

**Presentation on the Habitual Residence Condition by FLAC to the Joint Committee
on Social & Family Affairs - 06 February 2008**

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1. About FLAC

FLAC (Free Legal Advice Centres) is an independent human rights organisation dedicated to the realisation of equal access to justice for all. We campaign through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion. In this way our work involves us in social welfare law reform and working for those vulnerable and disadvantaged persons who are affected by the inequalities that arise in the practice of the law in this area and who as a result are socially and economically excluded from society.

2. Background Information on the Habitual Residence Condition

On 01 May 2004, on the accession of the ten new countries to the European Union (EU) the Government in the Social Welfare (Miscellaneous Provisions) Act 2004, introduced the Habitual Residence Condition (HRC) as an additional criterion for qualifying for socially assisted payments and Child Benefit. Under the provision one must prove, regardless of nationality, that they are ‘habitually resident in the state at the time of making an application’ for a social assistance payment or Child Benefit.

The Act allows the HRC to be applied to Unemployment Assistance, Old Age (Non-Contributory) and Blind Pensions, Widow(er)’s and Orphan’s (Non-Contributory) Pensions, One-parent Family Payment, Carer’s Allowance, Disability Allowance, Supplementary Welfare Allowance and Child Benefit. The measure was introduced in

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order to curb what the Government anticipated as ‘welfare tourism’ from the new member countries.

2.1 The Criteria

In section 17 of the 2004 Act it states that in order for someone to be habitually resident they must be able to demonstrate 2 years habitual residence in Ireland or the Common Travel Area.² This was also reiterated in section 246 of the Social Welfare Consolidation Act, 2005 which states:

*“it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date”.*³

The Department of Social and Family Affairs (DSFA) explained in its Internal Review of the Operation of the HRC in July 2006 that if a person has been present in the State for less than a 2 year period it shall be presumed that s/he is not habitually resident, and the onus will be on him/her to prove otherwise. The review further outlines that if s/he has been present for 2 years or more, s/he will still be required to satisfy the general requirement relating to habitual residence.

The factors used by the DSFA to determine habitual residence were taken from a case decided on by the European Court of Justice.⁴ This was referred to by the then Minister for Social & Family Affairs, Mary Coughlan TD in the Dáil⁵ and is also referred to in the Review of the HRC by the DSFA.⁶ Although no single factor is supposed to be the most

² Section 17, Social Welfare (Miscellaneous Provisions) Act, 2004

³ Section 246, Social Welfare Consolidation Act, 2005

⁴ *Robin Swaddling v. Adjudication Officer* (C-90/97), judgment 25/02/99

⁵ See Oireachtas Debates at Dáil Éireann - Volume 582 - 10 March, 2004, available at <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20040310.xml&Node=H9-1#H9-1>

⁶ P5, The Operation of the HRC, available at <http://www.welfare.ie/publications/hrcreview06.pdf>

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important,⁷ in practice it appears that many Deciding Officers now concentrate on the “centre of interest” criterion under which applicants need to prove that their centre of interest is in Ireland in order to be habitually resident. The criterion was put on a statutory basis in the Social Welfare and Pensions Act 2007. Section 30, amending the 2005 Act states that:

“Notwithstanding the presumption in subsection (1)”, namely the presumption that a person must be resident in Ireland or the Common Travel Area for a continuous period of 2 years,

“a deciding officer of the Executive, when determining whether a person is habitually resident in the State, shall take into consideration all the circumstances of the case including, in particular, the following:

- (a) length and continuity of residence in the State or in any other particular country;*
- (b) length and purpose of any absence from the State;*
- (c) nature and pattern of the person’s employment;*
- (d) the person’s main centre of interest;*
- (e) future intentions of the person concerned as they appear from all the circumstances.”⁸*

This means that the two years required residency should not be relied upon to decide an applicant’s habitual residence.

2.2 European Code of Social Security

Ireland has also ratified the European Code of Social Security, a legal instrument of the Council of Europe. The Code also prevents the State from specifying a fixed period of time to establish habitual residence. Indeed the Government has stated in its 32nd Report

⁷ P5, Habitual Residence Condition, SW108, available at <http://www.welfare.ie/publications/sw108.pdf>

⁸ Section 30, Social Welfare and Pensions Act, 2007

(covering the period 2004-5) to the Council of Europe regarding its compliance with the European Code of Social Security that:

“Ireland is aware that the relevant jurisprudence of the European Court of Justice precludes reliance on any specific duration of residence (e.g. two years) for the purposes of establishing habitual residence and has ensured that no such specific period is the determining factor in any HRC decision”.⁹

Although the European Code of Social Security is limited to the employees or ordinary residents of those States in the Council of Europe who have ratified the Code, in practice the change has also been extended to all applicants assessed under the HRC.

