THE HIGH COURT

JUDICIAL REVIEW

Record No. 1076/2010 JR

BETWEEN

IKRAAN JAMA

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

Judgment of Mr. Justice Hedigan delivered the 11th day of October, 2011

1. Application

1.1 These proceedings arise by way of an appeal under the Social Welfare Consolidation Act, 2005 concerning the eligibility of the applicant for child benefit during the period from October 2005 to February 2006. The applicant seeks an order requiring the respondent to provide her with access to copies of relevant reasoned decisions of the Social Welfare Appeals Officer and the Chief Appeals Officer and also seeks orders directing the Minister to publish such reasoned decisions and to establish a system enabling such decisions to be accessible to parties to a social welfare appeal, together with related declaratory relief.

2. Factual Background

2.1 The applicant is a Somali national who entered the State on 26th August, 2005. Initially refused, on appeal she was declared a refugee on the 22nd of February, 2007. While her application for refugee status was pending, she applied for child benefit in respect of her son, who was born on the 14th October, 2005. The Deciding Officer awarded her child benefit from March 2007. The Deciding Officer relied upon the habitual residency test in the Social Welfare (Consolidation) Act, 2005 (hereinafter 'the 2005 Act') and the fact that the applicant had been notified by the Department of Justice that her appeal had been successful by letter dated the 22nd February, 2007.

2.2 The applicant appealed from the decision of the Deciding Officer to an Appeals Officer under section 311 of the 2005 Act. The Appeals Officer, who reviewed the restriction of child benefit on appeal, found that the applicant satisfied the habitual residence condition for eligibility for child benefit from the date in February 2006, when a determination (albeit negative) had been made in respect of her refugee status, but not from the date of birth of her son in October 2005. The applicant then sought a review of this decision pursuant to section 318 of the 2005 Act, on the basis that the Appeals Officer erred, in law and on the facts, in finding that she is entitled to child benefit only from February 2006 and not from the date of birth of her son. The Chief Appeals Officer has accepted the review application, which is under consideration. She has been asked to review the decision of the Appeals Officer on the basis that the latter was wrong, in law

and in fact, in her determination regarding the habitual residence condition and/or qualifying for social welfare benefits from the respondent.

2.3 By letter dated the 11th May, 2010, the applicant sought from the respondent copies of any previous decisions by Appeals Officers or the Chief Appeals Officer in relation to the date from which persons, who have been recognised as refugees, are regarded as satisfying the habitual residence condition and/or qualifying for social welfare benefits. The Social Welfare Appeals Office had previously informed the applicant that it does keep copies of decisions, but sends them to the respondent, who is also invariably the respondent in the appeals coming before the Social Welfare Appeals Office. Consequently, the request for copies of previous decisions was directed to the respondent. By letter dated the 4th June, 2010, the applicant repeated the request to the Chief Appeals Officer. That office replied by letter dated the 4th June, 2010, advising that (with some limited exceptions) decisions are not filed or kept in the Social Welfare Appeals Office but are returned to the "relevant line section of the Department". The respondent has since furnished decisions in two cases by letter dated the 16th June, 2010, which relate to persons who obtained leave to remain, as opposed to refugees, and which staff "remembered". These two cases are not of particular relevance in that the legal status of a person declared a refugee is different to that of a person who has been granted leave to remain.

3. Applicant Submissions

3.1 The applicant submits that, in the absence of access to relevant decisions, she cannot be sure that the decision in her case is objectively fair and not arbitrary, and her lawyers are thus hampered in advising her. It is accordingly contended that the failure to provide for the recording of relevant decisions in an accessible manner is unfair and offends the requirements of constitutional justice. This lack of fairness is accentuated by the fact that the decision-maker, i.e. the Social Welfare Appeals Office, furnishes copies of all decisions to the respondent to appeals, i.e. the Department of Social Protection, but does not make them available to claimants, such as the applicant.

3.2 The applicant contends that decisions which address issues of principle, law or policy should be published. The applicant accepts that not all decisions of the Social Welfare Appeals Office should be published, as there are many decisions which are of a routine nature. The applicant submits that her appeal turns on what is essentially an issue of law, and argues that it would be surprising if the Appeals Officers and Chief Appeals Officer had not considered and made a decision on the issue in the past. It is contended that, as any such decision would have been sent to the respondent, the principles of mutuality and equality of arms would require that the applicant and her advisors would require that the applicant should have access to them.

