L2020 IESC 25

THE SUPREME COURT

[Supreme Court Appeal No. 2019/38]

McKechnie J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.

BETWEEN

CATALIN PETECEL
(SUING THROUGH HIS MOTHER AND LEGAL GUARDIAN MARIA PETECEL)
APPELLANTS

AND

THE MINISTER FOR SOCIAL PROTECTION IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 14th day of May 2020.

Introduction

1. The appellant in these proceedings is a young Romanian national, who has most unfortunately contracted a grave illness. He now resides in Romania and requires constant care. The proceedings relate to a decision by the first named respondent to refuse his application for disability allowance under the Social Welfare Consolidation Act 2005 ("the Act of 2005"). The appeal is against a decision of the Court of Appeal ([2019] IECA 25) upholding the decision of the High Court ([2018] IEHC 238) to dismiss his claim for judicial review reliefs.

2. In brief, the appellant has failed thus far, without consideration of his substantive arguments, because he has been held not to have exhausted the statutory appeal process available to him under the Act of 2005. That process involves an internal Departmental system of reviews and appeals, with, ultimately, an appeal to the High Court on a point of law. The appellant's position is that he should not be obliged to pursue the process in circumstances where he says that it cannot, as a matter of law, result in a finding in his favour on one of the key issues that he has raised – that is, whether the Irish disability allowance has been incorrectly classified in the relevant European Union instrument intended to coordinate the social security systems of the Member States (Regulation 883/2004).

3. The classification, as it currently stands, has the effect that the payment is not "exportable" – that is, that it is not payable to a person resident outside the State. It is common case that neither the Departmental appeal system provided for under the Act, nor a national court (whether dealing with the matter in a statutory appeal on a point of law or in judicial review proceedings), would have jurisdiction to declare the regulation invalid insofar as it adopts the classification. Such a finding could be made only by the Court of Justice of the European Union. Further, it is common case that the Departmental officials operating the appellate machinery under the Act do not have the power to refer

questions for preliminary ruling by the CJEU. There is a degree of disagreement between the parties as to the powers of the High Court when hearing a statutory appeal, the resolution of which may have further implications for the utility of the statutory system in circumstances such as these.

4. The appellant argues that in the circumstances he is entitled to take the speedier option of invoking the judicial review jurisdiction of the High Court in order to seek a reference to the CJEU on this issue, rather than having to first go through what he considers a futile sequence of appeals. However, when it comes to consideration of this argument it will have to be borne in mind that the classification point was not the only issue raised by the appellant. He was also maintaining, up to the stage at which he was seeking leave to appeal to this Court, that the respondent's officials erred in finding that he did not satisfy the habitual residence condition imposed by the Act of 2005.

5. The first issue to be determined by this Court is whether there is jurisdiction, within the Departmental process and on appeal to the High Court, to grant any form of remedy in respect of the allegedly invalid categorisation. If there is not, that fact might give rise to an exception to the general obligation to exhaust statutory remedies before seeking judicial review. If this issue is resolved in the appellant's favour, the Court will consider whether it would be appropriate to refer a question to the Court of Justice of the European Union on the substantive issue of the validity of the payment classification, rather than remitting the matter to the High Court.

6. Despite the order in which the issues were stated in the determination, it may be helpful to start by briefly describing the benefit and the EU law context, followed by reference to the submissions in the dispute about the classification. The statutory provisions relating to the decision-making process in the Department of Social Protection, provided for in Part 10 of the Act as amended, and the circumstances in which the impugned decision was made, will then be set out to explain the context in which the procedural issue arises.

Disability Allowance

7. Disability allowance is provided for in Chapter 10 of the Act of 2005 as amended. In brief, s.210 provides that the allowance "shall be payable" to a person of working age who, by reason of a specified disability, is substantially restricted in undertaking employment of a kind that would be suited to that person's age, experience and qualifications in the absence of the disability and whose weekly means do not exceed the maximum amount payable to a qualified person with no means. Regulations made under the Act (S.I. 142/2007) set out the criteria for eligibility in more detail. A person is qualified if he or she suffers from "an injury, disease, congenital deformity or physical or mental illness" which has continued, or, in the opinion of the deciding officer or appeals officer, may reasonably be expected to continue, for a period of at least one year.

8. The allowance is payable whether or not the person is availing of a service for the training of a disabled person under s.68 of the Health Act 1970 (which requires health authorities to make available a service for the training of disabled persons for employment suitable to their condition of health and for the making of arrangements with employers for

placing disabled persons in suitable employment). It may also be payable while the person is engaging in a prescribed course of education, training or development, or in employment or training and subject to such circumstances and conditions as may be prescribed (s.210 as amended). It may also be payable to persons who are normally resident in institutions such as hospitals or nursing homes, where the cost of their care and maintenance is met by the State authorities. A person detained for treatment under mental health legislation also remains entitled to the allowance.

9. The payment is means-tested, being payable to persons whose weekly means do not exceed the figure set for the full amount of the allowance, and the rate of payment will be reduced in accordance with such means as the person has. However, a disabled person in rehabilitative employment can earn up to a prescribed figure without losing entitlement. It will be increased in accordance with prescribed formulae where the claimant has qualified children or adults. It does not depend upon having a previous record of PRSI contributions and the unchallenged evidence is that it is funded from general taxation rather than through contributions.

10. As with many welfare payments, the means test includes an "earnings disregard". This means that if the recipient has some income from employment or self-employment, that income will be disregarded up to a prescribed amount for the purpose of calculating their means. Until recently, the rules relating to disability allowance specified that the employment or self-employment had to be "of a rehabilitative nature" (Rule 1(2)(b)(viii) of Part 2 of Schedule 3 of the Act of 2005, and rule 147 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 S.I. 142/2007). However, s.20 of the Social Welfare, Pensions and Civil Registration Act 2018 removed those words from the Act and Regulations. A person in receipt of disability allowance may, therefore, earn up to the prescribed amount from any form of work.

11. Regulations made under s.212 as amended provide for disqualification from receiving disability allowance. The main reason for disqualification is a failure to comply, without good cause, with such requirements as are specified in the regulations including attending for any medical or other examination or treatment; complying with instructions relating to his or her incapacity issued by a doctor; refraining from behaviour likely to hinder his or her recovery; and being available to meet with an officer of the Department regarding the claim (s.212 as amended). However, a person shall not be disqualified from receipt of the allowance while engaging in such class or classes of employment or training and subject to such circumstances and conditions as may be prescribed (s.212(2)) as substituted by s.26 of the Social Welfare and Pensions Act 2007).

12. An applicant is required (by virtue of s. 210(9)) to be habitually resident in the State. "Habitual residence" is defined in s.246(1) of the Act. A key feature, for the purposes of this case, is that the individual concerned cannot be regarded as habitually resident unless he or she both resides in the State and has a right to so reside (s.246(5)).

13. On the facts of this case, there was no question but that the appellant met the criteria in respect of disability. There does not appear to be any dispute about his means. The only issue is whether the habitual residence condition can lawfully be invoked against him.

