

# **FLAC Submission on the Habitual Residence Condition to the Joint Oireachtas Committee on Social Protection**

**FLAC**

**October 2010**

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For **more information**, contact us at

FLAC,

13 Lower Dorset Street, Dublin 1

T: 1890 350250 / 01 887 3600 | E: [info@flac.ie](mailto:info@flac.ie) | W: [www.flac.ie](http://www.flac.ie)

## Introduction

FLAC has produced a guide to the Habitual Residence Condition (HRC) to explain and clarify the operation of the Condition in Irish social welfare law. Since the introduction of the HRC in May 2004, there have been a number of amendments to the social welfare legislation which have led to the misunderstanding and misapplication of this provision by decision-makers in certain instances. FLAC's *Guide to the Habitual Residence Condition* is an information document aimed at the public, organisations working with social welfare claimants applying for payments subject to HRC as well as more generally policy-makers, politicians and the media. In compiling the document we referred to the most common queries received on our telephone information line, by email, through referrals from other organisations and in our centres.

The *Guide* is based on the operational guidelines issued by the Department of Social Protection (DSP) to its Deciding Officers and Community Welfare Officers and supplemented by FLAC's own knowledge of how the Condition is applied in practice. However, the *Guide* will only work in practice if the HRC is administered properly.

### **1. Misapplication of the Habitual Residence Condition and Unfair Processes**

#### **1.1 Problems with Applications and Written Decisions**

The perception of some of the callers to FLAC's information line is that they have been discouraged from actually applying for a payment as they are told they will not satisfy HRC without a proper assessment carried out. A person is entitled to apply for a payment, have the application considered and receive a written response. Individuals and organisations have informed FLAC that people are dissuaded from applying in the first place or are not given a refusal in writing with reasons given for refusal. This practice goes against the Department of Social Protection's own *Operational Guidelines on Decision-Making and Natural Justice*<sup>1</sup> as it is contrary to natural justice not to issue a written decision which is necessary in order to appeal a refusal.

The Department's own guidelines to its decision-makers clearly state that a decision "should be recorded in writing" and must be:

- *clearly written;*
- *properly signed (full signature (initials not sufficient) and name typed/written in capitals underneath);*
- *and dated.*

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<sup>1</sup> Available at <http://www.welfare.ie/EN/OperationalGuidelines/Pages/decnatj.aspx#record>

The failure to accept applications and to record decisions will have an impact on the accuracy of any statistics collated on the number of applications received and refused on HRC grounds. FLAC is concerned that the actual number of refusals cannot be ascertained as there are individuals who will not access the appropriate information or assistance and are therefore not aware of their entitlement to make an appeal.

## **1.2 Inconsistent Decision-Making at First Instance and Need for Adequate Training for Decision-Makers**

In the current economic climate where applications for social welfare have increased dramatically, Deciding Officers and Community Welfare Officers are under immense pressure to cope with the number of applications received. The Habitual Residence Condition is a complex legal issue which has a number of dimensions to it and has been subject to a number of amendments since its introduction in 2004. This has led to confusion amongst decision-makers and to wrong decisions being made at first instance as evidenced by the increase in the number of decisions on HRC referred to the Social Welfare Appeals Office. According to a response to a Parliamentary Question in September 2010, Minister Ó Cuiv stated that at the end of September 2010, 2562 decisions on HRC had been appealed of which almost 19 per cent (478) were allowed in full or in part<sup>2</sup>. Some of the more common mistakes or misconceptions made by decision-makers are discussed in the remainder of this submission and include the application of a two-year rule and lack of proper consideration of the five factors laid down in the social welfare legislation.

Given the current delays in the appeals system which mean that on average a person may be waiting 22 weeks for a decision on his or her appeal, individuals may be left in a very vulnerable situation especially where it may not be possible to access a Supplementary Welfare Allowance payment in the interim.

## **1.3 European Convention on Human Rights Act 2003**

Ireland is a signatory to the European Convention on Human Rights (ECHR) which was incorporated into Irish law in 2003. Section 3(1) of the ECHR Act 2003 obliges “every organ of the State” to “perform its functions in a manner compatible with the State’s obligations under the Convention provisions”. An “organ of the State” includes a tribunal or any other body... which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised” and thus includes officials of both the Department of Social Protection and the Health Service Executive.

