposition of the 19th of June, 2019. The respondents are resisting all relief.

4. The impugned decision is identified in a letter of the 1st of March, 2019, to the applicants' solicitor, to the effect that the appeal of the second named applicant against a decision of the 3rd of August, 2018, refusing her Jobseeker's Allowance, was disallowed. In the decision of the 3rd of August, 2018, the applicant was advised that she did not have habitual residence and she had not worked during her first 90 days of living in Ireland or since. The applicant was also advised that she did not have an employment record in Ireland and she did not submit any evidence that would substantiate habitual residence.

5. The above findings were appealed. However, on appeal the Appeal's Officer considered that the applicant's attendance at the Mendicity Institution did not afford her the status of a worker, and the applicant failed to produce evidence to support that the relevant work had been genuine and effective, or that the concept of a *quid pro quo* might have applied in the context of voluntary unpaid engagement or the activities undertaken during the placement. The Appeal's Officer concluded that it had not been demonstrated that the applicant had a right to reside in the State.

Nature of Jobseeker's Allowance

6. Section 246(5) of the 2005 Act provides:

> *"A person who does not have the right to reside in the State, shall not, for the purposes of the Act, be regarded as habitually resident in the State."*

7. The issue as to whether or not Jobseeker's Allowance is a payment intended to facilitate access to the labour market or, alternatively, a special non-contributory cash benefit within the meaning of Article 3 and 70 of Regulation 883/2004 has already been the subject matter of judicial consideration in *Munteanu v. Minister for Social Protection* [2017] IEHC 161 (O'Malley J.) and in *Macovei v. Minister for Social Protection* [2017] IEHC 593 (McDermott J.) and more recently in the judgment of the Court of Appeal in respect of an appeal of the judgment of O'Malley J. aforesaid ([2019] IECA 236). The Court of Appeal delivered judgment on the 31st of July, 2019.

8. In the High Court, in both matters aforesaid, the Court relied on C-333/13 *Dano v. Jobcenter Leipzig*, a decision of the Court of Justice of the European Union (hereinafter CJEU). Paragraph 82 thereof states:

> *"82. Accordingly, Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, does not preclude national legislation such as that at issue in the main proceedings insofar as it excludes nationals of other Member States who do not have a right of residence under Directive 2004/38 in the host Member State from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No. 883/2004."*

9. Both courts held that Jobseeker's Allowance was a special non-contributory cash benefit as opposed to an allowance intended to facilitate access to the labour market as contended for.

10. In the Court of Appeal, Peart J. quoted extensively from the judgment of O'Malley J. including at para. 17:

> *"115. Neither the directive nor the regulation preclude national legislation that makes entitlement to a social security benefit conditional upon the claimant having a lawful right to reside in the host State (Brey, Dano, Commission v. United Kingdom) . . .*
>
> *121. The requirement of a right to reside constitutes indirect discrimination. As such, it must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective . . .*
>
> *124. Jobseeker's Allowance is a special non-contributory cash benefit within the meaning of Articles 3 and 70 of the Regulation . . .*
>
> *126. The conditions for eligibility for Jobseeker's Allowance are therefore solely a matter for national legislation."*

11. At para. 44 of the judgment of the Court of Appeal it was stated:

> *"In my view, the trial judge was correct to conclude, as she did for reasons set forth at para. 124 of her judgment, that Jobseeker's Allowance is a special non-contributory cash benefit within the meaning of Articles 3 and 70 of the Regulation, and that the regulation applied, and that it may therefore be subject to an habitual residence requirement which itself depends on their being a right of residence."*

12. The applicants argue that the Court of Appeal might well have made a reference under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to the CJEU on this point, if the applicant in the case before it had given evidence of being a jobseeker. In the instant matter it is argued that the second named applicant was a jobseeker and therefore urged that a reference to Europe would be made on the issue of whether or not the Jobseeker's Allowance aforesaid is a benefit of a financial nature intended to facilitate access to employment.

13. The determination of the nature of the relevant allowance is for the national court to determine (see para. 41 of *Vatsouras and Koupatantze* (joined cases C-22/08 and C-23/08) of the CJEU). The Court also held that it was legitimate for Member States to grant an allowance only after it has been possible to establish a real link between the jobseeker and the labour market of that Member State.