Regulation 883/2004

14. Regulation (EC) No 883/2004 of the European Parliament and of the Council, as amended, (here referred to as "the Regulation") came into effect in May 2010. However, much of the jurisprudence of the CJEU concerning the precursor Regulations (1408/71 and 3/58) remains directly relevant. It will not always be necessary, therefore, to distinguish between the various regulations in the course of this judgment.

15. The Regulation is the principal EU instrument concerned with the coordination of social security systems and is the measure that ensures that citizens of the Union (or refugees or stateless persons residing in the Union) retain social security entitlements if they move between Member States. Much of it is concerned with the reconciliation of differing national rules and the identification of the State that will be responsible in particular situations.

16. Recital 16 in the preamble states that within the Community there is, in principle, no justification for making social security rights dependent on the place of residence of the person concerned. However, residence may be taken into account in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved. Recital 37 endorses the frequently expressed view of the Court of Justice that provisions derogating from the principle of the exportability of social security benefits must be interpreted strictly. Article 4 lays down the general principle of equality of treatment of all persons to whom the Regulation applies.

17. One of the most important provisions in the Regulation is Article 7, which provides that a cash benefit payable under the legislation of a Member State is not to be withdrawn, or otherwise adversely affected, by reason of the fact that the beneficiary resides in a different Member State.

18. Article 3.1 provides that the Regulation applies to all legislation concerning ten listed branches of social security, including "sickness benefits" and "invalidity benefits". Article 3.2 stipulates that the Regulation shall, unless otherwise provided for in Annex XI, apply to general and special social security schemes, whether contributory or non-contributory. It should be borne in mind, when attempting to classify a particular payment, that the list in Article 3.1 is exhaustive. A benefit will not come within the Regulation unless it covers a risk within one of the specified branches.

19. It is essential to note Article 3.5, which provides that the Regulation does not apply to *social assistance*. There is no question, therefore, of social assistance payments being exportable.

20. Accordingly, the first distinction to be borne in mind is that between social security and social assistance. The CJEU has consistently stated that a benefit may be regarded as a

social security benefit in so far as it is granted to recipients on the basis of a legally defined position, without any individual and discretionary assessment of personal needs, and if it concerns one of the risks expressly listed in the Regulation (for example "sickness").

21. A social security benefit does not lose that status merely because it is available only to certain classes of persons defined by, for example, assets or income, provided that the class is objectively and legally defined and the granting authority has no discretion to depart from the definition or to take into account other personal circumstances. The method by which the benefit is financed is immaterial to the classification of a benefit as social security, and it does not matter whether it is contributory or non-contributory. So, for example, a family benefit granted automatically to families on the basis of objective criteria relating to size of family, income and assets is a social security benefit for the purpose of Article 3. (See *Hughes v. Chief Adjudication Officer, Belfast* [1992] 3 C.M.L.R. 490 for each of these propositions.)

22. In *Commission v. Slovakia* (Case C-433/13), EU:C:2015:602, infringement proceedings were brought concerning disability-related allowances in the respondent State. The allowances were granted on foot of detailed medical and social evaluations. The case made by the State was that the allowances were social assistance, on the basis that a claimant would not necessarily have a right to payment even if all the criteria for eligibility were met. The CJEU was of the view that the evaluations were carried out on the basis of objective and legally defined criteria. However, it had regard to the interpretation of the legislation in the case-law of the national courts on this aspect, which tended in the opposite direction. The Court therefore found that the Commission had not substantiated its claim that the competent authorities had no discretion with regard to entitlement.

23. It is generally acknowledged that distinguishing between social security and social assistance is not always straightforward and that many Member States provide benefits that do not fit neatly into either category. The Regulation provides for a third category – "special non-contributory cash benefits". These are described in Article 70(1) as benefits provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of social security and social assistance. Article 70(2) is here set out in full:

> 2. *For the purposes of this Chapter, "special non-contributory cash benefits" means those which:*
>
> *(a) are intended to provide either:*
>
> *(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;*
>
> or

(ii) *solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,*

and

(b) *where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,*

and

(c) *are listed in Annex X.*

24. Article 7 does not apply to benefits covered by this definition. They will be provided exclusively in the Member State in which the person concerned resides, in accordance with the legislation of that State. In other words, such a benefit is not exportable and it is open to Member States to impose a habitual residence requirement.

25. The Court of Justice has held that a provision of this sort is a derogation from the principle of the exportability of social security benefits. As such, it must be interpreted strictly and can be applied only to benefits that fulfil the specified conditions of being both "special" and non-contributory.

26. In *Skalka v. Sozialversicherungsanstalt der gewerblichen Wirtschaft (Case C-160/02)* [2004] E.C.R. I - 1771 the Court observed that benefits in the Article 70(2)(a)(i) category were of a mixed kind. It considered, firstly, the "special" nature of the payments.

> *"They are characterised by the fact that they are connected partly to social security, in that they benefit as of right persons who fulfil the conditions for the grant of the social security benefits to which they are linked, and partly to social assistance in the sense that they are not dependent on periods of work or contributions and that they are intended to relieve a clear need."*

27. The payment in issue in *Skalka* was a compensatory supplement to a pension. The Court's analysis was as follows:

> *"It ensures the provision of an income supplement to those persons receiving insufficient social security benefit by guaranteeing a minimum means of subsistence to those persons whose total income falls below a statutory threshold. As it is intended to guarantee a minimum subsistence income for pensioners, the benefit is by nature social assistance. Such a benefit is always closely linked to the socio-economic situation of the country concerned and its amount, fixed by law, takes account of the standard of living in that country. As a result its purpose would be lost if it were to be granted outside the State of residence.*

A special benefit within the meaning of [the Regulation] is defined by its purpose. It must either replace or supplement a social security benefit and be by its nature social assistance justified on economic and social grounds and fixed by legislation setting objective criteria..."

28. The question whether the benefit is contributory in nature depends upon how it is actually financed – whether the funding comes from social insurance contributions or from public resources. In *Jauch v. Pensionsversicherungsanstalt der Arbeiter (Case C- 215/99)* [2001] E.C.R. I-1901 a care allowance had been financed, in the first instance, by the compulsory pension and accident insurance institutions of the respondent State, who then claimed reimbursement from the State. Having considered the mechanism of this system, the Court had found that the benefit was indirectly funded by increased sickness insurance contributions. Accordingly, the allowance was contributory in character. By contrast, in *Skalka* the contributions of insured persons formed no part of the financing arrangement.

29. For the purpose of fulfilling the requirement that such payments must be listed in Annex X of the Regulation, Article 9 obliges Member States to give written notification to the European Commission on an annual basis of, *inter alia*, the national legislation and schemes referred to in Article 3. As of the date of these proceedings, Ireland had made an Article 9 declaration in which four Irish benefits were identified as belonging to the category of "sickness benefits" (being health and safety benefit, illness benefit, carer's benefit and treatment benefit). A further two were identified as "invalidity benefits" (invalidity pension and partial capacity benefit). Disability allowance, on the other hand, was listed as a special non-contributory cash benefit, intended to provide a minimum level of subsistence pursuant to Article 70(2)(a)(i) of the Regulation. Other payments listed in this category were Jobseekers' Allowance and various non-contributory pensions.

