**THE HIGH COURT**
**JUDICIAL REVIEW**

[2020] IEHC 548
**[2019 No. 274 JR]**

**BETWEEN**

**F[redacted] S[redacted]**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on Friday the 6th day of November, 2020**

1. The ultimate issue in this case is whether the applicant was entitled to backdated payment of the difference between Irish and Romanian child benefit for the period between her arrival in Ireland in November/December 2016 and the making of an application for Irish child benefit on 16th January, 2018.

**Facts**

2. The applicant was born in July 1989 *(née* F[redacted] Z[redacted]) in Năsăud in the Transylvanian region of Romania. She was a Romanian citizen from birth and an EU citizen from Romanian accession in 2007.

3. She married C[redacted]-D[redacted] S[redacted] on 12th August, 2012. The child of the marriage, P[redacted]-L[redacted] S[redacted], was born in December 2015. That month, the applicant submitted a claim for the Romanian equivalent of child benefit which was granted in December 2015 or January 2016.

4. The applicant's husband moved to Ireland in October 2016 to take up employment as a healthcare worker. He did not make an application for child benefit. The applicant and the child then moved to Ireland in November or December 2016 and while she continued to receive Romanian child benefit she didn't make an application for Irish child benefit.

5. She completed an application form for child benefit on 10th January, 2018 which was received by the Minister on 16th January, 2018 (the latter date was deemed to be the date of the application). Part 7 of the form deals with late applications where the claim is made more than twelve months after the month in which the applicant or their spouse came to live in the jurisdiction. It provides for reasons for late application in the event of making an application for a backdated payment. That part of the form was left blank so the applicant didn't, at least originally, specifically seek back pay. The claim was granted in February 2018 and Romanian child benefit ceased around that time.

6. On 13th August, 2018 the applicant sought a review of the decision under s. 301 of the Social Welfare Consolidation Act 2005 on the basis that she should have been considered for a backdated payment. That was refused on 22nd August, 2018. The applicant then lodged a notice of appeal on 29th August, 2018 but the appeal was refused on 12th February, 2019.

7 A statement of grounds in the present proceedings was filed on 10th May, 2019, the primary relief sought being *certiorari* of the decision of 12th February, 2019 together with declaratory relief and an order that the matter be referred to the CJEU. Leave was granted by Noonan J. on 13th May, 2019 and a statement of opposition was filed on 15th July, 2019. I have now received helpful submissions from Mr. Derek Shortall S.C. for the applicant and from Mr. Kieran Binchy B.L. for the respondents.

**Relevant European law**

8. The relevant EU legislation is regulation (EC) No. 883/2004, as amended, and as implemented by regulation (EC) No. 987/2009. The predecessor regulations were Règlement no. 4 du Conseil (J.O. no. 30 du 16th Decembre, 1958, p. 597) and regulation (EEC) No. 1408/71, implemented by regulation (EEC) No. 574/72.

9. Key provisions of regulation (EC) No. 883/2004 include the following:

(i). Recital 12 of the preamble notes that *"[i]n the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period."*

(ii). Article 76(4) includes a requirement that applicants must inform the institutions of the competent Member State and of the state of residence as soon as possible of any change in their personal or family situation which affects their right to benefits under the regulation.

(iii). Article 76(5) goes on to say that failure to respect the obligation of information may result in the application of proportionate measures in accordance with national law, but nevertheless these measures shall be equivalent to those applicable in similar situations under domestic law and shall not make it impossible or excessively difficult in practice for claimants to exercise the rights conferred on them by the regulation.

(iv). Article 81 states that, *"[a]ny claim, declaration or appeal which should have been submitted, in application of the legislation of one Member State, within a specified period to an authority, institution or tribunal of that Member State shall be admissible if it is submitted within the same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former Member State either directly or through the competent authorities of the Member States concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the second Member State shall be considered as the date of their submission to the competent authority, institution or tribunal."*

10. As regards regulation (EC) No. 987/2009, recital 9 refers to the complexity of the field of social security and states that this requires all the institutions of a Member State to make

particular efforts to support insured persons in order to avoid penalising those who have not submitted their claim or certain information in accordance with regulation 883/2004.

11. Key caselaw includes the following:

(i). In *van Roosmalen v. Bestuur van de Bedrijfsvereniging voor de Gezondheid,* Case C-300/84 (European Court of Justice, 23rd October, 1986) the court said that the predecessor regulation must be interpreted broadly.

