



NOT FAIR ENOUGH

Making the case for reform of the
social welfare appeals system

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Glossary

AO: An Appeals Officer is a civil servant from the Department of Social Protection appointed by the Minister for Social Protection to decide social welfare appeals.

Appeal: A request to a higher authority, in this case an Appeals Officer, to overturn the initial refusal of a social welfare payment.

Appellant: A person who makes a social welfare appeal against a refusal or negative decision on his or her social welfare claim.

Beneficiary: A person who benefits from a social welfare payment, although he or she does not receive that primary social welfare payment himself or herself. This might be a partner or child who is dependent on the person who receives a primary payment plus an additional sum of money for the dependent person.

CAO: The Chief Appeals Officer is a civil servant, appointed by the Minister for Social Protection, with responsibility for overseeing the social welfare appeals system.

Claimant: A person who makes an application for a social welfare payment.

CWO: “Community Welfare Officer” was the name given to officials employed by the HSE responsible for administering the SWA scheme. These officials transferred to the DSP in October 2011 where they are now called Department of Social Protection representatives.

DAO: The Decisions Advisory Office is a section of the Department of Social Protection which provides assistance and guidance to decision-makers while monitoring decisions by Deciding Officers and Appeals Officers for consistency and quality.

DO: A Deciding Officer is a civil servant working in the Department of Social Protection who makes decisions on a claimant’s entitlement to a social welfare payment.

DSP: The Department of Social Protection, formerly known as the Department of Social and Family Affairs, is responsible for developing policy and legislation in relation to the State’s provision of social welfare to those in need of assistance. It also administers social welfare payments.

ECHR: The European Convention on Human Rights is a Council of Europe human rights instrument which has been incorporated into Irish domestic law through the ECHR Act 2003.

FOI: The Freedom of Information Acts 1997 – 2003 require certain public bodies to keep records and to make these records available to members of the public on request.

HSE: The Health Service Executive is a state-funded body responsible for the delivery of health and personal social services through medical professionals, hospitals and a network of Health Offices and health centres at community level. It is divided into four regions countrywide. The HSE was responsible for administering the Supplementary Welfare Allowance scheme until October 2011 when this responsibility was transferred to the Department of Social Protection.

HRC: The Habitual Residence Condition is a qualifying condition which those seeking a means-tested social welfare payment or Child Benefit must satisfy.

JOC: A Joint Oireachtas Committee is a parliamentary committee made up of TDs and Senators to oversee a particular department or area of policy. The committee can invite interested parties to make presentations or to question them about a particular area of interest.

Justiciable: Refers to issues which are capable of being decided upon by a court of law.

LAB: The Legal Aid Board is a state-funded service which provides civil legal aid and advice on matters of law to people who cannot afford a private solicitor.

Notice of appeal: This name is sometimes used to refer to the appeal form.

Ombudsman: The Office of the Ombudsman investigates complaints from members of the public who feel they have been unfairly treated by certain public bodies within the remit of the Office.

Operational Guidelines: These are guidelines issued to Deciding Officers which explain in more detail the requirements a claimant must satisfy to be entitled to a particular payment, or in some instances the relevant procedures to be followed by the Deciding Officer. Some of these documents focus on the Department's obligations to claimants.

Principal Act: The Social Welfare (Consolidation) Act 2005 is also referred to as the Principal Act. This piece of legislation forms the main social welfare law and is updated by amendments each year. All of the amendments are consolidated into one main piece of legislation approximately once every ten years.

Quasi-judicial body: an administrative body or person who exercises powers or functions similar to a judge. An administrative tribunal such as the Appeals Office must make decisions in line with natural justice.

Regulations: secondary law which governs how the primary legislation is implemented. These are usually brought into force when the Minister or other delegated person signs a statutory instrument or order into law.

Review: a Deciding Officer, Appeals Officer or the Chief Appeals Officer may re-consider an application or an appeal at each stage of the social welfare application and/or appeal process when a claimant or appellant requests such a review.

Submission: the written explanation put forward by each side to support his or her case. In this report submission usually refers to the Deciding Officer's submission which he or she is legally required to submit to the Appeals Office when an appeal is lodged. However, appellants and/or their representatives may also make submissions to counter the position put forward by the Deciding Officer.

SWA: Supplementary Welfare Allowance is a weekly allowance paid to people who do not have enough means to meet their needs and those of their qualified adult dependants or any qualified children. In addition to the basic allowance, those on SWA may be entitled to other payments to assist with accommodation and other costs.

SWAO: The Social Welfare Appeals Office or Appeals Office is a section of the Department of Social Protection which was established in 1991 to determine appeals against decisions on social welfare claims. It is located in D'Olier Street in Dublin and there are 39 Appeals Officers assigned to the office with an administrative support staff.

Unenumerated rights: Rights which are not expressly stated in the text of the Constitution but which are inferred through judicial interpretation of the legal instrument. These rights are said to be derived from natural justice.