30. While it is the Member States who make the declarations necessary for the categorisation of national schemes for the purposes of the Regulation, the Regulation as a whole, including Annex X, is an EU measure. The CJEU has on occasion declared the inclusion of a payment in a particular category to be contrary to the provisions of the Treaty – see, for example, Jauch (C-215/99), where an Austrian benefit was held to have been mischaracterised as social assistance by the respondent State. *Leclere v. Caisse nationale des prestations familales (Case C-43/99)* [2001] E.C.R. I-4265 is another example.

31. The respondent State in *Jauch* had argued that a care allowance was social assistance, on the basis that the risk of "reliance on care" was closer to the risk of "poverty" than to the risk of "sickness". The Court disagreed, noting its previous decision in *Molenaar v. Allgemeine Ortskrankenkasse Baden-Württemberg (Case C-160/96)* [1998] E.C.R. I – 843 that care insurance benefits that conferred on recipients a legally defined right, with the aim of improving the state of health and quality of life of persons reliant on care, were essentially intended to supplement sickness insurance benefits. It was emphasised that to qualify as a special non-contributory benefit, the payment in question must be both non-contributory and special.

32. The decisions in *Jauch* and *Leclere* led the Commission to the view that the Annex had become partially incompatible with Community law, and that it was necessary to revise it. Its proposed list omitted from the Annex invalidity benefits (including those intended for the maintenance or improvement of earning capacity); benefits granted to disabled children with the aim of meeting the extra family expenses caused by the presence of a disabled child; and care benefits (which had been characterised by the Court in *Jauch* as "sickness benefits in cash for the purpose of improving the state of health and quality of life of persons reliant on care, even if those benefits may cover independent aspects of the sickness itself"). The Commission's proposals in this regard were amended by the Council and Parliament, by the re-inclusion of certain disability-related benefits paid in three Member States. The Commission took issue with the result and sought annulment of the Regulation in so far as it referred to those benefits, on the basis that it did not accept that the conditions for non-exportability had been met.

33. In the proceedings *(Commission v. Parliament and Council (Case C-299/05)* [2007] E.C.R. I-8695) the Council, Parliament and Member States concerned argued that each of the payments in question came within the definition of a special non-contributory benefit because they had characteristics of both social security and social assistance. In this regard it was argued that they were akin to social assistance, in that the concept of need was an essential criterion and entitlement was not subject to contributions or length of employment, while they were akin to social security in that the competent bodies had no discretion in awarding the payment and their grant placed the recipient in a statutorily defined position. They were therefore hybrid benefits, that were closely linked to the economic and social situation of the Member States.

34. Given that the non-contributory nature of the benefits was not in dispute, the focus of the Court was on the question whether they were "special". It noted that a special benefit within the meaning of what is now Article 70(2)(a)(i) is in part defined by its purpose.

> *"It must either replace or supplement a social security benefit, while being distinguishable from it, and be by its nature social assistance justified on economic and social grounds and fixed by legislation setting objective criteria...*
>
> *...By contrast, a benefit is regarded as a social security benefit where it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a statutorily defined position and relates to one of the risks expressly listed..."*

35. The Court considered the applicability of the exception now contained in Article 70(2)(a)(ii) ("solely specific protection for the disabled"), and stated that a benefit could be deemed to be special under this heading only if its sole purpose was specific protection for the disabled, closely linked to the social environment of those persons in the Member State concerned. It declined to hold that this exception applied to Finnish and Swedish care allowances paid to parents of disabled children with the purpose of enabling them to provide for care, supervision and, possibly, rehabilitation of the children. The fact that the allowances were non-contributory, were awarded on a case-by-case basis and formed

part of package of services and benefits (and thus were closely linked to the social and economic environment) did not influence their main purpose, which the Court found to be medical. The allowances were therefore sickness benefits and not special non-contributory benefits.

36. One of the benefits in issue was a Swedish disability allowance, intended to finance the care of a third person or to allow the disabled person to bear the costs caused by his or her disability, and to improve that person's state of health and quality of life as a person reliant on care. The Court stated that benefits granted objectively on the basis of a statutorily defined position, which were intended to improve the state of health and quality of life of persons reliant on care, had the essential purpose of supplementing sickness insurance benefits. The purpose of the Swedish benefit was to meet the needs stemming from the disability, and to cover the risk caused by the sickness that was at the origin of the disability. It must therefore be regarded as a sickness benefit.

37. Finally, the Court considered three United Kingdom benefits described by the UK government as being intended to help promote the independence and social integration of the disabled and also, as far as possible, to help them lead a life similar to non-disabled persons. Entitlement in respect of two of them was based on the need for care rather than inability to work, and all three were only partially dependent on means. Two of the benefits were found by the Court to have a single purpose – namely, to help the disabled person to overcome, as far as possible, his or her disability in everyday activities. Accordingly, they should have been regarded as sickness benefits. The third, disability living allowance, was also found to be a sickness benefit. However, it had a distinct component relating to mobility. The Court held that this could be severed and listed as a special non-contributory benefit if the UK decided to create an allowance concerning that component alone.

38. In respect of each benefit, therefore, the Court made a finding that its inclusion as a special non-contributory benefit in the Annex was an error of law, vitiating the Regulation to that extent. However, it maintained the inclusion of the disability living allowance in the Annex pending the taking of appropriate measures in respect of the mobility component, so that the UK would not be compelled to grant that element of the benefit to an unspecified number of recipients throughout the EU.

39. In *Kersbergen-Lap v. Raad van Bestuur van het Uitvoeringsinstitut Werknemersverzekeringen (Case C-154/05)* [2006] E.C.R. I-6249 the issue was the exportability of a Dutch benefit payable to young people who suffered from total or partial long-term incapacity for work. It was non-contributory and was financed from public funds. The national court referred a question as to whether it was properly classed as a special non-contributory benefit.

40. The State authorities submitted that the payment was a hybrid benefit. It was akin to social security in that it benefitted, as of right, persons who had to deal with a contingency (incapacity for work) that was normally covered by social security. On the other hand, it resembled social assistance in that it was not dependent on periods of work

or contributions and was intended to relieve need by guaranteeing a minimum subsistence income to disabled young people.

41. Reiterating that a special benefit was defined by its purpose, the CJEU held that the benefit was a replacement allowance intended for those who did not satisfy the conditions of insurance for obtaining invalidity benefit. By guaranteeing a minimum income to a socially disadvantaged group (disabled young people) it was by its nature social assistance justified on economic and social grounds. Moreover, it was granted according to objective criteria defined by law. Although there was no means test and no needs assessment, the Court accepted the argument that the majority of disabled young people would not have sufficient means of subsistence if they did not receive the benefit. It also accepted that the payment was closely linked to the socio-economic situation. The amount payable was calculated by reference to the legal minimum wage and therefore took account of the standard of living in the Netherlands.

Submissions on the classification of disability allowance

42. The appellant accepts that the Court must consider, firstly, whether or not the allowance concerns one of the risks listed in Article 3 of the Regulation – if it does not, it cannot be regarded as a social security benefit. He submits that it covers the same risk as sickness benefits and/or invalidity benefits, which are expressly listed. It cannot be regarded as an unemployment benefit, linked solely to incapacity to work, since a recipient may take up rehabilitative employment without losing entitlement.