(ii). In *Institut National d' Assurances Sociales pour Travailleurs Indépendants (Inasti) v. Picard,* Case C-335/95 (European Court of Justice, 24th October, 1996), the court held that failure to submit a claim in a correct manner to the competent authorities of the applicant's place of residence did not preclude the application of a rule for the apportionment of benefits under regulation 574/72. That illustrates the point that different elements of the regulation may have an autonomous application so that non-compliance with certain provisions may not be disqualifying.

(iii). The court held in *Partena ASBL v. Les Tartes de Chaumont-Gistoux* SA, Case C-137/11 (Court of Justice of the European Union, 26th June, 2012), that the provisions of the regulation should be interpreted so as to contribute to the establishment of the greatest possible freedom of movement for migrant workers.

(iv). In *Raad van bestuur van de Sociale verzekeringsbank v. E. Fischer-Lintjens*, Case C-543/13 (Court of Justice of the European Union, 4th June, 2015), failure to provide information was held not necessarily fatal to continuity of social insurance cover.

(v). The court emphasised in *Tarola v. Minister for Social Protection*, Case C-483/17, (Court of Justice of the European Union, 11th April, 2019) at para. 36, and in other cases, that in the absence of reference to national law, provisions of EU law should generally be given an autonomous and uniform meaning throughout the EU.

**Relevant provisions of Irish law**

12. Pertinent domestic law provisions include the following:

(i). Section 241(1) of the Social Welfare Consolidation Act 2005 requires that, *"[i]t shall be a condition of any person's right to any benefit that he or she makes a claim for that benefit in the prescribed manner."*

(ii). Section 241(4) of the 2005 Act provides that a person who fails to make a claim for child benefit within the prescribed time shall be disqualified from seeking any backdating of payment to before the date on which the claim is made, "*unless a deciding officer or appeals officer is satisfied that there was good cause for delay in making the claim".*

(iii). Section 301 of 2005 Act allows for review of decisions, and was availed of by the applicant unsuccessfully prior to formal appeal.

(iv) The prescribed time is twelve months from becoming a qualified person under s. 220 of the 2005 Act - see art. 182(k) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) inserted by the Social Welfare (Consolidated Claims, Payments And Control) (Amendment) (No. 3) (Prescribed Time) Regulations 2008 (S.I. No. 243 of 2008).

**The grounds of challenge**

13. A number of the grounds as pleaded in the statement of grounds do not in themselves give rise to a basis to challenge the decision or to seek any other form of relief:

(i). grounds (i)1 and 2 are simply statements of fact;

(ii). grounds (i)3 and (ii)1 are simply statements of law; and

(iii). grounds (iii)1 and 2 are not substantive reliefs, but simply seek ancillary matters, namely a reference to Luxembourg and the consequential order of a reference back to the Chief Appeals Officer.

14. Thus, there are only three substantive grounds for the challenge, ground (i)4, (ii)2 first paragraph and (ii)2 second paragraph.

**Ground (i)4 - failure to treat ongoing receipt of Romanian child benefit as a claim for the purposes of art. 8(1) of regulation 883/2004**

15. This ground claims that *"[it] is common case that the Applicant has an extant claim in Romania since shortly after the birth of her son. The first named Respondent erred in law by refusing to treat the, then, extant claim in Romania as a claim for the purpose of Irish Child Benefit pursuant to Art. 81 of Regulation 883/2004. The first Named Respondent's justification for this is that the Irish claim was made later. This is an unduly narrow and restrictive interpretation of the provision which is erroneous and contrary to EU law. The extant claim in Romania should have been treated as a claim for the purpose of Irish Child Benefit, from the date upon which Ireland became the competent Member State (October 2016)."*

16. This question, while phrased in slightly tendentious terms, nonetheless raises a question of European law with which I deal with further below. The applicant's submissions sought to go beyond this to suggest that EU nationals who enter the State must be informed of their rights to apply for benefits generally, including the specific benefits they might qualify for. Apart from anything else, the problem for the applicant with that point is that she didn't plead any such obligations, so any such suggestion falls entirely outside the present case.

**Ground (ii)2, first paragraph – whether art. 76 of regulation 883/2004 applies**

17. This ground contends that *"[s]ubject to an extant claim made in one Member State being deemed acceptable in another Member State pursuant to Art. 81 of Regulation 883/2004, it is difficult to see how the provisions of Art. 76 would apply in the within proceedings"*.

18. While the drafting of this ground is somewhat sub-optimal in that the applicant is not entitled to relief merely because something is difficult to see, the essence of the ground is that non-compliance with art. 76 does not disapply the provisions of art. 81 of regulation

883/2004, if that applies. That raises a question of EU law with which I deal with further below.