Article 6 of the ECHR provides for fair procedures which means that the appropriate steps have to be followed in accepting and assessing applications within a reasonable period of time. In relation to social welfare assistance the DSP and HSE have a duty of care to ensure that a person is not subjected to inhuman or degrading treatment (Article 3) which includes destitution. This has been the subject of

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<sup>2</sup> Available at <http://www.kildarestreet.com/wrans/?id=2010-09-29.4837.0&s=%22habitual+residence%22+section%3Awrans#g4841.0.r>

litigation in Britain<sup>3</sup> and while the threshold to deem treatment as inhuman or degrading is set quite high, a person who is left homeless without access to any resources may be considered to have been subjected to this treatment.

The Convention also prohibits discrimination under Article 14 on the basis of “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. This prohibition on discrimination applies to all administrative decisions which also have to be made with reference to the ECHR.

## 2. The Rebuttable Presumption

The Habitual Residence Condition was first introduced in Section 246 of the Social Welfare (Consolidation) Act 2005 otherwise known as the Principal Act which states:

**246.—**(1) For the purpose of each provision of this Act specified in *subsection (3)*, 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.

The section contains a ‘rebuttable presumption’ or in other words the onus is on the applicant to prove that he or she is habitually resident if he or she has not been in the State or Common Travel Area for two years or more.

However, the Principal Act has since been amended by s. 30 of the Social Welfare and Pensions Act 2007 to include the five Swaddling criteria to determine habitual residence as outlined in detail in FLAC’s *Guide to the Habitual Residence Condition*. It was also amended by s. 15 of the Social Welfare (No. 2) Act 2009 which introduced a ‘right to reside’ and excluded a certain groups from being able to satisfy the HRC including people in the asylum, leave to remain or subsidiary protection processes.

### 2.1 The Two-Year Rule

As outlined in FLAC’s *Guide to the Habitual Residence Condition*, European Union case-law has made it clear that a State cannot specify a fixed period of time to determine habitual residence. Instead the social welfare legislation was amended in 2007 to include five factors from a European Court of Justice decision called *Swaddling*<sup>4</sup> which should now be used to assess a person’s habitual residence.

Furthermore Ireland is a signatory to the European Code of Social Security. In relation to the two-year habitual residence requirement, in its 32<sup>nd</sup> Report (*covering the period 2004-5*) to the Council of Europe on Ireland’s compliance with the European Code of Social Security, the Government stated at page 9:

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<sup>3</sup> *R. v Secretary of State for the Home Department, Ex p. Adam, Limbuela and Others* [2006] 1 AC 396 (HL).

<sup>4</sup> *Case C-90/97, Robin Swaddling v Adjudication Officer*

*“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”.*

While this provision is obsolete the remaining reference to a two-year rule in the Principal Act causes confusion for both applicants and decision-makers as it is not applicable to any person making an application for a payment and should therefore be removed.

## **2.2 The Common Travel Area**

Section 246(1) also contains a reference to the Common Travel Area which comprises the Republic of Ireland, Northern Ireland, England, Scotland, Wales, the Channel Islands and the Isle of Man. According to the Department of Social Protection’s own operational guidelines in relation to the factor pertaining to the length of residence in a particular State:

*...for the purpose of this factor periods of residence within the CTA immediately prior to moving to live in Ireland should be treated the same as periods of residence in Ireland. This arrangement applies only to UK citizens and EEA nationals who had retained their centre of interest within the Common Travel Area during these periods.*

Thus, the fact that a person has moved to the State from another part of the CTA should be taken into account and assessed under the first HRC criterion along with the other four factors. Despite the guidance published by the DSP, in practice FLAC has encountered people who have been refused a payment as their habitual residence was deemed to be in another part of the CTA from which they had moved without full consideration given to the other factors and the applicant’s individual circumstances. This includes returning Irish nationals as outlined in Crosscare’s submission to this Committee.

The failure of decision-makers to give proper consideration to periods of residence in the Common Travel Area is having a particularly negative impact on individuals who move from Northern Ireland to the Republic and Travellers who traditionally move within both jurisdictions.