2.3 Mechanics of assessment of the HRC

Whether or not an applicant is ‘habitually resident’ is decided on a case by case basis by a Deciding Officer in the relevant unit. An applicant can ask a Deciding Officer to review a decision if he/she is not happy with it and can then appeal to the Social Welfare Appeals Office (SWAO) if he/she is unhappy with the outcome of the review. The SWAO operates independently of the DSFA.

3. EU Workers

Within a year of its introduction, concerns were raised by the European Commission regarding the HRC as it applied to EU workers, particularly those from the new member States. The Commission issued Ireland with a Letter of Formal Notice on 22 December 2004 noting that the application of the HRC to EU workers was an indirect form of discrimination between Irish and EU citizens on the grounds of nationality as workers of non Irish nationality would be more likely to be affected by the Condition.

⁹See <https://wcd.coe.int/ViewDoc.jsp?id=1035109&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

They also noted that the two year rule was an obstacle to the freedom of movement within the EU. As a result of this input by the European Commission the HRC should not now apply to EU workers. In addition all EU workers with children are entitled to and should receive Child Benefit as it is considered a family payment under EU law. This also applies to EEA workers and Swiss nationals, who have the same rights in this regard as EU workers. However the HRC continues to be applied to those from outside the EEA or those EEA citizens who have not worked in Ireland and therefore have not paid any PRSI contributions.

3.1 EU Workers and Child Benefit

It is important to note that EU workers, working in Ireland are entitled to receive Child Benefit for their children living outside Ireland just in the same way that Irish people working in an EU member State are entitled to receive Child Benefit for their children living in Ireland and not with them. This is because Child Benefit is considered a family payment under EU law and as such this is a separate issue from the HRC.

3.2 EU Workers from the new member States

As already mentioned the HRC was introduced to curb what the government envisaged as ‘welfare tourism’ from the new EU countries, i.e. people migrating to Ireland just for social welfare purposes. However, according to the Migrant Rights Centre of Ireland (MRCI) report into the HRC and its effect on migrant workers only 3.4% of migrant workers coming to Ireland, from 1 May 2004 to 31 July 2005 applied for social assistance or Child Benefit and had their application determined by the HRC Unit.¹⁰ Thus, the Government’s original reason for introducing the HRC has been proved redundant as those people who migrated to Ireland from the new member states came here to work and the vast majority have done so.

4. The Effects of the HRC

¹⁰ Available at

http://www.mrci.ie/publications/documents/SocialProtectionDenied_ExecutiveSummary.pdf

The HRC has had a detrimental effect on certain already vulnerable groups in Irish society, particularly asylum seekers and migrant workers from both EEA and non-EEA countries. While this may not have been the intention of those who drafted the legislation this has turned out to be the reality. Asylum seekers and those seeking humanitarian leave to remain in the Direct Provision system are unable to access any social welfare payments, including Child Benefit until their legal status has been determined, which can take several years in some cases. Since the introduction of the HRC there seems to be an across the board policy to refuse applications for a social welfare payment to those in the Direct Provision system.

4.1 Inconsistencies with the HRC

There have also been inconsistencies in the application of the HRC by Deciding Officers, particularly in relation to the two year rule which have led to incorrect decisions being made. It seems that despite the change in the legislation in the Social Welfare and Pensions Act 2007 that the two year rule should no longer be a deciding factor, the rule in some cases is still being applied. FLAC is aware from both individuals and other organisations working in the area that this is the case.

Case Study 1

A non-EEA woman living in Ireland for about two years with a sick child was denied the carer's allowance even though she satisfied the HRC for other benefits which she was receiving.

In addition there have been cases where returning Irish emigrants have been unable to get social welfare payments due to the HRC.

Case Study 2

A returning Irish emigrant who came back to Ireland to care for her elderly mother was denied payments because she was not considered habitually resident. She was refused payment because she has not permanently re-established herself in Ireland, despite the fact that she is saving the State a substantial amount of money by returning to care for her mother.

These examples show that in certain cases an insufficient, harsh interpretation of the HRC is made, creating more hardship for people already struggling to survive in difficult circumstances. They also demonstrate a lack of consistency on the application of the HRC which in turn leads to confusion among applicants and incorrect decisions being made on initial application. As such, there seems to be insufficient understanding on up to date developments of the HRC in the relevant Units.

The Chief Appeals Officer (CAO) of the SWAO made reference to the inconsistencies in his Annual Report for 2006:

“During 2006 concerns were again expressed to the Decisions Advisory Office about the adequacy of the safeguards adopted by the Department to ensure consistency in the decision making process relative to the HRC. Appeals Officers have expressed concern that the roll out of the decision making function to Deciding Officers located in the Department’s Local Offices is likely to increase the risk of inconsistent decision making”¹¹

4.2 Delays in the Appeals Process

There are considerable delays in the processing of appeals in the SWAO. There are cases where people have been waiting up to one year for their appeals to be heard, some of whom have already waited a considerable amount of time for their initial application to be assessed. It is extremely unfair that people are waiting for such long periods of time before they get the payment(s) they are entitled to, when an incorrect decision has been made at first instance in the relevant units. These delays leave the people concerned and their children in extremely vulnerable financial situations.