**Ground (ii)2, second paragraph - breach of principle of effectiveness**

19. This ground contends that *"[i]n the alternative and without prejudice to the foregoing ... [t]he first named Respondent, applying the first limb of Art. 76(5) determined that the Applicant, having failed in her obligation to notify relevant changes in their circumstances, proportionate measures under national law 'equivalent to those applicable in similar situations under domestic law' fell to be applied. The first named Respondent stated that these measures apply equally to all claimants and that they were not disproportionate. However, the first named Respondent failed to have regard to the second limb of Art. 76(5) of Regulation 883/2004, which provides that 'these measures... shall not make it impossible or excessively difficult in practice for claimants to exercise the rights conferred on them by this Regulation.' Which is precisely is occurring here insofar as the claim has been rendered impossible."*

20. Where art. 76(4) and (5) are applicable, possible questions that might arise are whether the outcome is disproportionate or alternatively in breach of the principle of effectiveness. The legal grounds set out in s. (e) of the statement of grounds don't provide any ground for challenging the outcome as disproportionate, but only refer to the principle of effectiveness. Admittedly, a relief was sought including a declaration that the Chief Appeals Officer was in error in determining that the outcome was not disproportionate, but the respondents have objected that there is in fact no ground supporting that relief. I must uphold that objection in line with completely normal and orthodox rules of pleading – a relief alone is insufficient because there must be a supporting ground - and therefore have to hold that the complaint of disproportionality is not one on which this applicant can succeed on these pleadings. However, the complaint of breach of principle of effectiveness *is* properly pleaded and raises an issue of EU law which I deal with further below.

**Questions of European law arising**

21. It seems to me that three questions of European law arise from the three substantive grounds identified above, and I consider it appropriate in all circumstances to make a reference to the Court of Justice under art. 267 of the TFEU.

**The first question**

22. The first question is: does the concept of "claim" in art. 81 of regulation 883/2004 include the ongoing state of being in receipt of a periodic benefit from a first Member State (where the benefit is correctly payable by a second Member State) on each and every occasion on which such benefit is paid, even after the original application and the original decision by the first Member State to grant the benefit.

23. The position in relation to that question is as follows:

    (i). The applicant's position is that the concept of claim *does* include the notion of an ongoing claim, construing the regulation broadly.

(ii). The respondents' position is that "*claim*" merely means the original claim and that art. 81 doesn't make sense if applied to an ongoing "*claim*" because there is no date on which that claim is submitted to a Member State for the purposes of the article. It was also contended that there would be no deadline for an application for social security in the case of EU nationals already in receipt of a benefit when moving between Member States and thus they would be treated significantly more favourably than nationals or other EU citizens who were not in receipt of social security benefits at the time of entering the second Member State.

(iii). My proposed answer to the question is "No". I accept the respondents' submission and don't accept that every periodic payment amounts to a fresh claim. Those are payments made on foot of the only decision made by the authorities of the first Member State which was to grant the original claim. Subsequent payments are simply giving effect to that decision, which was made on foot of a single original claim. To extend the meaning of a claim to apply to every date on which a person receives a social security benefit would give rise to anomalies and discrimination against EU nationals who are not in receipt of a benefit when changing their member state of residence.

(iv). The answer makes a difference to the disposal of the proceedings because the reasoning of the decision under challenge would be incorrect if the applicant's submission is upheld.

**The second question**

24. The second question is: if the answer to the first question is yes, then in circumstances where a claim for social security is made incorrectly to a Member State of origin, when it should have been made to a second Member State, is the obligation of the second Member State pursuant to art. 81 of regulation 883/2004 (specifically, the obligation to treat a claim to the Member State of origin as being admissible in the second Member State) to be interpreted as being entirely independent of the applicant's obligation to give correct information regarding her place of residence pursuant to art. 76(4) of regulation 883/2004, such that a claim made incorrectly to the Member State of origin must be accepted as admissible by the second Member State for the purposes of art. 81, notwithstanding the failure of the applicant to provide correct information as to her place of residence in accordance with art. 76(4), within the period for making a claim prescribed by the law of the second Member State.

25. The position in relation to that question is as follows:

(i). The applicant's position is that this question should be answered "Yes" and that the obligation to treat the claim as admissible in the second Member State is entirely independent of the applicant's compliance or otherwise with the duty to provide information. Reliance is placed *on Raad van bestuur van de Sociale verzekeringsbank v. E. Fischer-Lintjens*, Case C-543/13 (Court of Justice of the European Union, 4th June, 2015), especially para. 54, where failure to provide information was held not necessarily fatal to continuity of social insurance cover.