43. The appellant relies on the analysis in *Commission v Parliament and Council*, and the finding therein that benefits granted objectively on the basis of a statutorily defined position, that are intended to improve the state of health and quality of life of persons reliant on care, have as their essential purpose the supplementing of sickness insurance benefits and must be regarded as sickness benefits. The description in that case of the Swedish allowance as being intended to help disabled persons to bear the costs caused by disability, as well as to improve their state of health and quality of life, is seen as particularly apposite.

44. It is submitted that there is no discretion involved in assessment of a claim for disability allowance. The payment is made on the basis of objective and legally defined criteria, and the Act provides that it "shall be payable" if those criteria are met. Although it is means-tested, a means test is not to be equated with the "individual and discretionary assessment of personal needs" referred to in the case-law. The absence of a contributory aspect is not determinative. Further, the appellant argues, on the authority of *Hughes*, that the source of funding of the benefit is immaterial for the purpose of classification of the payment as a social security benefit rather than as assistance.

45. The respondent submits that disability allowance meets each part of the definition of a special non-contributory benefit, as set out in Article 70(2) of the Regulation. The case made is that it is an income support payment which provides supplementary, substitute or ancillary cover against the risks covered by invalidity benefits under Article 3. It does not depend on periods of work or contributions, and guarantees a minimum subsistence

income having regard to the economic and social circumstances of the State. It is means tested and is funded exclusively from compulsory taxation. It is listed in Annex X.

46. Referring to the principle that a special benefit is defined by its purpose, the respondent contends that disability allowance is not intended to improve the state of health and quality of life of the recipient, or to meet the needs stemming from his or her disability, but is aimed at reducing poverty by ensuring a minimum means of subsistence. The fact that it covers a risk identified in Article 4 of the Regulation does not mean that it cannot be a special non-contributory benefit.

47. The respondent suggests that the fact that the allowance is payable by reference to objective, legally defined criteria should not be over-emphasised. In that regard, reliance is placed on the opinion of Advocate General Kokott in *Skalka*, where some criticism was expressed in relation to the CJEU's approach in *Hughes.* The Advocate General pointed out that social assistance is payable according to such criteria in many national legal orders, and that a guarantee of a minimum level of subsistence is no longer seen as a charitable measure on the part of the State.

Social Welfare Decisions and Appeals

48. The initial decision on a claim is made by a deciding officer (s.300(1) of the Act of 2005). An applicant who is dissatisfied with the decision then has a choice of routes to take, although in practice nothing much appears to turn on the option taken. In one procedure, provided for in s.301, another deciding officer may revise the decision if *inter alia* it appears to him or her that it was erroneous either in the light of new evidence or by reason of some mistake having been made in relation to the facts or the applicable law.

49. Alternatively, the applicant may opt to appeal (s.311). An appeals officer is not confined to the grounds upon which the decision of the deciding officer was based, and it is agreed that in effect the appeal is a full de novo assessment, in the course of which evidence on oath may be taken. The original adverse decision can, in practice, still be appealed after an unsuccessful s.301 review – while the applicant is likely to be technically out of time, it is Departmental policy to extend time if the delay was due to engagement with the review process.

50. Where an appeal has been submitted, it may, again, take a number of different routes. It is open to the Chief Appeals Officer, once an appeal has been received, to refer "any question" which has been referred to an appeals officer to the High Court (s.306). This power appears not to be exercisable once an appeals officer has made a decision, since that decision "on any question" becomes final and conclusive by virtue of s.320 (except as discussed below), and s.306 is subject to that provision.

51. Counsel for the appellant asserts, without contradiction, that s.306 (like its predecessors in social welfare legislation dating back some 30 years) has never been utilised.

52. Secondly, s.34 of the Social Welfare Act 1997 makes provision for certification by the Chief Appeals Officer that the ordinary appeals procedures are inadequate to secure the

effective processing of an appeal and to direct the person who has submitted the appeal to submit it to the Circuit Court for determination. Where this occurs, there is no further appeal from the decision of the Circuit Court. Clearly, this provision has no application to cases such as the present one.

53. If the appeal is heard by an appeals officer, that officer's decision will, as already mentioned, be final and conclusive, subject to the following possibilities relevant to this case:

(i) If the decision was adverse to the claimant, another appeals officer can revise it if it appears erroneous in the light of new evidence or new facts (s.317).

(ii) The Chief Appeals Officer may revise any decision of an appeals officer where it appears erroneous by reason of some mistake having been made in relation to the law or the facts (s.318).

54. A person who is dissatisfied may appeal a decision of an appeals officer or a revised decision of the Chief Appeals Officer to the High Court on "any question of law" (s.327). Accordingly, the statutory appeal does not appear to be available against a refusal by the Chief Appeals Officer to revise a decision – a fact noted by this Court in *Castleisland Cattle Breeding Society v. Minister for Social and Family Affairs* [2004] 4 I.R. 150. However, in those circumstances it appears to be possible to appeal the decision of the appeals officer – see *Meagher v. Minister for Social Protection* [2015] 2 I.R. 633. A restriction on the right of appeal to the High Court, which appeared to exclude decisions that were to be regarded as final and conclusive pursuant to s.320, was deleted by s.16 of the Social Welfare (Miscellaneous Provisions) Act 2010. That provision also introduced a right of appeal to the High Court by the Minister against either a revised decision or a refusal to revise by the Chief Appeals Officer.

55. It is relevant to note here that the Social Welfare Appeals Office was described in correspondence to the appellant from the Disability Allowance section as operating independently of the Department of Social Protection. However, the legislation expressly states that the Chief Appeals Officer and the appeals officers are officers of the Minister (s.304 of the Act of 2005, as amended by s.22 of the Social Welfare (Miscellaneous Provisions) Act 2010), and that they hold office during the pleasure of the Minister. Although they are bound to act judicially (see *Minister for Social, Community and Family Affairs v. Scanlon* [2001] I.R. 64), and the appeal system has been described as "robust and independent" (by Baker J. in *M.D. v. Minister for Social Protection* [2016] IEHC 70) it is not disputed in these proceedings that the officials are not exercising judicial functions but are dealing with the administration of the statutory social welfare code. They do not constitute a "tribunal" for the purpose of referring questions of EU law to the Court of Justice for preliminary ruling (under Article 267 of the Treaty on the Functioning of the European Union).

Background facts of the case

56. The appellant is a Romanian national who resided and worked in the State for some years between 2008 and 2011 inclusive. It is accepted that he worked in PAYE employment during that period and paid 167 PRSI contributions. He also enrolled for a course of study in 2011. Unfortunately, later that year he was diagnosed with multiple sclerosis and subsequently returned to Romania for treatment. Apart from a brief stay in Ireland in 2012, he has remained in Romania ever since. His condition deteriorated rapidly, to the point that he is now unresponsive and requires 24-hour care. He is cared for by his mother, the second named appellant, who is his legal guardian. The appellant's family understandably commenced efforts to obtain some form of social welfare income for him, based on his work record in this State. In April 2016 an application for invalidity pension was refused on the basis that he did not have sufficient contributions.

