

O. 58, r. 18(1)

No. 2



SUPREME COURT

Record No:

2019/00038

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. **Title of the Proceedings:** *[As in the Court of first instance]*

CATALIN PECETEL

(SUING THROUGH HIS LEGAL GUARDIAN MARIA PETECCEL)

MARIA PECETEL

APPLICANT/APPELLANTS

-and-

**MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE
ATTORNEY GENERAL**

RESPONDENTS

2. Name of Respondent:

The Minister for Social Protection, Ireland and the Attorney General

3. Application to extend time:

Yes

No

If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.

4. Do you oppose the applicant's application to extend time:

Yes

No

If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.

N/A

5. Do you oppose the applicant's application for leave to appeal:

Yes

No

6. Matter of general public importance:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance.

This section should contain no more than 500 words and the word count should appear at the end of the text.

- (i) The sole issue determined by the High Court and the Court of Appeal is whether the proceedings should be dismissed by reason of the Appellant's failure to exhaust the appeal mechanisms established by Part 10 of the Social Welfare (Consolidation) Act, 2005 as amended (*'the 2005 Act'*). The decision of the Court of Appeal involved the application of well established principles of national law to the particular facts of this case.
- (ii) The issue to be raised in the appeal does not raise a matter of principle but rather seeks to challenge the application of a general principle to the particular facts of the case. The appeal does not meet the threshold established in *BS v. Director of Public Prosecutions* [2017] IESCDET 134 or *Price Waterhouse Cooper (A Firm) v. Quinn Insurance Limited (Under Administration)* [2017] IESC 73
- (iii) In the proposed Grounds of Appeal contained at the Appendix to the Application for Leave to Appeal the Appellant accepts, as a general principle, that the *'default position'* is that a statutory appeal mechanism ought to be utilised but argues that these proceedings fall into one of the exceptions identified in *EMI Records (Ireland) Ltd v. The Data Protection Commissioner* [2013] 2 IR 669 or *McGoldrick v. An Bord Pleanála* [1997] 1 IR497. Thus the Appellant does not dispute the general principles already established by the Superior Courts but, rather, seeks to alter the manner in which they were applied to this case. By definition, an appeal framed in that manner does not meet the threshold established by Article 34.5.3 of the Constitution.
- (iv) The fact that social welfare law generally, including the interaction between national and European Law, has given rise to complex litigation in other cases does not, of itself, mean that the issue in this case raises a matter of general public importance.

- (v) The reliance by the Applicant on the importance of European Law is misplaced in circumstances where the only issue determined by the High Court and the Court of Appeal related to the preliminary issue of whether alternative remedies under the 2005 Act had been exhausted. The necessity to make references to the CJEU in other cases is not relevant to the assessment of whether a matter of general public importance arises in this appeal.
- (vi) That the Appellant may wish to raise issues relating to the interpretation of European Law in the substantive challenge underlying the decision in issue does not, of itself, mean that the issue in this appeal is one of general public importance. This appeal does not raise issues relating to the categorisation of Disability Allowance pursuant to Regulation 883/2004 or the correct date upon which an assessment of the facts and circumstances for determining habitual residence/right to reside should be made. This appeal does not concern the interpretation of social welfare law or the consideration of rights of free movement, citizenship or social welfare law arising from the Treaty on the Functioning of the European Union

Word count - 495

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

- (i) The Appellant has not identified any specific basis upon which he contends that it is in the interests of justice, as defined in *Price Waterhouse Cooper v. Quinn Insurance Limited* [2017] IESC 73, that an appeal be granted.
- (ii) The grounds raised by the Appellant constitute an *ad misericordiam* plea that his personal circumstances should justify the grant of an appeal. Notwithstanding these circumstances, it does not follow that it is in the interests of justice for an appeal to be granted. Further, the legal principles in issue do not constitute an “overly restrictive procedural impediment”. There was no procedural impediment on the Appellant pursuing his statutory remedies under the Social Welfare Consolidation Act 2005. Rather, he elected not to do so in favour of pursuing litigation before the Superior Courts in circumstances where it has been held he was not entitled to do so.
- (iii) The application of well established principles relating to the exhaustion of domestic remedies is not an attempt to avoid engaging in the issues raised in the proceedings. It is in the interests of justice that the statutory scheme established by the Oireachtas for the review of decisions of Deciding Officers be upheld.
- (iv) The fact that an applicant may desire for a particular issue to be litigated before the Superior Courts does not entitle him to bypass a legislative scheme for the review of decisions. The applicant’s desire in this regard is not a factor to be considered in the assessment of whether the interests of justice require an appeal.

- (v) The Decision of the Court of Appeal that there was no error in the manner in which the High Court exercised its discretion necessarily implies that the Court of Appeal did not consider it necessary to exercise discretion in a different manner.

