



FLAC Concerns in relation to the Application of the Habitual Residence Requirement

The Habitual Residence Condition (HRC) which was initially introduced to curb an anticipated influx of ‘welfare tourists’ from the new EU accession countries, now has an increasingly negative impact on people whose residency status is not yet determined including those living in direct provision. People living in the direct provision system had previously been entitled to certain social assistance payments if they met the other qualifying conditions.

New Guidelines for Deciding Officers on the Determination of Habitual Residence

The Department of Social and Family Affairs (DSFA) has recently published new “*Guidelines for Deciding Officers on the Determination of Habitual Residence*” which explicitly exclude a number of categories of people including asylum seekers or persons living in direct provision from satisfying the HRC. The criteria for determining whether a person is habitually resident are contained in Section 246 of the Social Welfare Consolidation Act 2005, as amended by Section 30 of the Social Welfare and Pensions Act 2007. The five criteria have been taken from a decision of the European Court of Justice *Case C 90/97 Swaddling v UK*, in which habitual residence was based on five factors:

- a. “the length and continuity of residence in the State or in any other particular country;
- b. the length and purpose of any absence from the State;
- c. the nature and pattern of the person’s employment;
- d. the person’s main centre of interest, and
- e. the future intentions of the person concerned as they appear from all the circumstances.”

FLAC contends that the recently issued guidelines are *ultra vires* the powers of the Department as there is no specific provision in the legislation to exclude asylum seekers or those whose residency status is not yet determined. The Deciding Officer should make a determination based on the individual circumstances of each case and base their decision on the factors above which are set out in the legislation. The authors of the Guidelines recognise that the document is merely intended to provide information and direct the Deciding Officer and it is expressly stated that the document “does not purport to be a legal interpretation of the relevant legislation” however it does refer to a number of legal issues.

To defend its position on its interpretation of a “right to reside” (contained in Section 5.1 of the Guidelines) the DSFA is relying on a Supreme Court decision *Goncsescu and Ors v Minister for Justice, Equality and Law Reform* decided in July 2003. This decision

was made prior to the introduction of the HRC therefore FLAC suggests that if it was considered an appropriate legal authority on this issue it would have been taken into consideration when the Oireachtas first enacted or has since amended the relevant legislation. The *Goncescu* case is not a case relating to social welfare entitlements and although it discusses the term “residence” it does not discuss the term “habitual residence” which is the issue at question. In the aforementioned case, the appellants had exhausted the asylum system and sought to convert their status to a completely different category under certain EU agreements however deportation orders had been issued against them therefore they were no longer entitled to remain in the State. FLAC is of the opinion that the judgment of the Supreme Court in the *Goncescu* case is strictly speaking *obiter* as it refers to completely different circumstances whereby the appellants could no longer be deemed to be part of the asylum process.

Recent Casework and Consistency in Decision Making

FLAC is concerned at the length of time it takes an applicant to get a first instance decision from the Department and then if refused, to get an oral hearing for appeal. The Social Welfare Appeals Office (SWAO) has limited resources and is dependent on the various sections within the Department to transfer an appellant’s file in order to process an appeal and set a date for oral hearing if required so it is paramount that this is done within a reasonable period of time. There appears that in some of the schemes there is a backlog in processing claims therefore some applicants may be waiting for a substantial period for an initial decision which they then have to appeal. This prolongs the entire process and creates a great deal of stress while the person continues to wait without receiving a payment to which they may be entitled.

In a number of recent appeals on the issue of the HRC before the SWAO in which FLAC and other organisations have been involved, representatives of the Department have argued that a decision in a social welfare appeal can not set a precedent for other appeals. This seems to be in response to a number of positive decisions of the SWAO in which asylum seekers were granted a payment on appeal. In particular a positive decision taken by one Appeals Officer which cited a previous decision of the Chief Appeals Officer (CAO) has been relied upon in a number of cases. The original decision of the CAO criticised the long delays in the asylum process and stated that individuals should not be penalised for circumstances beyond their control.