3.3 The applicant argued before the Chief Appeals Officer that, in circumstances where she has been declared a refugee, the entitlement to child-benefit should be back-dated to the birth of the child in respect of whom the benefit is to be paid. The applicant

bases her case on the proposition that a person is a refugee from the moment the conditions set out in international law by the Convention relating to the Status of Refugees 1951 (hereafter 'the 1951 Convention') are satisfied, and that the domestic claims process merely provides the mechanism by which the status is identified. It is contended that the State's duties apply with retrospective effect once a person's status as a refugee has been established. The applicant points to Article 24(1)(b) of the 1951 Convention in this regard insofar as it provides that the State shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in relation to social security.

3.4 The applicant argues that, in order to honour this obligation, the State must ensure that a refugee claimant's entitlement to social security benefits is not affected by the delay in recognising his or her status. The applicant cites *FK v. HMRC* [2009] IKUT 124 as support for this proposition, in which the Court ruled that the normal rules regarding the effective date for an award of benefit do not apply if a claimant is granted asylum. The Court ruled that such a person is considered to be eligible to receive child benefit from the date of the claim for refugee status rather than the date of the decision.

3.5 The applicant relies upon the constitutional right to fair procedures in a decision-making process, and contends that such right includes the requirement that relevant information, documentation and matters of evidence be disclosed. The applicant relies upon *Kiely v. the Minister for Social Welfare (1)* [1977] IR 267 in this regard, in which Henchy J. held that a lack of mutuality and the potential for an unjust determination

would be breach of natural justice. Henchy J further found that natural justice is not observed where "the scales of justice are tilted against one side through all proceedings". The applicant accordingly submits that both parties were not heard fairly as the respondent had access to earlier relevant decisions while the applicant did not. The applicant refers to *Nolan v. the Irish Land Commission* [1981] IR 23, where Costello J. upheld the right of the plaintiff to have "full information as to the case he has to meet". The applicant also refers to *Re R Limited* [1989] IR 216, where Finlay J in the Supreme Court held that, where a judgment contains determinations of questions of law or principles, the judgment should be circulated for the benefit of the legal profession and the public.

3.6 The applicant further contends that the publication of relevant decisions will not only assist claimants in making their case, but would also ensure greater consistency in decision-making by the Social Welfare Appeals Office. The applicant contends that the need for consistency in relation to applications for refugee status has been expressly acknowledged, and relies in this regard on *Manzeke v. The Secretary of State for the Home Department* [1997] Imm AR 524, where Lord Woolf M.R. held that it is beneficial to the general administration of asylum appeals for adjudicators to have the benefit of the views of a Tribunal in other cases of a general situation in a particular part of the world. The applicant also cites *Atanasov & Others v. Refugee Appeals Tribunal* [2007] 4 IR 94, where MacMenamin J in the High Court held that conformity and consistency in decision-making are essential facets of fair procedures, and that these standards would be difficult to achieve in the absence of access to previous decisions of the Tribunal.

3.7 The applicant contends, in relation to the respondent's attempt to rely on administrative difficulties, that a database of decisions has in fact been created and that the respondent is overstating the difficulties. Further, the applicant argues that, even if administrative difficulties do exist, they should not override the obligation to provide fair procedures. In *Gallagher v. The Revenue Commissioners* [1995] IR 55, Hamilton CJ relied on the *dicta* of Lane LJ in *R v. Board of Visitors of Hull Prison* [1979] 1 W.L.R. 141, who said that "mere administrative difficulties, *simpliciter*, are not in our view enough" and that "[c]onvenience and justice are often not on speaking terms".

3.8 The applicant relies heavily on the Supreme Court decision of *Atanasov & Others v. Refugee Appeals Tribunal* [2007] 4 IR 94. The question in that case was whether an applicant before the Refugee Appeals Tribunal is legally and/or constitutionally entitled to access previous decisions of the Tribunal. The court held that previous decisions of the Tribunal should be made available to applicants and that the established system, which did not allow for previous decisions to be accessed, was manifestly unfair.