57. On the 15th September 2016, the appellant applied to the respondent for disability allowance pursuant to s.210(1) of the Act of 2005. The application was refused by a deciding officer on the 7th November 2016, on the basis that the appellant was not resident in the State and therefore did not meet the statutory criteria.

58. The appellant's solicitor wrote to the deciding officer taking issue with the finding as to his habitual residence, contending that he had remained resident in Ireland while receiving medical treatment abroad. The argument raised concerned the correct date by reference to which the assessment of a claimant's "centre of interests" should be considered. Since this issue is no longer live, it is not necessary to discuss the details of this submission but it should be noted that court proceedings were threatened in the absence of a revision of the decision. The response to this, sent by the Assistant Principal of the Disability Allowance section on the 5th April 2017, was that the decision of the deciding officer was binding in the absence of an appeal. It was suggested that judicial review proceedings would be premature, in circumstances where the appellant had not exhausted his remedies.

59. The appellant's solicitor then wrote again to the deciding officer on the 25th April 2017, seeking to have the decision revised. The grounds were concisely put as follows:

> *"We say that the decision exhibits an error of law, insofar as we submit that Disability Allowance is in fact a sickness benefit for the purpose of Article 3(1)(a) of Regulation 883/2004 and is therefore exportable. We also note that, Ireland, as the last placement of employment, is the competent Member State to discharge sickness benefits. We say that Ireland has incorrectly categorised Disability Allowance as a special non-contributory cash benefit, in Annex X of Regulation 883/2004.As an emanation of the State you and your Department are obliged to apply EU law and dis-apply any conflicting provisions of national law."*

60. The Department's initial response was to request completion of a habitual residence form. The solicitor complied, while submitting that exportable benefits were not subject to the habitual residence condition.

61. The decision of the second deciding officer, finding that the appellant did not satisfy the habitual residence condition, was sent on the 9th June 2017. The decision records the reasons for finding that the appellant was not habitually resident in the State. It does not refer to the classification issue. The decision was sent under cover of a separate letter from the same Assistant Principal who had responded to the earlier threat of legal proceedings and who now addressed the "exportability" issue. Having referred to Regulations 883/2004 and 987/2009, the Assistant Principal continued:

> *"While the general conditions for qualifying for benefits and the design and financing of schemes remain a matter for the individual Member States, the EU Regulations determine, amongst other things, where a person is to be insured and what benefits must be exported outside the State.*
>
> *The Regulations also provide for a particular class of benefit known as a special non-contributory benefit. These benefits are generally social assistance type non-contributory payments which are financed from general taxation. Such benefits are provided in the Member State in which the person resides and in accordance with its legislation. Accordingly, such benefits are not exportable. In Ireland one of the benefits classed as special non-contributory benefits is DA. Therefore any application for DA is decided in accordance with Irish legislation."*

62. Rather than appeal, the appellant initiated judicial review proceedings through his legal guardian on the 17th July 2017. He sought an order of certiorari quashing the decisions of the 9th of June 2017, as well as certain declaratory reliefs. Two key points were put forward. The first was that the respondent had erred in determining that the appellant was not habitually resident in Ireland, in circumstances where he was said to be merely "staying" in Romania so far as Regulation 883/2004 was concerned. The second was that disability benefit should not be included in Annex X. In respect of the latter point, it was asserted that the payment did not meet the Article 70 criteria and should have been categorised as a sickness benefit or invalidity benefit. A preliminary reference to the CJEU was sought.

The High Court

63. It appears that all aspects of the case were fully argued in the High Court. However, in refusing relief, the trial judge (Barrett J. – see *Petecel v Minister for Social Protection* [2018] IEHC 238) declined to consider the substantive issues raised, holding that the appellant had failed to exhaust alternative remedies available under statute.

64. Counsel for the appellant is recorded in the judgment as having submitted that the issues in the case were such that it was bound to ultimately end up in the High Court in any event, and that the appeals framework was unable to address "certain weighty legal issues". Barrett J. observed that the case might indeed end up in the High Court "in some shape or form", but in his view it should do so in the shape or form left after completion of the appeal process. He accepted the bona fides of the appellant but did not accept that the appeals process could not deal with the issues in the case, stating that to find otherwise would be to place the appellant unfairly ahead of those who went through the

proper process, and would encourage dishonest applicants to contrive at points of law with a view to sidestepping the appeals process.

65. The submission that the Chief Appeals Officer did not have the power to make a preliminary reference to the Court of Justice was noted, but Barrett J. considered that it remained to be seen whether this point, which was at that time the subject of separate High Court proceedings, was correct as a matter of law. In any event, the High Court could potentially become involved, whether through the appeals process or a related judicial review, and could then make such reference as might be appropriate.

66. In conclusion, Barrett J. referred to the judgment of Barron J. in *McGoldrick v. An Bórd Pleanála* [1997] 1 I.R. 497, where it was said that the choice between an appeal and judicial review was not just about the question whether there was an alternative remedy:

> *"The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness..."*

67. Barrett J. found that the statutory process offered an adequate remedy that could properly consider all of the issues raised, including the possibility of access to the High Court. In those circumstances it was "appropriate and sensible" for the court to dismiss the application.

The Court of Appeal

68. On appeal, the appellant submitted that judicial review was the appropriate course of action because he could not obtain the remedy he claimed under the statutory process. The categorisation of disability allowance in Annex X would be binding on an appeals officer or the Chief Appeals Officer, and could be changed only by a declaration of the High Court, or by a ruling of the CJEU on a reference.

69. The appellant further submitted that the case concerned very complex issues relating to European Union and social welfare law, and that the High Court was the more appropriate venue for such matters. An appeal to the High Court under the Act was said to be unsuitable, on the basis that according to the case law on statutory appeals the court would be limited to an examination of the original decision by the officials, with a view to establishing whether or not they had based the decision on an identifiable error of law or an unsustainable finding of fact. This was contrasted with what was argued to be a broader jurisdiction in judicial review. Finally, relying on *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 and *EMI Records (Ireland) Ltd v. The Data Protection Commissioner* [2013] IESC 34, he submitted that the appeals officer would lack subject matter jurisdiction.

70. Costello J. did not accept the proposition that cases involving complex issues of European law should be seen as a separate category that could constitute an exception to the obligation to exhaust a statutory appeals process. She acknowledged that there was force in the submission that a party should not be required, as a precondition to judicial review,

to engage in a "pointless" appeals process which could never confer the benefit sought. However, she was satisfied that the process was not pointless in the instant case. On her reading of the Act, questions of law raised by the appellant could be referred to the High Court by the appeals officer, or by the appellant himself in an appeal on a point of law. (I note here that the reference to an appeals officer is presumably a typographical error, this power being confined to the Chief Appeals Officer.)