## **3. Groups Adversely Affected by the Habitual Residence Condition**

The rationale for the introduction of the HRC was to prevent welfare tourism from nationals of the ten States acceding to the EU in May 2004. However, since the European Commission issued infringement proceedings against the State as the application of the Condition to EU migrant workers was found to inhibit freedom of movement, the groups who have been particularly affected by the HRC are not those who were the initial target of the Condition. This is an invidious Condition which creates inequity between the general population and already vulnerable groups applying for social welfare assistance.

### **3.1 Asylum Seekers (Protection Applicants)**

In a series of cases taken by FLAC in 2009, the former Chief Social Welfare Appeals Officer held that the social welfare legislation did not contain any blanket exclusion of asylum seekers or other persons within the leave to remain or subsidiary protection processes. The decisions stated that each person's individual circumstances should be taken into account when assessing his or her habitual residence.

Following the issuing of this final set of decisions in December 2009, the Social Welfare and Pensions (No. 2) Act 2009 was guillotined through the Dáil without adequate time for debate which seeks to exclude all individuals in the asylum, leave to remain or subsidiary protection processes from satisfying the Habitual Residence Condition.

The Chief Appeals Officer's approach outlined a straightforward and consistent way to deal with social welfare applications that would not entitle persons who are here for quite short periods or who have no intention of remaining here to access full social welfare benefits but would not exclude a whole category of people who have been in the State for lengthy periods. Instead new applicants who are still awaiting a decision on their immigration status are now refused on the basis of the Habitual Residence Condition no matter how long they have been living in Ireland which can often be for a period of years<sup>5</sup>.

Prior to the introduction of the HRC in 2004, Child Benefit was a universal payment paid to the parents of all children living in Ireland. Due to the Department's application of the HRC to people within the asylum or protection process, an inequality between children living in Ireland has been created. Children whose parents' have not yet received a decision on their immigration status are refused the payment contrary to Articles 2 and 3 of the United Nations Convention on the Rights of the Child to which the State is a signatory. Article 2 of this Convention prohibits discrimination of any sort based on the status of a child's parent including his or her immigration status and Article 3 states that in all decisions concerning children the "best interests of the child" must be a paramount consideration. A further inequality also exists between children within the asylum process as the parents of children who were in receipt of the payment before May 2004 continue to receive it, as do parents who have been granted the payment on appeal, whereas the parents of children who were born here or arrived after the introduction of the Condition do not.

For more information on these cases see FLAC's briefing documents on the Habitual Residence Condition ([August](#) and [December 2009](#)) available on [www.flac.ie](http://www.flac.ie)

### **3.2 EU Migrant Workers and Job-seekers**

A number of issues arise in the context of EU nationals who are workers, former workers or job-seekers.

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<sup>5</sup> According to the latest figures available from the Reception and Integration Agency (RIA), in August 2010 there were 2642 people living in accommodation provided by RIA for more than three years. See [http://www.ria.gov.ie/filestore/publications/RIAAug\(A4\)2010.pdf](http://www.ria.gov.ie/filestore/publications/RIAAug(A4)2010.pdf)

FLAC has received calls to our telephone information line from EU nationals who have been told that they are no longer entitled to a social welfare payment because they were made redundant and are no longer considered to be habitually resident. However, a person's habitual residence is not solely based on his or her employment as there are other factors to be considered including a person's centre of interest and his or her future intentions.

In some cases decision-makers have apparently misunderstood the concept of retaining EU worker status even after a person has been made redundant. As FLAC explains in the *Guide to the Habitual Residence Condition* a person who has worked in the State for more than twelve months is entitled to Supplementary Welfare Allowance indefinitely while he or she continues to job-see and those who have worked for less than a year still retain worker status for six months and are entitled to SWA for that time while continuing to look for work.

Another aspect of this issue is that people are not told of their entitlement to Jobseekers Benefit which is not subject to HRC and is linked instead to PRSI contributions. Instead some individuals have not known about their entitlement or have not been able to access the benefit and instead have been assessed under the HRC which should not be applied in this situation.

### **3.3 Victims of Domestic Violence**

The rigid application of the HRC to spouses whose immigration status is linked to that of their partner has a particularly negative effect on individuals (usually women) who are forced to flee the family home due to domestic violence.