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FLAC 2012

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- Brightwater Selection (Ireland) Ltd v. Minister for Social and Family Affairs* [2011] IEHC 510
- Corcoran v. Minister for Social Welfare* [1991] 2 I.R. 175
- Doherty v. South Dublin County Council* [2007] IEHC 4 (Charleton J., Unreported, 22 January 2007)
- ESB v. Minister for Social and Family Affairs* [2006] IEHC 59
- Galvin v. the Chief Appeals Officer and the Minister for Social Welfare* [1997] 3 I.R. 240
- Goncescu & Others v. Minister for Justice, Equality and Law Reform* [2003] IESC 49
- Henry Denny & Sons (Ireland) Limited T/A Kerry Foods v. Minister for Social Welfare* [1998] 1 I.R. 34
- In re Article 26 and the Health (Amendment) Bill 2004* [2005] IESC 7
- Jama v. Minister for Social Protection* [2011] IEHC 379
- Kiely v. Minister for Social Welfare* [1977] 1 I.R. 267
- Lovett v. Minister for Education* [1997] 1 ILRM 89
- Lyons & Anor v. Financial Services Ombudsman* [2011] IEHC 454
- Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3
- McGee v. Attorney General* [1974] I.R. 284
- McLoughlin v. Minister for Social Welfare* (1958) I.R. 5
- Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64 ; [2001] 2 ILRM 342
- Murphy v. Minister for Social Welfare* [1987] I.R. 295
- Neenan Travel Ltd. v. Minister for Social and Family Affairs* [2011] IEHC 458
- O'Donnell (a minor) v. South Dublin County Council* [2007] IEHC 204 (Laffoy J., Unreported, 22 May 2007)
- O'Donnell & Others v. South Dublin County Council & Others* [2008] IEHC 454 (Edwards J. Unreported, 11 January 2008).
- O'Sullivan v. Minister for Social Welfare* [1997] 1 IR 464
- Ryan v. Attorney General* [1965] I.R. 294
- Shanley v. Commissioner of Public Works in Ireland* [1992] 2 IR 477
- Solovastru v. Minister for Social Protection* [2011] IEHC 532
- The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642

English Cases

- Begum (FC) v. London Borough of Tower Hamlets* [2003] UKHL 5

American Cases

- Goldberg v. Kelly* 397 US 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)

Cases of the European Court of Human Rights

Airey v. Ireland [1979] 2 E.H.R.R. 305

Belilos v. Switzerland (1988) 10 E.H.R.R. 466

Buchhov v. Germany (1981) 3 E.H.R.R. 59

Conka v. Belgium (App. 22424/93), Judgment of 5 February 2002; (2002) 34 E.H.R.R. 1298

Dauti v. Albania (2009) App. No. 19206/05

Dombo Beheer v. The Netherlands, judgment of 27 October 1993, Series A, No.274-A; (1994) 18 E.H.R.R. 213

Ettl v. Austria, judgment of 23 April 1987, Series A, No. 117; [1988] 10 E.H.R.R. 25

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Golder v. UK (1975) 1 E.H.R.R. 524.

Kudla v. Poland (App. 30210/96), Judgment of the Grand Chamber of 26 October 2000; (2002) 35 E.H.R.R. 198

Mocie v. France Application no. 46096/99

Sali v. Sweden, admissibility decision of 10 January 2006

Salesi v. Italy [1993] 26 E.H.R.R. 187

Salomonsson v. Sweden (App. 38978/97), Judgment of 12 November 2002

Sramek v. Austria [1982] ECHR (app. 8790/79)

Stec v. United Kingdom [2005] 41 E.H.R.R. SE18

Steel and Morris v. UK [2005] 41 E.H.R.R. 403

Tsfayo v. the United Kingdom (2009) 40 E.H.R.R. 2

Statutes and Statutory Instruments

European Convention on Human Rights Act 2003

Freedom of Information (FOI) Acts 1997 – 2003

Social Welfare (Consolidation) Act 2005

Social Welfare (Appeals) Regulations 1998 [S.I. No. 108 of 1998]

Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 [S.I. No. 142 of 2007]

Other Authorities

Bunreacht na hEireann (The Irish Constitution) 1937

United Nations Human Rights Instruments

Universal Declaration of Human Rights (1948)

UN International Covenant on Civil and Political Rights (ICCPR) (1966)

UN International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

UN Convention on the Rights of the Child (CRC)

Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

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The European Convention on Human Rights and Fundamental Freedoms (1950)

The European Social Charter (revised) (1999)

The European Code of Social Security (revised) (1990)

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Foreword & acknowledgments

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. FLAC was established in 1969 by law students to provide legal information, advice and representation to people who could not afford to pay for legal services and to campaign for a state civil legal aid system. Today FLAC has an office in Dublin and works for law reform for the benefit of disadvantaged and marginalised people.

In pursuit of the goal of promoting access to justice, FLAC works in a number of ways. It operates a telephone information line and supports a network of legal advice centres where volunteer solicitors and barristers impart legal advice. Through these services FLAC keeps statistics on legal queries received and conducts research on people's ability to access justice around the country. The organisation also generates publications and guides on legal topics aimed at informing the public about their rights and promoting access to justice. FLAC campaigns on core issues, carrying out strategic litigation and conducting research into areas of law and policy where it can bring about positive social change.