Word count - 300

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

Word count -

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please set out in the Appendix attached hereto the Respondent's grounds of opposition to the Grounds of Appeal set out in the Appellant's Notice of Appeal.

10. Cross Application for Leave:

If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.

If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 500 words and the word count should appear at the end of the text.

N/A

Word count -

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.

12. Priority Hearing:

Yes No

If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

This section should contain no more than 100 words and the word count should appear at the end of the text.

The Respondents note the application for priority made by the Applicant. The Respondents take a neutral position on whether priority should be granted and will abide by any directions made by the Supreme Court

Word count: 34

13. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.

This section should contain no more than 100 words and the word count should appear at the end of the text.

A reference to the CJEU is not necessary to determine the appeal, which raises questions of national law relating to the exhaustion of alternative remedies in advance of an application for Judicial Review. The decisions of the High Court and the Court of Appeal related only to the preliminary question of whether the Appellant has exhausted the alternative remedies contained in the 2005 Act. Neither the High Court nor the Court of Appeal considered the issues of European Law argued by the Appellant. Therefore, a reference to the CJEU does not arise

Word count: 92

Appendix
Grounds of Opposition (and Cross Appeal)

1. **Title of the Proceedings:** *[As in the Court of first instance]*

CATALIN PECETEL

(SUING THROUGH HIS LEGAL GUARDIAN MARIA PETECCEL)

MARIA PECETEL

APPLICANT / APPELLANTS

-and-

**MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE
ATTORNEY GENERAL**

RESPONDENTS

2. **Respondent's grounds for opposing an appeal if leave to appeal is granted:**

Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.

1. By judgment delivered on 4 May 2018 the Learned High Court Judge dismissed the application for Judicial Review brought by the Appellant on the basis that he had failed to exhaust the appeals framework established by the Social Welfare (Consolidation) Act of 2005 (*"the 2005 Act"*). By judgment delivered on 6 February 2019, the Court of Appeal dismissed the appeal brought by the Appellant.
2. The Court of Appeal held that the High Court had correctly exercised its discretion in reaching the conclusion that the Appellant had an adequate alternative remedy to bringing an application for Judicial Review of the impugned decision of the Deciding Officer. In reaching that conclusion, it is

denied that the Court of Appeal erred in law and/or in fact and/or exercised their discretion erroneously/upon an incorrect legal basis and/or perversely and/or unreasonably and/or irrationally or not at all as alleged in the Notice of Appeal or at all. In reaching that conclusion the Court of Appeal acted in accordance with well established principles of law and existing jurisprudence.

3. The Court of Appeal correctly held that Part 10 of the 2005 Act provided an adequate alternative remedy for the Appellant in accordance with which he could challenge the impugned decision of the Deciding Officer. Part 10 of the 2005 Act establishes a comprehensive appeal framework in accordance with which decisions of a Deciding Officer may be reviewed. Section 311 of the 2005 Act enables any person to appeal a decision of a Deciding Officer to an Appeals Officer, with the said appeal being a full *de novo* appeal. Section 318 of the 2005 Act enables the Chief Appeals Officer to revise an appeal decision where it appears that the decision was erroneous by reason of a mistake as to the law or the facts. Section 327 of the 2005 Act provides an appeal to the High Court on any question of law. Section 206 of the 2005 Act permits the Chief Appeals Officer to refer any question which has been referred to the Appeals Officer, other than a question to which section 320 applies, for the decision of the High Court. The different appeal and review mechanisms established by the 2005 Act permit an applicant for a social welfare payment to raise any questions of law or fact that is relevant to the decision taken by the Deciding Officer.

Notwithstanding the existence of this statutory framework, the Appellant elected to seek Judicial Review of the decision of the Deciding Officer and failed to exhaust the statutory remedies available to him.

4. The Respondents plead that the Appellant has not established any basis upon which these proceedings should be considered to be an exception to the general rule (the existence of which is accepted by the Appellant) that statutory appeal mechanisms ought to be exhausted before an application for Judicial Review is made.

