THE SUPREME COURT

[Supreme Court Appeal No. 38/2019]

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

Ruling of the Court delivered the 27th day of January, 2021.

Introduction

1. The first-named appellant ("the appellant") initiated these judicial review proceedings with the aim of making the case a) that he was habitually resident in the State for the purposes of entitlement to receive Disability Allowance and b) in the alternative, that the classification of the payment in relevant domestic and European Union instruments (and thus the requirement to be habitually resident in the State) was incorrect as a matter of EU law. His claim was dismissed without consideration of either issue in the High Court and, on appeal, in the Court of Appeal on the basis that he had failed to exhaust his remedies, because he had not pursued to finality the internal departmental appeals procedure established under the Social Welfare Act 2005.

2. The High Court made no order on costs. The Court of Appeal awarded the costs of that appeal against the appellant.

3. In the course of an oral hearing on the application for leave to appeal to this Court, the appellant withdrew the habitual residence argument. It was noted in the judgment granting leave that had this issue remained live, it could have been argued that the statutory appeals mechanism still had a role to play. In the event that there were two issues to be determined in the appeal – whether the appellant was obliged to exhaust his statutory remedies if the persons authorised to decide appeals under the statutory scheme did not have jurisdiction to give him the remedy he sought (that is, they did not have power to find the domestic legislation invalid or to refer the issue to the Court of Justice of the European Union); and whether Disability Allowance was correctly categorised as a matter of EU law.

4. In its first substantive judgment in this matter, delivered on the 14th May 2020 (*Petecel v. The Minister for Social Protection & ors* [2020] IESC 25), this Court allowed the appeal insofar as the exhaustion of remedies was concerned. It also reached a preliminary view on the categorisation issue in favour of the respondents, subject to receiving further submissions from both parties in relation to aspects of the legislation.

5. The second judgment was delivered on the 15th July 2020 (see [2020] IESC 41). The Court dismissed the appeal on the substantive issue of the legal nature of the payment.

The ruling on costs

6. The parties have filed written submissions in respect of costs. Neither has requested an oral hearing.

7. The appellant submits that there were two "events" for the purposes of consideration of costs. He succeeded on the remedies issue, while the respondents succeeded on the categorisation issue. It is submitted that these events should not be seen as in some way cancelling each other out, in circumstances where there had been no determination of the substantive issue in either the High Court or the Court of Appeal.

It is further submitted that the litigation has clarified the law relating to both the provisions of the Social Welfare Act 2005 and the categorisation of Disability Allowance, and that there was a public interest element in both. In the circumstances, the appellant says that the costs order made in the Court of Appeal should be vacated and that he should be allowed some portion of the costs of the proceedings.

8. The respondents note that the costs orders in the High Court and Court of Appeal were governed by the provisions of O.99 of the Rules of the Superior Courts. Section 169 of the Legal Services Regulation Act 2015 (and the recast O.99) came into force on a date after the leave decision and the lodgement of the substantive written submissions but before the hearing and supplemental submissions.

9. However, the respondents do not seek an analysis of the proper treatment of the costs of these proceedings under the new regime. Their position is that while (in their view) they would be entitled to an award of costs, having been successful in the appeal, they do not seek an order in their favour. However, they submit that the appellant is not entitled to his costs. He has obtained no relief in the proceedings. The decision of this Court to grant leave to appeal was made in circumstances where the habitual residence argument was not withdrawn until the oral hearing of the leave application. It is submitted that it was reasonable for the respondents to raise the exhaustion of remedies argument in relation to this mixed question of law and fact. Its abandonment meant that the appeal before this Court proceeded on a materially different basis.

10. Nonetheless, the respondents accept that the appellant was successful in one aspect of the appeal. While this fact would not entitle him to costs under the statutory regime set out in the Act of 2015, they suggest that it would be appropriate for the Court to leave the order of the High Court in place, to vacate the order of the Court of Appeal and to make no order in respect of the costs of this appeal.

Decision

11. The Court accepts that there is a degree of force in the respondents' arguments. However, it must be pointed out that the remedies issue was a significant one which

had resulted in the refusal of both of the courts below to rule on the appellant's substantive case. Furthermore, the respondents did not drop their reliance on the exhaustion of remedies principle even after the appellant had withdrawn the habitual residence contention. The argument made at that stage was that the appellant should have gone through each step of the statutory process, despite the acknowledged fact that that process could never have concluded with a finding that the allowance was invalidly categorised.

12. In the circumstances the Court considers it appropriate to leave the High Court order in place, to vacate the order of the Court of Appeal in relation to costs, and to award the appellant one-third of his costs before this Court.