71. Costello J. accepted that the parameters of such a statutory appeal were as described by the appellant, in that the court would be limited to deciding whether the decision of the appeals officer or chief appeals officer was based on an identifiable error of law or a finding of fact that was unsustainable. However, she considered that there was no authority to suggest that the High Court, when dealing with such an appeal, could not refer a question to the CJEU. She also observed that there was no authority for the proposition that the High Court could not declare that the State had erred in its categorisation of disability allowance for the purposes of the Regulation, and found that the contrary was the case. In her view, the High Court would in fact have a broader jurisdiction on a statutory appeal than in judicial review, since it could decide that the appellant was in fact entitled to the allowance.

72. In *EMI Records (Ireland) Ltd. v The Data Protection Commissioner* [2013] IESC 34 it had been noted that in some cases an appeal would not permit the person aggrieved to adequately ventilate the basis of their complaint about the original decision. Clarke J. had referred in this context to the judgment of Hogan J. in *Koczan v Financial Services Ombudsman* [2010] IEHC 407, where that judge had pointed out that this situation might arise because of constitutional difficulties, or because of other circumstances whereby the body to whom the statutory appeal lies does not have jurisdiction to deal with all the issues in a particular case.

73. Costello J. observed that *EMI* might well support the appellant's arguments were it not for ss.306 and 327 of the Act of 2005. However, given the existence of the statutory right of appeal on a point of law, and the right of the Chief Appeals officer to refer a point of law, she saw no basis for finding an exception to the general obligation to pursue the statutory procedure.

The leave to appeal

74. The leave application in this case was determined after an oral hearing. During the course of that hearing the appellant withdrew his contention concerning habitual residence. By determination issued on the 18th of July 2019 ([2019] IESCDET 58), the Court, for the reasons set out therein, granted leave to appeal.

Submissions on the procedural issue

75. Both parties accept the general principle that an application for judicial review ought only be made where alternative remedies have been exhausted. It is also agreed that this is not an absolute rule.

76. In respect of the question whether he has chosen the appropriate remedy, the appellant submits that appeals officers are bound to accept that the categorisation of the payment, set out in an EU measure, is valid. They cannot disapply EU law and cannot make enforceable decisions in respect of categorisation. They therefore lack jurisdiction to grant him the remedy he asks for. Accordingly, he maintains that he was right to seek judicial review rather than to invoke the statutory appeals mechanism. He relies primarily in this regard on the judgment of this Court in *EMI Records (Ireland) Limited & Ors v. The Data Protection Commissioner and Eircom plc* [2013] IESC 34.

77. In *EMI*, the Data Protection Commissioner had determined a complaint against Eircom and had issued an enforcement notice. Eircom had appealed to the Circuit Court in accordance with the relevant legislation, and the record companies affected by the determination had applied to be joined as notice parties in the appeal, on the basis that their economic interests were affected. However, they also initiated judicial review proceedings in respect of the notice. The High Court judge (Charleton J.) considered that judicial review was appropriate in the circumstances. On appeal, the Commissioner argued that the statutory appeal was the more appropriate remedy.

78. The sole judgment in the case was delivered by Clarke J. Having reviewed the authorities, he summarised his views as follows (in paras. 41 to 43):-

"41. *Thus the overall approach is clear. The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan v. Financial Services Ombudsman [2010] IEHC 407 (Unreported, High Court, Hogan J., 1st November, 2010), that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned.*

42. *However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such circumstances is not necessarily closed. However, the principal areas of exception have been identified. In some cases an appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision. As pointed out by Hogan J. in Koczan..., that may be so because of constitutional difficulties or other circumstances where the body to whom the statutory appeal lies would not have jurisdiction to deal with all the issues. Likewise, there may be cases where, in all the circumstances, the allegation of the aggrieved party is that they were deprived of the reality of a proper consideration of the issues such that confining them to appeal would be in truth depriving them of their entitlement to two hearings.*

43. *However these and any other examples must be seen as exceptions to the general rule. In addition, the conduct of the party seeking to question the initial decision is*

a factor although not, as Barron J. pointed out in McGoldrick v. An Bórd Pleanála [1997] 1 I.R. 497, necessarily a decisive one."

79. In developing the discussion of the adequacy of an appeal, Clarke J. pointed out that the legislature has provided a variety of models for statutory appeals (a subject he had also addressed in *Fitzgibbon v Law Society* [2014] IESC 48). It followed that in answering the question whether or not an appeal would be an adequate remedy, the court must determine, firstly, whether the appellate body has a sufficiently broad jurisdiction to consider the complaints made about the original decision. The next question is whether the body can, if the complaints are made out, provide an appropriate remedy. That may not dispose of the issue in all cases since, as Clarke J. said (in para 48):

> *"Even if the appellate body has a sufficiently broad jurisdiction, there may be cases where, looking at the process as a whole, a party might nonetheless be said to have been deprived of their legal entitlement by being required to pursue an appeal from a fundamentally defective first instance determination, thereby depriving the party concerned of their statutory entitlement to both a hearing and an appeal."*

80. In the circumstances of the *EMI* case, the fact that the record companies had at best a conditional right of appeal to the Circuit Court, dependent on there being an appeal brought by the addressee of the enforcement notice, was seen as particularly significant.

81. The appellant submits that s.306 (the power of the Chief Appeals Officer to refer a question to the High Court) should not be seen as ousting the discretion to grant judicial review. The section has never been invoked, and there is no authority dealing with its parameters. In any event, he argues that since the case was "inexorably" bound for the High Court, the precise route taken should not be seen as particularly important.

82. Referring to *Meagher v. Minister for Social Protection* [2015] 2 I.R. 633 and *Canty v. Attorney General* [2011] IESC 27, the appellant makes the case that s.327 – the right to appeal to the High Court on a question of law – is procedurally limited in that it cannot be utilised for the purpose of challenging the validity of a law.

83. The judgment in *Meagher* does not analyse this issue in any depth but simply records the acceptance by the appellant that he could not challenge the legislation in those proceedings. In *Canty v. The Attorney General*, however, the determination of a similar issue was part of the ratio of the Court's decision. The appellant in those proceedings had been unsuccessful in a statutory appeal from a determination of the Private Residential Tenancies Board on a point of law under the Residential Tenancies Act 2004. That Act provided, in s.123(4), that the decision of the High Court on such an appeal should be final and conclusive. The appellant wished to appeal the High Court decision and sought leave to seek declaratory relief by way of judicial review, claiming that s.123(4) was unconstitutional. Leave having been refused, he appealed to this Court and argued, inter alia, that the subsection violated Article 34.4.4 (as it stood at the time) because it did not include a proviso in respect of issues relating to constitutional validity.

84. Giving the sole judgment, Denham J. disposed of this point in clear terms.

> *"However, no question as to the validity of any law can be raised in a Tribunal under the Act of 2004. Therefore no such issue could arise on appeal on a point of law to the High Court and Article 34.4. could not arise for consideration. Thus this ground must also fail."*

85. The appellant has referred to a number of judgments that in his view emphasise the narrow parameters of the Court's jurisdiction in an appeal under s.327. In *Neenan Travel Limited v. Minister for Social and Family Affairs* [2011] IEHC 458 Laffoy J. held that a claim that an appeals officer had acted *ultra vires* could not be pursued in the appeal before her, since the jurisdiction of the High Court under the section was limited to determining whether or not the decision of the officer was correct in law.