14. In light of the foregoing I am satisfied that this point has already been conclusively determined by the High Court and the Court of Appeal (having binding force) as aforesaid based on sound cogent reasoning that the Jobseeker's Allowance is a special non-contributory cash benefit within the meaning of Articles 3 and 7 of the Regulations and accordingly there is no necessity for a reference under Article 267 of the TFEU to the CJEU.

Was the Second-Named Applicant a Worker?

15.(1) In *Levin*, C-53/81, the CJEU held that the term "worker" or "activity as an employed person" may not be defined by reference to national laws of Member States but must have a community meaning and therefore, such terms required clarification (para. 11) and because these terms define the field of application of one of the fundamental freedoms guaranteed by the Treaty they may not be interpreted restrictively (para. 13).

(2) Article 4 of Directive 68/36/EEC grants the right of residence to workers upon the mere production of documents covering the basis of entry and confirmation of engagement from the employer, it does not otherwise subject the right to any condition relating to the kind of employment or to the amount of income derived from it (para. 14). Effectiveness of community law would be impaired, and achieving the objectives of the Treaty would be jeopardised if the enjoyment of the rights were reserved solely to full-time employment and earnings at least equivalent to the guaranteed minimum wage (para. 15).

(3) In those circumstances the Court held that persons who pursue an activity as an employed person on a part-time basis only and receive less than the minimum guaranteed wage were included in relation to freedom of movement for workers (para. 16).

(4) At para. 17 freedom of movement for workers covers only the pursuit of effective and genuine activities, to the exclusion of activities of such a small scale as to be regarded as purely marginal and ancillary.

16.(1) In C-196/87, Steymann, the relevant worker carried out work within and on behalf of the Bhagwan Community in connection with its commercial activities in circumstances where work plays a relatively important role in the life of the community and only in special circumstances can members avoid partaking in work. In return the community provides for the material needs of its members including pocket money irrespective of the nature and extent of the work.

(2) The Court held that in such a case it is impossible to rule out a *priori* the possibility that work carried out by members of the community constitutes an economic activity within the meaning of Article 2 of the Treaty. Insofar as the work aims to ensure self-sufficiency for the community it constitutes an essential part of participation in the community; providing for the material needs including pocket money may be regarded as an indirect *quid pro quo* for the work carried out.

17. In C-344/87, *Bettray*, it was confirmed that the term "*worker*" must be interpreted broadly. The CJEU went on to state that, that concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned; the essential feature being for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. The Treaty provisions guaranteeing freedom of movement for persons wishing to pursue an economic activity cover only the pursuit of an

effective and genuine activity. Activities carried out merely as a means of rehabilitation or reintegration cannot, on that basis alone be regarded as a "work" for the purposes of community law.

18. In *Vatsouras and anor*. aforesaid (joined cases C-22/08 and C-23/08) of the 4th of June, 2009, the Court reiterated the essential feature of an employment relationship as above and the activities that come within the ambit of the concept of a worker. The Court also held that neither the origin of the funds, nor the limited amount of remuneration can have any consequence on whether or not a person is a worker. An employment of a short duration cannot, in itself exclude that employment from the scope of the freedom of movement.

19. In C-333/13, *Dano*, of the 11th of November, 2014, it was stated that Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence. Unequal treatment with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38.

20. At para. (f)(i)(5) of the statement of grounds it is asserted that the second named applicant's employment, though not financially remunerated, was nonetheless genuine and effective as she attended her place of work four days per week and received meals and understood that it would lead to a paid position. It is asserted that she carried out normal employee tasks and obtained the status of a worker, and in those circumstances it is asserted that the respondent erred in law by refusing to consider that the applicant enjoyed a right to reside as a worker.

21. In the grounding affidavit of the second named applicant of the 22nd of March, 2019, such applicant states at para. 7 that Wendy Moynan, Social Worker, supported her looking for work and Ms. Moynan made representations to the Mendicity Institution which is a charitable organisation that works in the area of homelessness. She asserts that this Institution had a workshop where participants undertook manual work and this work can be undertaken as part of a Community Employment Scheme (CE Scheme). She asserts that it was agreed with the Institution that she would do one month in the workshop on an unpaid basis as a means to ensure that she had the capacity and commitment to move onto the CE Scheme which would be on a paid basis.

22. She asserts that she was provided with meals each day when she attended for a period of a month or so and that she was required to be there for four days each week where she was doing copper craft, making decorative flowers and so on, which products were sold by the Institution. She states that unfortunately at the end of the trial period she was informed by the Institution that they would not transfer her to the CE Scheme as she did not fit the profile of individuals normally taking part in same. She exhibits a reference from the Institution dated the 30th of May, 2018.