4.3 Delays in the Asylum Process

¹¹ page 14, SWAO Annual Report, 2006 available at <http://www.socialwelfareappeals.ie/pubs/annreps/annrep06.pdf>

It is also extremely unfair that those waiting for a decision on their legal status are not deemed ‘habitually resident’ until their status has been determined, i.e. those applying for asylum or humanitarian leave to remain in the Direct Provision system. They can be waiting for up to 5 years before such decisions are made.

The CAO has also been critical of the refusal of the DSFA to grant payments to asylum seekers who are waiting for a decision on their status. In one recent decision (in accordance with section 318 of the Social Welfare Consolidation Act 2005), he states,

“It seems to me, therefore, that the failure of the State to provide for the expeditious hearing of asylum appeals, thereby giving rise to the artificial status of entitled to remain pending appeal, should not be used as a reason for penalising appellants who can exercise no control over the timescale within which their artificial status will be finally determined.”

This passage was quoted in a case which was brought to the attention of FLAC where the SWAO deemed the applicant habitually resident to receive Child Benefit due to the individual circumstances of the case which proved her centre of interest was in Ireland. She has been in the asylum process for a number of years and her family also resides here. There are many other people in similar circumstances in the asylum process who should also be receiving Child Benefit.

5. The HRC and Child Benefit

Prior to the implementation of the Social Welfare (Miscellaneous Provisions) Act, 2004, Child Benefit was universal and was paid to the designated carer of each child in the state regardless of income or immigration status. FLAC has had a special focus on the restoration of Child Benefit as a universal payment.

Child Benefit was and is seen by the State as a crucial element in the fight against child poverty. The National Children's Strategy 2000-2010 states that

*"Children will be provided with the financial supports necessary to eliminate child poverty"*¹²

The children affected by the HRC in this way are a relatively small but significant group. While there are no accurate figures available FLAC estimates 3,000 is a reliable one. The majority of children affected by the HRC are the children of asylum seekers or those seeking humanitarian leave to remain, of which there are 2064 under the age of 18 currently in Direct Provision (as at 28/10/2007) according to statistics from the Reception and Integration Agency.¹³ A small number of these children are already in receipt of Child Benefit however the majority of those in Direct Provision are refused the payment.

The main category of other children effected are the children of migrant workers. As the numbers are relatively low, the cost of restoring the payment to its former universal status would not be of considerable detriment to the State given the numbers involved, but would make an enormous difference to the everyday lives of these children.

5.1 International Human Rights Law

Ireland has been party to the UN Convention on the Rights of the Child (CRC) since 1992 and FLAC has concerns that the denial of Child Benefit to some children resident in the State is inconsistent with the provisions of the Convention.

The CRC requires in article 2.1 that

¹² Objective G of The National Children's Strategy, page 63.
<http://www.omc.gov.ie/documents/Aboutus/stratfullenglishversion.pdf>

¹³ See http://www.ria.gov.ie/statistics/2007_Statistics

“States Parties respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”¹⁴

Article 3.1 of the Convention further states that in

“all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.¹⁵

Finally the right of every child to “benefit from social security” is protected under Article 26 of the Convention which states

“States Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.”¹⁶

In a recent Dáil debate the Minister for Social and Family Affairs, Martin Cullen TD stated that the consistency of the HRC with the CRC was fully examined prior to the introduction of the condition. He stated:

“Prior to the introduction of the habitual residence condition in 2004, full examination was given by my Department to the question of whether it was

consistent with a number of international conventions to which Ireland was party, including the UN Convention on the Rights of the Child.”¹⁷

¹⁴ Article 2(1), UN Convention on the Rights of the Child, hereinafter CRC, available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

¹⁵ Article 3(1), CRC

¹⁶ Article 26(1), CRC

However, FLAC believes that there is still inconsistency between the HRC and fundamental Children's Rights. For example

- How can the HRC be compliant with article 2 of the CRC, which prohibits discrimination on the basis of status when decisions on Child Benefit applications are made based on children's and their parent's legal status?
- How are the best interests of all children in this jurisdiction being realised when some children who are already in vulnerable situations are denied Child Benefit?
- In addition, how do children who are refused Child Benefit, benefit from social security as required under article 26?

We in FLAC believe that further steps need to be taken by the Government in order for them to be fully compliant with the CRC.

The CAO in the SWAO also expressed his concern about the compatibility of the HRC with the CRC in his annual report in 2004:

"There are particular concerns in relation to the application of the HRC to the Child Benefit Scheme – including a view that Child Benefit should have been excluded from the remit of the HRC altogether..... there is a concern that the HRC provision may be in breach of the United Nations Convention on the Rights of the Child – to which Ireland is a signatory".¹⁸

5.2 Government Policy

In addition to this inconsistency with International Human Rights Law the Government is also at odds with its own policies and strategies regarding child poverty by denying Child Benefit to certain children. Child Benefit has always been used by the State as an

¹⁷ See Oireachtas Debates at Dáil Éireann - Volume 642 – 04 December, 2007, available at <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20071204.xml&Node=H3-1#H3-1>

¹⁸ page 10, SWAO Annual Report, 2004 available at <http://www.socialwelfareappeals.ie/pubs/annreps/annrep04.pdf>

important tool and positive initiative in combating child poverty. In the current National Children's Strategy 2000-2010, the Government again acknowledges this and states that

*“Child benefit is an important means of reducing child poverty and supporting the welfare of children, given its universal coverage and its neutral relationship to both the employment incentive and decisions regarding family formation. Significant increases have been allocated directly to support and maintain children in Ireland. Child Benefit will continue to be increased over the lifetime of the Strategy”.*¹⁹

Furthermore in the Social Partnership document “Towards 2016” the Government states that

*“very significant additional resources are being made available in 2006 to help tackle child and family poverty”*²⁰

despite the fact that parents who do not satisfy the HRC are being refused Child Benefit and other relevant payments which would alleviate such child and family poverty. It is thus FLAC's view that the Government needs to re-examine the imposition of the HRC on Child Benefit in light of both International Human Rights Law and its own child poverty policies.

5.3 Inconsistent decisions

Like the other HRC cases mentioned there have also been inconsistencies in Child Benefit decisions in the Child Benefit unit. Inadequate communication on new developments in the HRC has led to incorrect decisions being made. For example, initially only the status of the mother was examined when assessing Child Benefit

¹⁹ The National Children's Strategy, page 63.

<http://www.omc.gov.ie/documents/Aboutus/stratfullenglishversion.pdf>

²⁰ Towards 2016: Ten Year Framework Social Partnership Agreement 2006 – 2015, page 46.

http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf

applications. However by pointing to the needs and rights of families FLAC established the concept of the family unit whereby the father of a child who satisfies the HRC can receive Child Benefit on behalf of his child/children even if his partner does not satisfy it. However FLAC came across a case where such an applicant was refused Child Benefit.

Case Study 3

The Child Benefit of an EU woman was stopped when she separated from her violent partner, as she was deemed not to satisfy the HRC even though her ex partner, who was also an EU national, did.

The decision in this case is not only inconsistent with the HRC policy but also very dangerous for the woman involved. These instances simply cannot continue to occur as they leave women and children at an extremely high risk of poverty and destitution.

5.4 The Effects of the refusal of Child Benefit on Children

In practice the denial of Child Benefit regarding HRC has had a hugely detrimental effect on children. The lack of Child Benefit means parents cannot meet their children's most basic necessities. These include suitable food and dietary supplements. Everyday items such as over-the-counter medicines and simple playthings are often way beyond the means of the parents who do not receive the payment. In addition, children's schooling is affected. Many parents simply cannot find the voluntary contributions so regularly requested by schools, and cannot even afford the books or extra curricular activities that are so essential for the integration and development of their children.

6. Recommendations

1. Child Benefit should be removed from the list of payments affected by the HRC and restored to its universal status. The Government then will be both implementing its own policies and will also be consistent with International Human Rights Law.
2. The determination procedures of the HRC should be streamlined to make it a fair and transparent system, Human Rights compliant and put it in line with the Government's own policies.

3. Provision should be made for adequate training and regular briefing sessions in the ongoing developments regarding the HRC, to ensure that there is a consistent and fair application of the Condition.
4. Up to date, clear guidelines on the HRC should be widely circulated to all those working in the DSFA, not just those directly involved in the decision making process but to all those giving information to the public. This could also improve the quality of decisions at first instance. Furthermore easy to understand guidelines should be published in leaflet form, in different languages and distributed to all DSFA Offices so all members of the public have easy access to them.
5. Sufficient resources should be put into the SWAO to clear the backlog of cases in that office and allow the appeals process to be completed as swiftly as possible to alleviate unnecessary financial burden.
6. The Chief Appeals Officer of the SWAO should publish a greater number of cases than are published at the moment in order to achieve greater transparency in the system.

Glossary of Acronyms

CAO	Chief Appeals Officer
CRC	United Nations Convention on the Rights of the Child
DSFA	Department of Social & Family Affairs
EEA	European Economic Area
EU	European Union
FLAC	Free Legal Advice Centres
HRC	Habitual Residence Condition
MRCI	Migrant Rights Centre of Ireland
SWAO	Social Welfare Appeals Office

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