5. The fact that the substantive proceedings seek to raise questions of European Law does not entitle the Appellant to bypass the appeals system established by the 2005 Act. It is not accepted that the within proceedings necessitate a reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty of the Functioning of the European Union ('TFEU') or that the possibility of such a reference entitles the Applicant to bypass the appeal system established by the 2005 Act. The question of whether an Appeals Officer or the Chief Appeals Officer is a 'Court or Tribunal' within the meaning of Article 267 TFEU does not arise for determination in the within proceedings.
6. In so far as an Appeals Officer may not have jurisdiction to determine certain questions of law, the appeals framework established by the 2005 Act permits the referral of any question that has been referred to an Appeals Officer for the decision of the High Court pursuant to section 306 of the 2005 Act. Further, section 327 of the 2005 Act permits any person who is dissatisfied with the decision of an Appeals Officer or the revised Decision of the Chief Appeals Officer to appeal to the High Court on any question of law. The alleged limitations on the jurisdiction vested in an Appeals Officer do not preclude questions of law from being raised and determined before the High Court.
7. It is denied that the jurisdiction of the High Court on a statutory appeal is limited in the manner contended by the Appellant. The Court of Appeal correctly held that the Appellant had not cited any authority to support the proposition that the High Court, in a statutory appeal, could not refer a question to the CJEU or grant relief in respect of the categorisation of Disability Allowance for the purposes of Regulation 883/2004. The Court of Appeal correctly took account of the fact that the jurisdiction of the High Court may be wider on a statutory appeal when compared to an application for Judicial Review. The decisions in *Canty v Attorney General* [2011] IESC 27 and *Meagher v. Minister for Social Protection* [2015] 2 IR 633 do not support the contention made by the Applicant that the High Court would not be able to refer any question to the CJEU or consider the validity of the

categorisation of Disability Allowance for the purpose of Regulation 883/2004 in the context of a statutory appeal.

8. The Respondents plead that the substantive issues in the case are not such that they could only be determined by the Court of Justice of the European Union in the manner contended in the Notice of Appeal.
9. The Respondents plead that there is no general principle that complex issues of European Union Law can only be determined by the Superior Courts in the manner alleged in the Notice of Appeal or at all. The Court of Appeal correctly held that there did not exist a general proposition that complex matters relating to the interaction between European and national law are more appropriately dealt with before the Superior Courts rather than the Social Welfare Appeals Office.
10. The contention that the Court of Appeal failed to exercise its own discretion in assessing whether the Appellant's appeal should be upheld is not supported by the judgment of the Court of Appeal. It is clear from the judgment that the Court of Appeal agreed with the conclusions of the High Court and declined to exercise their discretion in a different way.
11. It is denied that the judgment of the Court of Appeal contains two errors of law as alleged in the Notice of Appeal or at all. In so far, as paragraph 20 makes reference to an Appeals Officer referring points of law to the High Court pursuant to section 306 of the 2005 Act, it is clear from paragraph 9 of the judgment that the Court of Appeal understood that the jurisdiction contained in section 306 is vested in the Chief Appeals Officer.
12. The statement at paragraph 10 of the judgment to the effect that '*the appellant did not appeal the revised decision of the Deciding Officer to an Appeals Officer pursuant to s. 311*' is a statement of fact and not of law. The Appellant has never argued that he could not invoke the appeals process established by Part 10 of the 2005 Act. The decision in *McDonagh v. The Chief Appeals Officer* [2018] IEHC 407 is not relevant to the issues in the within appeal.

13. The Court of Appeal is not obligated to address every decision of the High Court cited by either party. Primary reliance was placed on the decision of the High Court (White J) in *Hrisca v Minister for Social*, (unreported, White J., High Court, 16 Feb. 2012) in oral argument by the Appellant. The decision of the High Court (Dunne J) in *Solovastru v. Minister for Social Protection* [2011] IEHC 532 does not address the availability of alternative remedies and was not required to be specifically addressed by the Court of Appeal. The plea that it was 'ignored' by the Court of Appeal is misconceived.

14. The only issue determined by both the High Court and the Court of Appeal related to the preliminary question of whether the Appellant had exhausted his alternative remedies contained in the 2005 Act. Therefore, the only appeal that is before this Honourable Court relates to that question. Notwithstanding the fact that the substantive issues were argued before the High Court, no decision was reached by the High Court. The appeal filed with the Court of Appeal made a similar application for that court to consider the substantive issues. The Court of Appeal only considered the preliminary issue and, in light of their findings the question of the consideration of the substantive issues did not arise.

15. An appellate court ought only consider a question of law that has not been decided by the Court below in exceptional circumstances. The Respondents plead that the fact that arguments were made on the substantive issues before the High Court is not an exceptional circumstance that would justify this Honourable Court hearing an appeal on the substantive issue in the proceedings. The Respondents note that the Court of Appeal did not hear argument on the substantive issues but confined itself to the appeal on the preliminary issue. The Respondents plead that the Appellant's medical circumstances are not an exceptional circumstance that would justify departure from the ordinary rules. There is no exceptional circumstance that would justify this Honourable Court hearing and determining the substantive issues raised in the within proceedings.

3. Additional grounds on which the decision should be affirmed:

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

The Respondents do not rely on grounds other than those pleaded at Section 2 above.

4. Cross Appeal

Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.

N/A

5. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

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