Social welfare law reform is one of FLAC's priority areas of work. This research is intended, therefore, to provide a useful overview of the appeals system while analysing it through a human rights lens. To ensure that the report would be relevant to a variety of actors, FLAC convened a Steering Group of experts familiar with the social welfare appeals system: Professor Gerry Whyte (Trinity College Dublin) who acted as chairperson, Moya De Paor (Northside Community Law Centre), Joe O'Brien (Crosscare), Patrick Stagg (Citizens Information Service), Dr Liam Thornton (University College Dublin) and, while she was the Legal Officer with the Public Interest Law Alliance (a project of FLAC), Jo Kenny. The group was extremely supportive and gave generously of their valued expertise and advice throughout the process. FLAC is also indebted to public information consultant Ciara Murray for her assistance.

While many members of FLAC's staff contributed to this report, the writing was chiefly the work of FLAC's Policy and Advocacy Officer, Saoirse Brady and the use of the appeals process by FLAC's Senior Solicitor, Michael Farrell, informed FLAC's knowledge and experience of the system. FLAC is indebted in particular to both of them and their expert work in the advance of social welfare rights. In addition, FLAC's Research Officer Gillian Kernan and our Communications Officer Yvonne Woods made essential contributions to the report. A particular thank-you is reserved for advocates who took time out of their very busy schedules to participate in the survey. FLAC wanted to give advocates the chance to have their say about a system with which they engage on a regular basis. The results were enlightening and helped FLAC to evaluate the system from the advocate's perspective which in turn helped to devise strong and practical recommendations. FLAC would also like to thank Geraldine Gleeson, Chief Appeals Officer, and Dan Kavanagh, Deputy Chief Appeals Officer, for meeting and corresponding with FLAC to convey the official view of the system. The Decisions Advisory Office also provided valuable information, for which FLAC is grateful.

Introduction

FLAC, an independent human rights organisation that seeks equal access to justice for all, recognises that those who need support should be able to access their rights and entitlements to it in a fair and timely way. Social welfare law is a key area of FLAC's work because many people who need to avail of the welfare system find it to be a labyrinth of complex law, rules and regulations with an appeals mechanism that is neither open nor transparent. Based on FLAC's own casework, its contact with colleagues and on a legal analysis, this report examines whether the appeals system provides an accessible, fair and independent means of reviewing social welfare decisions. It concludes that the appeals system is failing those whom it is intended to serve and that the basic rights of access to social welfare, to fair procedures and to an effective remedy are not available as needed.

While the Social Welfare Appeals Office has existed for over 20 years, it has come under unprecedented strain in recent years. Applications to the office have more than doubled since 2007 (SWAO 2012:11). This has highlighted a number of issues in the administration of the current appeals process which pose problems for both appellants and advocates using this mechanism. Among the main problems are the lack of publicly available prior decisions, the lengthy delays, the complexity of the relevant law and procedures and the failure to ensure even-handedness and consistency in the process. The system's administrators also face challenges due to the sheer number of appeals and the current financial crisis.

There have been previous examinations of the appeals system. In its 2005 study from the perspective of advocates, entitled *The Social Welfare Appeals System: Accessible & Fair?* Northside Community Law Centre (NCLC) came to a number of conclusions about the appeals system in general. It recommended steps to ensure independence and fair procedures. It also recommended the making available of prior decisions while protecting the appellant's privacy.

The Department of Social Protection's Decisions Advisory Office (DAO), established to support Deciding Officers in their decision-making, has also examined the system but from the perspective of the decision maker and the public purse. It published an "Appeal" from the *Social Welfare Appeals Office* in its bulletin of November 2009. This stated that the Appeals Office had "been concerned for some time past about the level of errors and other deficiencies in appeals submissions coming to us from a small but, nonetheless, significant number of scheme sections and local offices" (DAO 2009:2). The bulletin referred to a survey carried out by the Appeals Office and Decisions Advisory Office in 2008 which examined 1686 live appeals. Of these, "some 8% revealed shortcomings and deficiencies of varying degrees in relation to the deciding officer's decision or the appeal submission on the grounds of appeal" (DAO 2009:2). It listed the type of errors revealed by the survey, which included:

- No formal decision on file
- Inadequate comment by the Deciding Officer on the grounds of appeal
- Relevant evidence and reports unclear or not on file
- File papers not in sequence and not tabbed, and
- Deciding officer's decision not properly explained to the claimant.

The bulletin highlighted the "very significant part" that Deciding Officers might play in helping the Appeals Office to process appeals by:

- dealing speedily with cases which are sent to them by the Appeals Office for their comments on the grounds of appeal and forwarding case papers to the Appeals Office, and
- ensuring that the comments or submissions and the documentation sent to the Appeals Office is of a high quality which doesn't require it to do further work (DAO 2009:1).

While some steps have been taken to address these issues, many of the problems identified continue to occur. The percentage of decisions which are reversed on appeal is substantial. Many of these are even reversed on a re-examination of a file by the same decision-maker.

The failures of the system are not just mechanical failures. They have consequences for people's lives. Given the vital part that social welfare payments play in the lives of many people, these consequences are severe. