

Court of Appeal
(Inferior Jurisdiction)

Judge Anthony Ellul

Appeal Number: 12/2016

Maksimova Desislava Vasileva (ID 60804A) [respondent]

vs

Director General Social Security (appellant)

28th March, 2017.

On the 28th March, 2016 the appellant appealed in accordance with article 109 of the Social Security Act (Chapter 318 of the Laws of Malta), from the Umpire's decision dated 19 February 2016 and notified to the Department on the 26 February 2016, on the grounds that her decision is factually and legally unfounded. The appellant alleged that Umpire based her judgment on a wrong application of the law of the evidence presented.

Facts of the Case.

1. Respondent is a Bulgarian citizen, and a divorced mother of three children. Since in Malta she worked with seven different companies offering health services. The employment period with each company varied from a few days to a few months. Her last employment was with Prime Care Ltd which started on the 2nd March 2015 and ended on the 3rd April 2015.
2. On the 13 July 2015 she applied for social benefits. The assistance is a non-contributory cash benefit, which is financed through tax revenue. It is a benefit within the meaning of article 70(2) of Regulation 883/2004.
3. By means of a letter dated 9th September 2015, the Director of Social Security informed her that she was not entitled to receive social assistance.

"A citizen of the European Union may reside in Malta if he has sufficient resources for himself and his family members, ensuring that they do not become a burden on the Social Assistance System in Malta (L.N. 191 of 2007)."

4. Maksimova Desislava Vasileva appealed. In a letter received by the Office of the Umpire on the 23 September 2015, she claimed that she requires social assistance because:

"(.....) suddenly I found myself in a very bad situation. I had good and well paid job as a nurse at Medina Home, Rabat, but unfortunately my place of work was closed when I was 7 months pregnant. This situation left me without maternity leave and any income and destroyed my plans to be able to support my family, which now consist of three children and me. Since April 2015 I was struggling a lot to provide the existence but now all my resources are gone".

5. The Umpire upheld the appeal and reversed the decision of the Director General Social Security without prejudice to further decisions which may be appropriate by the Director of Citizenship and Expatriate Affairs and the consequences arising therefrom;
6. The appellant appealed the decision.

Umpire's Decision.

In her decision the Umpire stated:

*"That as correctly stated by the Director (Social Security) Legal Notice 191 of 2007 clearly provides that **a citizen of the European Union may reside in Malta if such person has sufficient resources for himself/ herself and his/ her family, ensuring that they do not become a burden on the Social System in Malta.***

That nevertheless, Article 3 of the Legal Notice 191 of 2007 cannot be considered in a vacuum and is to be interpreted in the light of all provisions of the said Legal Notice."

To this end the Umpire cites a number of provisions from the afore-mentioned Legal Notice 191 of 2007 (**Subsidiary Legislation 460.17 – Free Movement of European Union Nationals and their Family Members Order**), namely:

Article 3(1):

"Subject to the provisions of this Order, a Union citizen may enter, remain and reside in Malta, seek and take up employment or self-employment therein, and shall enjoy equal treatment with Maltese nationals within the scope of the Treaty, and such right shall, subject to what is stated in this Order, be also applicable to other family members accompanying or joining the Union citizen, including those who are not nationals of a Member State, and to the partner with whom the Union citizen has a durable relationship:

Provided that the Director may refuse, terminate or withdraw any such right in the case of abuse of rights or fraud:

Provided further that the Union citizen shall not be entitled to social assistance during the first three months of residence or, where appropriate, the longer period referred to in subarticle (4) other than workers, self-employed persons, persons who retain such status and members of their families, nor shall he be entitled, prior to acquisition of the right of permanent residence, to maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons."

Article 11(1):-

"Without prejudice to the provisions of article 3 and subject to any restrictions or conditions as may be imposed by this Order, any citizen of the Union may reside in Malta if he:

(a) has sufficient resources for himself and his family members and other family members, ensuring that they do not become a burden on the social assistance system in Malta; and

(b) has comprehensive sickness insurance cover in Malta for himself and his family members."

Article 11(4):

***"Entitlement to a registration certificate** by the Union citizen referred to in subarticle (1) shall be evidenced as follows:*

(a) with proof that he and his family members and other family members are covered by comprehensive sickness insurance in respect of all risks in Malta;

(b) with proof that he has sufficient resources for himself and his family members and other family members as provided for in this article, to avoid their becoming a burden on the social assistance system in Malta during the period of their residence;

(c) with the production of a valid identification document of the citizen of the Union;

(d) the provisions of article 8(7)(b) relating to the issue of a registration certificate or a residence card, as applicable, shall apply mutatis mutandis in respect of family members and other family members of the Union citizen who may reside in Malta by virtue of subarticle (1)".

Article 13(1):

"A person who ceases to have the right to reside by virtue of this Order or who becomes an unreasonable burden on the social assistance system, may be removed from Malta:

Provided that a removal order shall not be the automatic consequence of the person's recourse to the social assistance system of Malta:

Provided further that without prejudice to the provisions of this Order, a removal order shall not be issued in the case of a person who is a worker, or a self-employed, or a job-seeker, who can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged, or the family members of such persons".

Reference was also made to the judgments **Dimitar Nikolov (SA 059756A) v. Direttur tas-Sigurta' Socjali** (Court of Appeal – 13 January 2016) and **Pensionsversicherungsanstalt v. Peter Brey** (Case 140/12 decided on 19 September 2013 para. 80).

Notably the Umpire observed that:

"That the requisites enunciated in Legal Notice 191 of 2007 are applicable at the stage of granting a certificate of residence and no provision in the Legal Notice can be construed as meaning that a European Union Citizen who holds a valid certificate and enjoys permission to reside within Malta, does not qualify for social assistance. Furthermore Article 3(1) clearly limits the right to social assistance for determinate time limits that is three months or six months as the case may be."

Grievance.

The appellant states that the manifest and clear grievance is the Umpire's wrong appreciation of the law and of the evidence produced and thereby arriving at a manifestly wrong decision. The appellant explains that the present case is based on the provisions of the:-

"Free Movement of European Union Nationals and their Family Members Order (Subsidiary Legislation 460.17) which Order implements, inter alia, the provisions of Directive 2004/38/EC of the European Parliament and of the Council of the 29 April 2004. The aim of the Directive is to prevent economically inactive EU citizens from using the host Member State's welfare system to fund their means of subsistence. Therefore, this Directive enables a Member State to have the possibility of refusing to grant social benefits to economically inactive EU citizens who do not have sufficient resources to claim a right of residence and who exercise their right to freedom of movement for the sole reason in order to obtain another Member State's social assistance;"

The appellant claims that although the Umpire declared that respondent was granted a Residence Permit in 2010 and also a Permanence Residence Certificate – said documents were not exhibited in case file. The appellant argues that:

"The Respondent did not present any documentation which shows that in fact she applied for residence in Malta and that her application was accepted. Without that application, the Umpire should have never concluded that the Respondent applied for residence and that the certificate was granted;"

However, the application for social benefits filed by the respondent has a copy of the residence documentation issued by the local authorities to respondent and valid up to the 13th April, 2020.

This Court notes that contrary to what the appellant is suggesting a copy of Ms Vasileva's "Residence Documentation" is presented in the case file as part of her Social Assistance Application.

The appellant also claims that the respondent is a "*Benefit Tourist*". He highlights a number of circumstances:-

- (i) *"Her work report shows that she worked in a very sporadic way and she changed jobs incessantly. This was also pointed out in the social worker's report."*;
- (ii) No proof of a comprehensive sickness insurance cover was presented to the Umpire. This was a requirement in terms of Article 11 of SL 460.17 and *"the ultimate aim of this article is to prevent citizens of other EU member states from abusing of our social benefits."*;
- (iii) The appellant also claims that, *"(18) the Directive and the Order implementing the Directive are emphasizing the fact that a number of conditions need to be satisfied so that the applicant does not become a burden on the hosting Member State. Dato ma non concesso that the Respondent did in fact have a certificate of residence issued in her favour, that would imply that she has sufficient resources for herself and her family, apart from being covered by the insurance and therefore the Respondent would not be in need of social assistance."*

Furthermore, he draws a distinction between the judgment cited by the Umpire namely, **Dimitar Nikolov vs Direttur tas-Sigurta' Socjali** and the present case (fol 7):

"22. The present case is totally different because here Respondent, who is economically inactive, is claiming non-contributory benefits and not short-term contributory benefits as in the Dimitar Nikolov case. It is also not known when Respondent will be going back to work – but from the evidence produced, it is clear that the date is set in the far and uncertain future and consequently, it is clear that Respondent is not actively seeking another employment."

Considerations.

The court immediately notes that from the appellant's decision (dated 9th September 2015) it is evident that he did not consider the merits of respondent's case but merely based his decision on the fact that he contends that in terms of Legal Notice 191 of 2007 respondent, as a foreigner, must have sufficient resources for herself and her children in order to continue living in Malta.

In terms of article 3(1) of Legal Notice 191 of 2007 it is only during the first three months of residence that Union citizens are not entitled to Maltese social assistance. This in itself is proof that Union citizens are entitled to apply for social benefits and the appellant has a duty to process the application and decide on the merits of the case.

With regards to payment of social benefits to EU citizens in host member countries, a relevant judgment delivered by the European Court of Justice

(Chamber) is **Alimanovic** (C67/14) delivered on the 15th September, 2015 wherein the Court:

- i. Established that social assistance is a concept that refers, "(...) *to all assistance schemes established by the public authorities, whether as national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State (judgment in Dano, C-333/13, EU:C:2014:2358, paragraph 63)*". In the case under review, the benefit requested by respondent is not a benefit of a financial nature intended to facilitate access to the labour market, but to provide a subsistence to the beneficiary and his family that is necessary to lead a life in keeping with human dignity.
- ii. "49. *It must first be recalled in this connection that, so far as concerns access to social assistance, such as that at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38 (judgment in Dano, C-333/13, EU:C:2014:2358, paragraph 69)*".
- iii. "50. *In order to determine whether social assistance, such as the benefits at issue in the main proceedings, may be refused on the basis of the derogation laid down in Article 24(2) of Directive 2004/38, it is therefore necessary to determine beforehand whether the principle of equal treatment referred to in Article 24(1) of that directive is applicable and, accordingly, whether the Union citizen concerned is lawfully resident on the territory of the host Member State*".

It has to be decided whether the applicant has retained the status of worker or *job-seeker* according to Directive 2004/38. From the acts it does not transpire that the respondent qualifies as a worker or job-seeker in terms of Directive 2004/38¹.

In terms of article 11(1) of Legal Notice 191 of 2007 any citizen of the Union may reside in Malta if he:

- (a) Has sufficient resources for himself and his family members, ensuring that they do not become a burden on the social assistance system in Malta; and

¹ There is absolutely no evidence that the respondent is seeking employment. What transpires is that she is in not in a position to seek employment as she has the responsibility of a young child and does not have the financial means to get the services of a baby-sitter.

- (b) Has comprehensive sickness insurance cover in Malta for himself and his family members.

In the **Dano case** (C-333/13) delivered on the 11th November 2014 by the Grand Chamber of the European Court of Justice, it was held that:

"71 *Second, for periods of residence longer than three months, the right of residence is subject to the conditions set out in Article 7(1)² of Directive 2004/38 and, under Article 14(2)³, that right is retained only if the Union citizen and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State (judgment in Ziolkowski and Szeja, EU:C:2011:866, paragraph 40).*

72 *Third, it is apparent from Article 16(1) of Directive 2004/38 that Union citizens acquire the **right of permanent residence after residing legally for a continuous period of five years in the host Member State and that that right is not subject to the conditions referred to in the preceding paragraph.** As stated in recital 18 in the preamble to the directive, once obtained, the right of permanent residence is not to be subject to any conditions, with the aim of it being a genuine vehicle for integration into the society of that State (judgment in Ziolkowski and Szeja, EU:C:2011:866, paragraph 41)".*

Therefore, it is essential to consider whether the applicant has acquired the right of permanent residence in terms of article 16 of the above-mentioned directive⁴, a matter which was not considered by the appellant. In such a case the conditions that the respondent shall have sufficient resources for herself and her family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in Malta, do not apply. Such an issue should have been considered by the appellant when processing respondent's application. It transpires that the appellant was given a residence permit with effect from the 15th April, 2010. The application by the respondent was filed on the 17th July 2015 and the decision by the appellant is dated 9th September 2015. Both events

² "All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) **have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;...**"

³ "2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein".

⁴ Recital 17 of the preamble states: "Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. **A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure**".

occurred after five years had elapsed since respondent was granted a residence permit. Furthermore, there is no proof that an expulsion order had been issued against the respondent or that during the said period the respondent was absent for periods stipulated in the Directive (article 16(3) of the Directive). Therefore, from the evidence at hand the respondent acquired the right of permanent residence.

For these reasons the court rejects appellant's appeal, with costs at his charge.

Anthony Ellul.