Women's Aid, in its submission on the Immigration, Protection and Residence Bill in 2008, identified the HRC as a barrier for non-Irish women gender-based violence<sup>6</sup>. This is due to the fact that some women's immigration status is linked to that of her partner's status therefore if they separate it may cause her problems in accessing a payment in her own right:

*The HRC severely impacts on a woman's ability to leave a violent relationship and to access support services. Firstly, she may not be regarded as HRC compliant and may therefore have no access to any financial assistance, including emergency assistance through the Supplementary Welfare Allowance scheme<sup>7</sup>.*

The submission also highlights the difficulty faced by women's refugees which cannot support a person fleeing a violent relationship unless she is entitled to a social welfare payment.

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<sup>6</sup>Available at

[http://www.womensaid.ie/download/pdf/submission\\_on\\_immigration\\_residence\\_and\\_protection\\_bill.pdf](http://www.womensaid.ie/download/pdf/submission_on_immigration_residence_and_protection_bill.pdf)

In these situations the Community Welfare Officer should exercise a degree of flexibility and ensure that the individual's safety is paramount in any decision regarding an application for a payment. While the person may initially receive an emergency or urgent payment not subject to HRC under the Supplementary Welfare Allowance scheme, the difficulty occurs when she seeks to access a long-term payment where she may be deemed not to be habitually resident.

### **3.4 Cross-border issues**

FLAC has been contacted by individuals experiencing problems accessing social welfare payments due to cross-border issues. Colleagues in Northern Ireland have also identified issues where people who live in one jurisdiction and work in the other cannot access their entitlements on either side of the border which can lead to hardship for those involved. There seems to be a lack of cohesion between the authorities on both sides of the border in ensuring that one State is responsible for this person and that he or she is given the payment to which he or she is entitled. Given the nature of certain payments which are linked to a primary payment, e.g. rent supplement which is not itself subject to HRC but linked to payment of a job-seekers payment or Supplementary Welfare Allowance which is, people have been refused this payment as their pattern of employment has taken place in Northern Ireland. However once any contribution based payments have expired they are not considered by the decision-maker as being habitually resident in the Republic of Ireland for social assistance payments despite being able to show other clear connections to this State.

In FLAC's experience, individuals from Northern Ireland who reside in the Republic and who may own property here, have worked here or have other connections here, have been told that they are not habitually resident and have been refused a payment despite showing a clear connection to the State.

### **3.5 Travellers**

Given Travellers' traditional nomadic way of life, the application of the HRC is particularly harsh on Travellers returning from another part of the Common Travel Area to resume residence in the State where they have retained family or other links.

FLAC has been contacted by individuals and organisations working with Travellers in relation to the application of the HRC to Travellers returning from Northern Ireland or another part of the Common Travel Area who have been refused on the basis of the HRC despite having spent most of their lives in the State.

The Irish Traveller Movement has highlighted the extent of the problem stating that:

*The current policy and practice is causing extreme hardship and distress. Whilst the decision can be appealed and may be overturned, this can take weeks or months, during*

*which time the applicant has no source of income. There is a risk of extreme poverty and homelessness in these cases<sup>8</sup>.*

#### **4. Conclusion and Recommendations**

FLAC through both its policy work and casework in social welfare law has a proven track record in identifying areas where the law has been misapplied. In relation to the Habitual Residence Condition, FLAC is concerned that people are facing hardship due to both the misapplication of the Condition as well as its restrictive nature. In light of this, FLAC recommends that:

1. The reference to the two-year requirement to satisfy the HRC should be removed from the legislation in the upcoming Social Welfare Bill in December.
2. Comprehensive training should be made available for Deciding Officers and Community Welfare Officers which adequately explains people's rights to payments subject to the HRC. This will ensure that people can access payments to which they are entitled without delay while also ensuring that correct decisions are made at first instance thereby reducing the number of unnecessary social welfare appeals.
3. The Condition should not be applied in a restrictive sense in cases involving particularly vulnerable groups at risk of poverty and destitution. A common sense approach should be taken and each case decided on its own individual merits to ensure that nobody who should be entitled to a payment is left without any means.

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<sup>8</sup> <http://www.itmtrav.ie/keyissues/myview/85>