FLAC maintains that it is a fundamental principle of administrative law that there should be consistency in decision-making. A precedent decision establishes a principle or practice in relation to a particular issue. This can then be applied to other cases, but whether it applies or not depends on the facts of the individual case. To ignore previous decisions on the overall point at issue in a case would lead to inconsistency in decision-making which would be unfair to applicants and in breach of their right to a fair hearing and of the principle that like applications must be treated alike. In order for appellants or advocates to be aware of any noteworthy decisions, the SWAO should publish a comprehensive and anonymised report of decisions to ensure transparency and consistency in decision-making. The fact that the Department in this instance argues that each case should be considered on its merits, seems to be contradictory to the current policy of excluding all persons living in direct provision from qualifying for any social assistance payment.

FLAC is also concerned at recent developments in social welfare appeals relating to the HRC in which the Appeals Officer has found in favour of the appellant but the Department has refused to make payment. Instead the Department has asked the Chief Appeals Officer to review the decision but has not implemented the order for payment in the interim. FLAC is not aware of any legislative authority for this policy and has requested the Department to provide details of any such justification provided for in the legislation. Furthermore there have been cases where the appellant has not been officially notified that the Department are not making payment and the person involved has not been given any reason for the failure to pay.

Developments in Cases relying on the Family Unit Concept

It has recently come to the attention of FLAC that a number of children are being denied Child Benefit due to the fact that their parents do not cohabit. This is happening despite the fact that their father satisfies the HRC. While the Department acknowledges that it changed its administrative procedures in 2005 to include claims for Child Benefit made on the basis that the father of a child has residency status where the mother does not, it asserts that this arrangement only applies in circumstances where the family unit comprises of a father, mother and child(ren) living together in one household. There is to our knowledge, no requirement that the parents of a child have to live together in order for the father's residency to establish a claim for Child Benefit.

Furthermore, Article 8 of the European Convention on Human Rights (ECHR) provides for the right to respect for family and private life. There is no obligation that the parents of a child are married and/or live together in order to constitute a family unit. In *Boughanemi v France* (22 EHRR 228 1996) the European Court of Human Rights stated:

“ The concept of family life on which Article 8 is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate”

In another judgment *Keegan v. Ireland* (18 EHRR 342 1994) the Court ruled that there was a breach of Article 8 as family life can exist even where the parents are no longer cohabiting.

The ECHR has been incorporated into domestic law and the ECHR Act, 2003 requires that “ ...every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions” .

FLAC believes that the parent with whom the child is living (which in these cases is the mother who does not have residency status) should continue to be the qualified adult for the purposes of receiving Child Benefit but that she should be allowed to rely on the father's status in order to qualify for the payment.

Summary of Issues to be raised with the DSFA

- Each decision made on a person's ability to satisfy the HRC should be made solely within the terms set out in the relevant legislation and not any additional criteria which do not have any statutory basis.

- The Department should not rely on the *Goncescu* case as it is not directly related to social welfare entitlements or habitual residence.
- There is a need to ensure consistency in decision-making by recognising precedents set in social welfare appeals.
- All decisions at first instance should be given due consideration and should be made within a reasonable amount of time. If the applicant appeals the decision then the Department should cooperate fully with the SWAO in order to enable the Office to set a date for appeal as soon as possible.
- A comprehensive version of the decisions of the SWAO should be published, with all personal details of the case removed, so that appellants and first instance applicants can know what criteria they must meet and to ensure transparency, consistency and confidence in the process.
- The Department should keep applicants and appellants informed of any developments in their applications, appeals or if there are any issues surrounding payment.
- In the case of the Department seeking a review of a decision of an Appeals Officer, the order for payment should be implemented until the Chief Appeals Officer reaches a decision.
- For the purposes of Child Benefit, the Department should recognise the rights of the family under Article 8 of the ECHR by widening the “ family unit concept” to allow parents who do not cohabit to qualify for the payment where one parent satisfies the HRC.