(ii). The respondents' position is that the question does not arise having regard to the proposed answer to the first question, but if it does arise, the answer is "No", and that failure to provide correct information that would have allowed the claim to be properly transferred precludes application of the transfer procedure in art. 81 in practice and in principle. Here, there was a fundamental failure to comply with legal duties. The applicant was in breach of art. 76(4) and it would not have been possible for the Romanian authorities to operate art. 81 because the applicant never told them that she was living in Ireland prior to making the claim for child benefit here.

(iii). My proposed answer is that the question does not arise having regard to the proposed answer to the first question, but if it does arise, the answer is "No", for the reasons articulated in the respondents' submission.

(iv). The answer to this question makes a difference because the decision challenged places reliance on the applicant's non-compliance with art. 76(4).

**The third question**

26. The third question is: whether the general EU law principle of effectiveness has the consequence that access to EU law rights is rendered ineffective in circumstances such as those in the present proceedings (in particular, in circumstances where the EU national exercising free movement rights is in breach of her obligation under art. 76(4) to notify the social welfare authorities of the Member State of origin of her change of country of residence) by a requirement of national law in the Member State in which the right of free movement is exercised that in order to obtain a backdating of claims for child benefit an EU national must apply for such a benefit in the second Member State within a period of twelve months prescribed by the domestic law of the latter Member State.

27. The position in relation to that question is as follows:

(i). The applicant's position is that there has been a breach of the principle of effectiveness because the applicant's claim for backdating was not allowed.

(ii). The respondents' position is that the question should be answered "No" and that there has been no breach of the principle of effectiveness. The twelve-month rule is a neutral provision that applies equally to both Irish and EU citizens and provides an opportunity for backdating if application is made within twelve months or if good reason is shown.

(iii). My proposed answer is also "No" and I accept the submission of the respondents. In my view, the applicant's submission fundamentally misunderstands the test of effectiveness. It is not a guarantee that any particular claim will succeed. If it was so interpreted, then no claim with an EU law basis could ever be refused on the basis of national law (such as the statute of limitations); not just in social welfare, but across all fields of law where there is an intersection with EU law, because that would make the particular claim impossible or excessively difficult for the *particular applicant concerned*, even if he or she failed to avail of opportunities to exercise

rights. That is a totally different situation from a law that fails to give a reasonable opportunity to *applicants generally*. The latter kind of provision contravenes the principle of effectiveness; a neutral and reasonable law that a particular applicant fails to avail of does not.

(iv). The question makes a difference because the 12 month time limit for making a claim was relied on by the respondents to justify refusal of backdating.

**Order**

28. Accordingly, the order will be:

(i). I will refer the following questions to the CJEU under art. 267 of the TFEU:

(a). does the concept of "claim" in art. 81 of regulation 883/2004 include the ongoing state of being in receipt of a periodic benefit from a first Member State (where the benefit is correctly payable by a second Member State) on each and every occasion on which such benefit is paid, even after the original application and the original decision by the first Member State to grant the benefit;

(b). if the answer to the first question is yes, then in circumstances where a claim for social security is made incorrectly to a Member State of origin, when it should have been made to a second Member State, is the obligation of the second Member State pursuant to art. 81 of regulation 883/2004 (specifically, the obligation to treat a claim to the Member State of origin as being admissible in the second Member State) to be interpreted as being entirely independent of the applicant's obligation to give correct information regarding her place of residence pursuant to art. 76(4) of regulation 883/2004, such that a claim made incorrectly to the Member State of origin must be accepted as admissible by the second Member State for the purposes of art. 81, notwithstanding the failure of the applicant to provide correct information as to her place of residence in accordance with art. 76(4), within the period for making a claim prescribed by the law of the second Member State;

(c). whether the general EU law principle of effectiveness has the consequence that access to EU law rights is rendered ineffective in circumstances such as those in the present proceedings (in particular, in circumstances where the EU national exercising free movement rights is in breach of her obligation under art. 76(4) to notify the social welfare authorities of the Member State of origin of her change of country of residence) by a requirement of national law in the Member State in which the right of free movement is exercised that in order to obtain a backdating of claims for child benefit an EU national must apply for such a benefit in the second Member State within a period of twelve months prescribed by the domestic law of the latter Member State.

(ii). I will direct the applicant to lodge all necessary books and papers for the CJEU with the Principal Registrar within 28 days and will adjourn the balance of the matter pending the decision of that court.