23. In the letter of the 30th of May, 2018, the Institution confirmed that the second named applicant was then engaging with the Institution on a voluntary unpaid level since the 4th

of April, 2018, where she was attending four days per week and participating in a variety of different voluntary activities. It is asserted that "she is very pleasant to fellow service users and staff, very willing to engage in any tasks that are set and very skilled at any tasks she undertakes".

24. Ms. Moynan, Social Worker aforesaid, lodged the appeal to the first named respondent by letter of the 14th of February, 2019, and also swore an affidavit in the within proceedings dated 3rd of May, 2019.

25. Ms. Moynan became involved with the second named applicant in October, 2017 and asserts that she has tried to help her access training and employment. Ms. Moynan liaised with the Mendicity Institution in 2017/2018 regarding access to a placement in one of their workshops. It is asserted that at this time the workshops were in the process of transitioning into a CE Scheme and Ms. Moynan was told by the workshop manager that the second named applicant would be waitlisted and then nominated for a place on the CE Scheme. In advance of this she was required to do voluntary work for one month to demonstrate commitment and reliability for the scheme. She was not subsequently nominated.

26. In an affidavit of Caitriona O'Connor of the Department of Employment Affairs and Social Protection, dated the 19th of June, 2019, on behalf of the respondents, it is denied that the second named applicant had achieved the status of a worker as she was engaged on a voluntary unpaid basis and participated in a variety of different voluntary activities as per the letter aforesaid of the 30th of May, 2018.

27. At para. 126 of Ms. O'Connor's affidavit she states that both the assertion of the second named applicant in her affidavit to the effect that the workshop she participated in could be undertaken as part of a CE Scheme, and Ms. Moynan's assertion in her affidavit that the workshops were in the process of transitioning into a CE Scheme are inaccurate.

28. At para. 128 Ms. O'Connor states that the Institution was not an approved Community Employment sponsor. Although the Institution made enquiries about setting up a CE Scheme in 2017, this was never pursued. At para. 129 eligibility for such a scheme is set out and the paragraph concludes with the statement that the second named applicant was not eligible for CE Schemes.

29. The applicants have not countered the above portions of Ms. O'Connor's affidavit.

30. The applicant's written submissions are to the effect that the respondent erred in law in finding that the applicant's attendance at the Institution was more in the nature of a service user who was engaging with its employment and integration service than as a worker.

31. The respondent's submissions are to the effect that the Institution creates opportunities for people experiencing homelessness, isolation and marginalisation to live better lives and relies heavily on the letter of the 30th of May, 2018, referring to the voluntary nature

of the activities and the variety of different activities involved on a voluntary basis and it is asserted in the circumstances that the second named applicant was not a worker during the period of attendance with the Institution.

32. Taking the first named applicant's position at its height, the conversation between the Institution and Ms. Moynan was to the effect that in advance of the second named applicant being placed on a waitlist and thereafter to be nominated for a place on a CE Scheme she was requested to do voluntary work for one month to demonstrate commitment and reliability for the scheme. In the event, there was no such scheme in operation, that the applicant was eligible for.

33. The letter of the 30th of May, 2018, does not make reference to the second named applicant being waitlisted or to any agreement in respect of future work status, or to any CE scheme. The second named applicant's involvement was categorised as voluntary. The second named applicant is referred to as a fellow service user.

34. The assertion that the Institution does not have capacity or involvement with a CE Scheme for which the applicant would be eligible is not countered.

35. The second named applicant has failed to demonstrate the existence of any form of mutually agreed promise that work on a CE Scheme would follow the one-month placement.

36. The second named applicant's activities and the provision of meals could be considered marginal or subsidiary at best notwithstanding that products made by the applicant would have been sold to support the Institute charity.

37. In all of the circumstances therefore it appears to me that the impugned decision could not be considered irrational or contrary to law in finding that the second named applicant's attendance at the Mendicity Institution was more in the nature of a service user *inter alia*, as opposed to a worker.