4. Respondent's Arguments

4.1 The respondent submits that the decision in *Atanasov* is readily distinguishable from the instant case. Firstly, no database of the type sought by the applicant is maintained or has historically been maintained by the respondent and, in the circumstances, there is no inequality of arms as between the applicant and the

respondent. Further, as individual decisions are determined on their particular facts, even if a database were established and available, it would have no material impact on the determination of social welfare appeals. The respondent also submits that it would be very expensive and time-consuming to develop a system of the type sought by the applicant.

4.2 The respondent also argues that the reliefs ought to be refused on the basis that the cost and logistical and administrative burden of establishing the system contended for by the applicant would be wholly unreasonable and disproportionate having regard to the value of the benefit at issue in her appeal and the minimal benefit that would accrue even if such an appeal were established.

5. Legal Framework

5.1 Section 220(3) of the Social Welfare Consolidation Act 2005 (hereafter 'the 2005 Act') provides that a person shall not be qualified for child benefit unless he or she is "habitually resident" in the State at the date of the making of the application for child benefit. Section 246(1) of the 2005 Act creates a presumption that a person is not habitually resident in the State at the date of application unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of two years ending on that date. Section 246(4) provides that, notwithstanding that presumption, a Deciding Officer, when determining whether a person is habitually

resident in the State, shall take into consideration all the circumstances of the case, including in particular five listed factors such as the person's main centre of interest and future intentions.

5.2 Social welfare appeals are provided for under Part 10 of the 2005 Act. Under section 311, where any person is dissatisfied with the decision given by a Deciding Officer, the question shall, on notice of appeal, be referred to an Appeals Officer. Pursuant to Regulation 19 of the Social Welfare (Appeals) Regulations 1998, decisions on appeals are issued in brief summary with reasons for the decision given where it is a negative one.

5.4 Section 318 of the 2005 Act provides for revision by the Chief Appeals Officer of the decision of an Appeals Officer where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.

5.5 Section 307 of the 2005 Act provides that, where a person appeals a decision of a Deciding Officer and the Chief Appeals Officer certifies that the ordinary appeals procedures are inadequate to secure the effect of processing that appeal, the Chief Appeals Officer shall cause a direction to be issued to the appellant directing them to submit the appeal to the Circuit Court for determination. Under Section 306, the Chief Appeals Officer may, where she considers it appropriate, refer any question to the High Court.

5.6 Pursuant to section 327 of the 2005 ct, any person who is dissatisfied with the decision of an Appeals Officer or the revised decision of the Chief Appeals Officer, save for an exception under section 320 which is not material to the case at hand, may appeal that decision or revised decision to the High Court on any question of law.

6. Decision

6.1 The issue that arises may be summarised as follows; whether there is a duty to maintain some form of open database recording important decisions and whether the applicant is entitled to have access thereto in order to search for relevant previous decisions in similar applications.

6.2 In relation to the duty only to maintain a database, *Kiely* is relied upon for the assertion that there should be access to previous decisions. The respondent herein, however, says that there are not any previous relevant decisions. In *Kiely*, the appellant's husband suffered severe burns on his arms and hands in an accident in June 1966 while he was working for the respondent. He died in October 1968, and coronary thrombosis was certified to be the cause of death. The appellant made a claim for death benefit. Section 16 of the Social Welfare (Occupational Injuries) Act, 1966 provides that death benefit shall be payable where an insured person dies as a result of personal injury caused by accident arising out of and in the course of his insurable employment. The appellant contended that the stress and anxiety experienced by her husband due to his injuries had

induced the thrombosis which killed him. The claim was rejected by a deciding officer and by an appeals officer on appeal. In the High Court, it was held that the applicant should know what type of case he has to meet. Henchy J stated:-

> "It would be contrary to natural justice if one side were allowed to shelter behind his controverted documentary evidence while the other side had to bring his witnesses to the hearing, where they might be required to give their evidence on oath and to be subject to cross-examination. The lack of mutuality and the potential for an unjust determination inherent in such a procedure would put it in conflict with the rule of *audi alteram partem*."

Henchy J went on to state:-

> "... This Court has held, in cases such as *In re Haughey* [1971] IR 217, that Article 40, s. 3, of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally—to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like—but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently-cited dictum of Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109,118, 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the

nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'

Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. *Audi alteram partem* means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination. The dispensation of justice, in order to achieve its ends, must be even-handed in form as well as in content."