86. In similar terms, Charleton J. said in *Douglas v. The Minister for Social Protection* [2012] IEHC 27 (with reference to his own earlier judgment in *Manorcastle Ltd. v. Commission for Aviation Regulation* [2009] 3 I.R. 495) that the jurisdiction was limited to the examination of the decision with a view to determining whether it was undermined by a serious and significant error, or a series of errors which together amounted to serious and significant error. In *Brightwater Selection (Ireland) Limited v. Minister for Social and Family Affairs* [2011] IEHC 510 Gilligan J. said that the task of the Court was to consider whether or not the appeals officer had based the decision on an identifiable error of law, or a finding of fact that was not sustainable.

87. It is not suggested that the slightly different formulations used reflect any divergence in principle.

88. The respondent submits that the appeals system established under the Act of 2005 enables the consideration of all issues, both factual and legal, by way of review of decisions within the Social Welfare Appeals Office and by the High Court and permits the determination of the substantive issue raised by the appellant.

89. The proposition put forward by the appellant to the effect that the jurisdiction vested in the High Court in the context of an appeal on a point of law is so limited as to preclude consideration of the validity of the classification of disability allowance is described as "unsustainable" as a matter of both national and European law. It is suggested that, for the argument made by the appellant to be correct, jurisdiction would have to be so limited that it would preclude the determination of a purely legal question, such as that which arises in these proceedings.

90. It is submitted that the authorities cited by the appellant do not support the broad arguments put forward on his behalf. Rather, these authorities (*Neenan Travel Ltd v. Minister for Social Protection & Family Affairs* ([2011] IEHC 458), *Douglas v. Minister for Social Protection* ([2012] IEHC 27) and *Manorcastle Ltd. v. Commission for Aviation Regulation* ([2009] 3 IR 495)) support the general proposition that, in the context of a statutory appeal, the High Court may only grant relief if it determines that the original

decision is vitiated by a serious and significant error or a series of such errors, such that it would be appropriate for a decision to be set aside. The judgment of Charleton J. in *Manorcastle* is described as simply identifying the principle that the High Court must be guided by the legislation under consideration when determining the nature of its jurisdiction in a statutory appeal.

91. The respondent makes the point that the constitutional challenge in Canty related to the appeals provisions of the Act in question, and not to the substantive law being applied by the decision-maker. In summary, the respondent says that there is no reason as a matter of national law why issues of the sort raised in these proceedings could not be dealt with in the statutory process.

92. The respondent also relies on the fact that until a very late point in the proceedings the appellant was seeking to maintain the argument that the Departmental officials had erred in finding that he was not habitually resident in the State. Such an issue is undoubtedly appropriate to an appeal on a point of law.

93. The respondent accepts that a national court cannot find that the Regulation is invalid. However, a national court would be entitled to reject an unfounded challenge to the validity of an EU measure – see *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost (Case C-314/85)* [1987] E.C.R.4199 – since by so doing it would not be calling the existence of the measure into question. If a court considers that the validity may indeed be questionable it would be obliged to refer the issue to the CJEU. Under the statutory appeal process, the issue could come before the High Court by way of either a referral or an appeal, and it submitted that there is no basis for suggesting that the High Court would not have jurisdiction to refer a question in the course of dealing with either.

Should this Court refer the classification issue to the CJEU?

94. This question arises if the Court holds that the appellant was entitled to seek a remedy by way of judicial review, in circumstances where the substantive issue in the case has not been determined by the High Court.

95. The parties agree that an appellate court ought not, save in exceptional circumstances, determine an issue for the first time in an appeal. However, there is jurisdiction to consider an issue that was argued but not determined in the High Court.

96. The appellant again contends that a national court does not possess the jurisdiction to declare that a payment has been validly categorised. He submits that the principle that an appellate court should not hear a case not tried and decided in a lower court is subject to a number of exceptions, as explained in *KD v. MC* ([1985] I.R. 697). In particular, he relies on the judgment of Keane C.J. in *A.A. v. Medical Council* ([2003] 4 I.R. 302). The Chief Justice stated that, as an appellate court, this Court would not consider an issue of constitutional law which had not been fully argued and determined in the High Court, save in the most exceptional circumstances. However, he stated that the Court was not automatically precluded from considering such an issue simply because it had not been determined. The proper approach depended, where the case had been raised and argued

before the High Court, on whether the interests of justice required that a party should be permitted to obtain a decision on that ground before an appellate Court. At para 19 he said:

> *"It would seem to me unjust that, where a particular ground has been raised and fully argued in the High Court, a party should be precluded from obtaining a decision on that ground in this court through no fault of his own. In the present case, it would mean that the case would have to be remitted to the High Court with an almost inevitable further appeal to this court, resulting in the incurring by a party not in default of significant costs and delay in having the appeal resolved. That does not seem to me to be a just and convenient way of dealing with the appeal."*

97. Keane C.J. also referred to the suggestion made by Murray J. in *Dunnes Stores v. Ryan* [2002] 2 I.R. 60 to the effect that the Court ought to have jurisdiction to determine a point on which no decision on any disputed question of fact was required. In *McGowan v. The Labour Court* [2013] 3 I.R.718 O'Donnell J. observed that this was "a sensible and pragmatic approach". In *McGowan* the constitutional point had been fully argued, but not determined because the trial judge had considered that it would have been preferable if it had been brought by plenary proceedings. In those circumstances, if the Court declined to deal with the matter then, having regard to the costs and other implications for the parties, the outcome would not be consistent with the administration of justice.

98. On this question the respondent submits, of course, that the classification issue is *acte claire* and that there is no need for a reference. However, should this Court determine otherwise, it is submitted that the appropriate course would be for the matter to be remitted to the High Court for consideration. While the issue was argued before the High Court, it was not subject to any determination by that Court. Consequently, there have been no findings made in relation to the nature or purpose of disability allowance and the distinction between it and other payments. In this regard, the respondent submits that such issues are issues of fact, more appropriately determined by a court of first instance as opposed to an appellate Court. Moreover, it is asserted that it would be unjust to foreclose the respondent's entitlement to appeal any adverse decision on the issue.

Discussion and conclusions:

99. It is well established that the existence of a right of appeal is not an automatic bar to the right to seek judicial review but is a matter to be taken into consideration in the exercise of the discretion of the High Court judge. In the circumstances of this case, the first question that arises is whether the statutory appeal process can deal only with the legal merits of a claim for a benefit, or can deal also with the issue as to the validity of the legislation.

100. The task of the deciding officers, appeals officers and Chief Appeals Officer under the Act of 2005 as amended is, in my view, the interpretation of the provisions of the social welfare code and the application of those provisions to the facts of the claim before them. Clearly, this task could not involve determination of the constitutional validity of the

legislation as a matter of national law, since under the Constitution that would be a question that the officials would have no jurisdiction to answer. They are obliged to act on the basis that the legislation is valid. Therefore, a person claiming that a substantive provision in the Act is unconstitutional would (after establishing *locus standi* by receiving an adverse decision) have to commence High Court proceedings. It may be noted here, by way of example, that in *P.C. v The Minister for Social Protection* [2017] IESC 63 this Court considered the constitutionality of a provision disentitling convicted prisoners to payment of the State contributory pension. There was no suggestion at any stage of the proceedings that the plaintiff should have gone through the statutory appeal process, with a view to having the issue determined by the High Court in an appeal on a point of law.