Constitutionality of S.246(5) of the 2005 Act

38. In para. 7 of the reliefs claimed in the statement of grounds a declaration is sought that s.246(5) and ss.246(6)-(7) of the 2005 Act are unconstitutional in that they:

    1. have the effect of discriminating contrary to Article 40.1 of the Constitution against the applicants by treating them unequally before the law in an unjustified manner;

    2. fail to vindicate the personal rights of the applicant pursuant to Article 40.3.1;

    3. fail to allow account to be taken of the applicants' special status as members of a vulnerable community and the first named applicant's disability;

    4. fail to vindicate the rights of the minor applicants pursuant to Article 42A with respect to primary education; and,

5. are disproportionate, arbitrary and contrary to reason and fairness insofar as the sections wholly prohibit the payment of a social welfare payment intended for the applicants' benefit.

39. In the grounding section of the statement of grounds ((f)(ii)) it is suggested that the necessity to have a right to reside test, where Irish citizens are deemed automatically to have such a right, is repugnant to the Constitution. In oral submissions counsel for the applicant clarified that the claim as to unconstitutionality is confined to s.246(5) of the 2005 Act.

40. In written submissions the applicant refers to *MacMathúna v. Ireland and the Attorney General* [1995] 1 IR 484, where Finlay C.J. held:

> *"It is clearly conceivable that under certain circumstances statutory provisions, particularly those removing in its entirety financial support for the family, could constitute a breach of the constitutional duty of the State under Article 41."*

41. This statement was made in the context that, as stated by Hardiman J. subsequently in *Sinnott v. Minister for Education* [2001] IESC 63, the courts decline to interfere in matters of social welfare on the basis that provision of social welfare and socio-economic rights is within the field of national policy and to be decided upon by a combination of the executive and legislature and cannot be adjudicated upon by the courts (save potentially in the circumstances identified by Finlay C.J. aforesaid).

42. The applicants accept that the CJEU has acknowledged that Member States are entitled to have a right to reside test prior to the payment of social welfare benefits. However, it is argued that rights under the Constitution may well be more extensive than those under EU legislation. It is acknowledged on behalf of the applicants that the applicants have not been rendered destitute by reason of the failure to afford Jobseeker's Allowance, and the 2005 Act enjoys a presumption of constitutionality.

43. By reason of the nature of the within judicial review proceedings, in fact the Court is reviewing the Jobseeker's Allowance only, therefore, it appears to me impossible to come to the conclusion in that narrow review that the State is removing in its entirety financial support for the family, as contemplated by Finlay C.J.

44. Furthermore, in the matter of *Agha v. Minister for Social Protection* [2018] IECA 155, Hogan J. held as follows:

> *"46 the State cannot generally be expected to make social security payments to persons with no right to reside in the State. This is why it cannot be regarded as unconstitutional to deny such payments to the Aghas prior to the date on which their respective entitlements to reside here was legally established.*
>
> *71 the statutory requirement that the qualifying parent must also have a legal entitlement to reside in the State cannot be regarded as unconstitutional."*

45. Although in *Agha* the Court of Appeal held that ss. 246(6)-(7) of the 2005 Act were unconstitutional this portion of the decision was overturned subsequently by the Supreme Court in its judgment of the 2nd of November, 2019, ([2019] IESC 82) (see in particular paras. 53 & 55 of the judgment of Dunne J).

46. In light of all of the foregoing it seems to me clear that the applicants failed to discharge the burden on them of the unlawfulness of s.246(5) and therefore cannot succeed in their challenge to the right of residence test provided by s.246(5) of the 2005 Act under the Constitution.

Incompatibility with the ECHR Act, 2003

47. As a standalone ground it is asserted that the provisions of s.246(5) of the 2005 Act offend the provisions of the ECHR Act 2003 based on like reasons as was claimed to support the proposition that the provision offends the Constitution.

48. Given however:

    (a) section 3 of the Act does not apply to the Oireachtas;

    (b) in the CJEU case of *Collins* C-138/02 it was found to be legitimate to make Jobseeker's Allowance conditional on a right of residence;

    (c) states have a margin of appreciation;

    (d) the right of residence test is clearly necessitated for the economic wellbeing of the country; and,

    (e) the Act is entitled to the benefit of the presumption of constitutionality,

    the applicants have failed to demonstrate that the impugned provision of the 2005 Act offends the provisions of the 2003 Act notwithstanding reference by the applicants to various judgments of the European Court of Human Rights requiring special consideration to be given to the needs of gypsies as a minority (without specifying the nature of the special consideration).

Conclusion

49. By reason of the foregoing the reliefs sought by the applicants are refused.