6.3 In *Nolan*, Costello J in the High Court held that a plaintiff has the right to have "full information as to the case he has to meet". In this case, the plaintiff, who owned land which the defendants wanted to acquire, was seeking a declaration that, prior to the hearing by the lay commissioners of his objection to the acquisition of the land, his solicitor was entitled to inspect certain documents referred to in the summons. Costello J granted the relief sought and held:-

"The plaintiff should know prior to the hearing the case that he has to meet so as to enable him to cross-examine the defendants' witnesses and to adduce evidence himself, if he should be so advised. It follows from this conclusion that, as the plaintiff will not have had an adequate opportunity to know the case he has to meet, the proposed hearing would infringe the principles of natural justice because it would

be held contrary to the principle *audi alteram partem* and because the absence of the procedures sought would imperil a fair hearing of the issues to be determined."

6.4 The Supreme Court has also acknowledged the importance of the promulgation of previous decisions. *In Re R* concerned an appeal against orders made in the High Court pursuant to s. 205 of the Companies Act, 1963. These orders directed that the proceedings be held in camera and that none of the affidavits or exhibits referred to should be disclosed to anyone who was not a party to the proceedings. Finlay C.J. stated, albeit in a dissenting judgment,:-

> "Where a judgment contains decisions on questions of law or principles applicable to the interpretation of s. 205, it is desirable that even though the decision only may have been announced in public, the detailed judgment is delivered in camera, that an edited version of the judgment, avoiding the revealing of seriously prejudicing information, should be circulated for the benefit of the legal profession and of the public."

6.5 The nature of the Appeal Officer hearings is somewhat differently perceived by the applicant and the respondent. The applicant considers them to be hearings which are adversarial in nature and which may result in a form of judgment which could approximate to an indicative, as opposed to binding, precedent. The respondent considers them to be more in the nature of an administrative application which results in a bare determination recording the decision made. Important decisions are recorded and reported in the annual report for the assistance of the public and Appeal Officers alike.

This report is exhibited and contains the kind of information on particular decisions that the applicant would like to see were there any such decisions relevant to the issues arising in her appeal. Yet the respondent says that there are none save the decisions which they notified the applicant's solicitor of and which are not helpful. The applicant's solicitor avers his belief that there must be more relevant decisions. I accept this averment is made with complete honesty and considerable professional expertise. It is nonetheless an opinion and one which is contradicted by Mr. Barry in his affidavit at paragraph 6. Mr. Barry has not been cross-examined and the onus lies on the applicant to prove her case. In this regard the applicant is in some difficulty.

6.6 Is there an obligation to maintain a database? It seems that such a system is currently being developed. I am informed that the Social Welfare Appeals Office has, earlier this year, introduced a new decisions/reports computer system which Appeals Officers now use to record decisions and reports of hearings. This database is not, however, available to either the public or the Department of Social Protection, but will be used to increase the number of cases which will be published in the annual report and on the Appeals Office website. The respondent argues and I accept that the problem with public access to this database is that it, of its nature, contains information that is personal and therefore confidential. Anonymzing such a large database would inevitably be a very costly exercise. The applicant relies upon *Manzeke* and *Atanasov*, yet these cases relate to very different situations, i.e. the political state of certain countries. Consistency of decisions requires in these kinds of cases that they do not involve very different assessments of countries where there is no evidence of change. This type of decision-

making is very far removed from the decision as to whether a particular person meets the requirements set out in statute or detailed guidelines.

6.7 Information, even for the purposes of maintaining a claim, may be refused on public policy grounds, see *The State (Williams) v. Army Pensions Board & Anor* [1983] IR 308. On the evidence herein, the maintenance of such an anonymized database would be very expensive. This must be balanced against the somewhat doubtful benefit that might accrue from the ability of applicants for social welfare entitlement to access such information. Public policy in this regard, notably in these straitened times, must surely outweigh a right of access to such information.

6.8 The applicant's concern in this application is the criteria applied to assess "habitual residence" of a refugee in applying for child benefit and specifically as to when that entitlement commences. It seems to me that the best course of action in these cases where an applicant does not agree with the criteria applied is to avail of the special form of appeal provided in the statutory framework.

6.9 In summary, there is in my judgment no duty on the respondent to maintain a database or open library of decisions made to which the public can have access to research those decisions. This being so, the question of a right of access thereto does not arise. For the reasons outlined, I must refuse the reliefs sought.