101. Similarly, the Departmental officials clearly do not have competence to determine the invalidity of an EU instrument and do not have the right to refer such an issue to the Court of Justice. It might well be, and possibly often is, the case that the decision of an appeals officer could involve the interpretation of national legislation by reference to EU law. That would reflect the obligation of administrative authorities (as well as decision-making bodies) to implement EU law. An appeal to the High Court in such a case could result in a question being referred to the CJEU as to, for example, the compatibility of the particular interpretation with EU law, and I can see no jurisdictional bar to that.

102. Alternatively, it is possible that an appeals officer might have to consider the disapplication of a national provision on the basis that it is incompatible with EU law. Again, such a course of action might be considered appropriate in certain circumstances, and it would be open to the Minister to appeal to the High Court. However, it should be remembered that disapplication of a national measure does not invalidate that measure (for a discussion on this topic, see *Minister for Justice and Equality v. Workplace Relations Commission (Case C-378/17),* EU:C:2018:979), and that, therefore, a decision by an administrative authority to disapply a particular provision does not amount to a legal finding of invalidity.

103. However, it is abundantly clear that an administrative authority cannot declare an EU measure to be invalid, since that power is reserved to the Court of Justice of the European Union.

104. In moving then to consider the circumstances of the instant case, I will leave aside (but will return to) the issue as to habitual residence. On the exportability issue, the deciding officers were dealing (as an appeals officer would have been if the matter had been appealed) with a national provision that was undoubtedly compatible with the categorisation of disability allowance as a special non-contributory benefit in Annex X of the Regulation. There was, in effect, a double layer of legislation which they were bound to apply and no lawful means by which the appellant could have obtained a favourable decision on the classification issue at that level of the process.

105. The issue then is whether the right of access to the High Court at the end of the process has the consequence that a claimant may not seek judicial review as an alternative.

106. Questions as to the scope of the jurisdiction of the High Court in a statutory appeal must always be answered by reference to the terms of the statute creating that jurisdiction. The fact that one Act uses similar terminology to another may be helpful but is not necessarily determinative. However, it may be borne in mind that an appeal on a point of law is the narrowest of the four categories of statutory appeals identified by Clarke J. in *Fitzgibbon v. Law Society* [2014] IESC 48.

107. In this form of appeal, the High Court is asked to determine whether or not the task of interpreting and applying the provisions of the relevant legislation has been carried out correctly, by reference to the legislation and the evidence grounding the decision under appeal, and without reference to issues such as jurisdiction, *vires*, or the constitutional validity of the legislation under consideration. Where a litigant seeks to argue such an issue, the Court will decline to rule on the matter on the basis that it does not properly arise from the decision under appeal, since it could not have been determined by the decision-making body.

108. It is, I think, noteworthy that the deciding officer who carried out the review in this case did not even address the issue of the classification of disability allowance. This could only have been because it was considered that there was no jurisdiction to embark upon it. The letter sent to the appellant in relation to this aspect came from an Assistant Principal who was not part of the appellate structure and was not purporting to make a decision in the appeal – rather, it appears that he was putting the Department's position on record in circumstances where legal proceedings had been threatened.

109. Had the appellant proceeded with an appeal to an appeals officer, it does not appear to me to be possible that he would have achieved a different outcome on this issue. The appeals officer would have been bound to assume the validity of both the national measure and the classification in the Regulation. Had the appellant then proceeded to the High Court with an appeal on a point of law, the judge would have been presented with a decision that confined itself to the question of habitual residence. It seems at least possible, in those circumstances, that the High Court would have considered that the issue of classification did not arise from the decision. Perhaps more importantly, in my view, it would be a point of law that did not properly arise in a decision based on the interpretation and application of the legislation and should not, therefore, be the subject of an appeal from that decision on a point of law.

110. It seems to me, therefore, that the case comes within the exception, discussed in *Koczan* and *EMI,* that applies where, for jurisdictional reasons, the statutory appeal process cannot provide the remedy sought.

111. I am mindful here of the fact that throughout the High Court and Court of Appeal stages of this litigation the appellant was continuing to maintain the argument about habitual residence. There is no doubt that this issue was one that, if it stood alone, would have been entirely appropriate for determination within the Departmental process and, if necessary, an appeal to the High Court. However, the judgments in *Koczan* and *EMI* expressly refer to the possibility that a statutory appeal process might not, for

jurisdictional reasons, be able to deal with *all* of the issues raised in a given case. It would, I think, be wrong (and possibly would breach the principles of equivalence and effectiveness) if a claimant were to be required in all such cases to split up the issues and pursue different forms of litigation, with the increased time and costs that would necessarily be involved. It should be borne in mind that court procedural rules are intended to assist in the administration of justice, and not to put litigants through an extended series of obstacles.

112. I am also mindful of the concern expressed by the trial judge that some persons (not including the appellant herein) might attempt to "sidestep" the proper utilisation of the statutory appeals process by asserting specious points of law in judicial review proceedings. However, it seems to me that that is an issue best dealt with on a case by case basis, given the discretionary nature of judicial review relief.

113. I would, in the circumstances, hold that the appellant was entitled to bring these judicial review proceedings. The issue he has raised as to the validity of the classification of disability allowance is one that could not be decided in the internal appeals structure and would, for that reason, not have been appropriate to an appeal on a point of law.

114. The next issue, then, is how the Court should proceed. It seems to me that the first question is whether the classification issue is *acte claire*. If the Court were to find that there is no doubt as to the propriety of the categorisation of disability allowance as a special non-contributory benefit, there would in my view be nothing to be gained from remitting the matter for further consideration by the High Court. If it is not entirely clear, the Court could either remit, so that relevant findings of fact could be made, or decide to refer a question to the CJEU.

115. While the definition of the allowance in s.210 certainly seems to be within the concept of social assistance, for the reasons argued by the respondent, there are two aspects that are of concern. The first is that, at the time when the appellant made his application, it was possible to work and to earn up to a prescribed amount without losing entitlement, but only if the work was considered to be rehabilitative in nature. That restriction was removed in 2018, but while it was in force it might have been seen as strengthening the argument that there was a medical or rehabilitative purpose to the allowance, as opposed to a sole purpose of maintaining a subsistence level of income.

116. The second issue is the disqualification criteria. These could, in my view, be regarded as on-going conditions of entitlement, and they are clearly geared towards improving the health and quality of life of the claimant.

117. It seems to me that there may be some possibility, having regard to those two aspects and to the caselaw discussed above, that the CJEU would find that at the relevant time there was a medical purpose to the overall conditions of eligibility.

118. These aspects were not debated by the parties at any stage of these proceedings. Accordingly, I would propose that the parties should be invited to make further

submissions on the earnings disregard and the disqualification criteria, described in paragraphs 10 and 11 above, by reference to the CJEU jurisprudence.

Isabelle O'Malley

Approved 16 January 2021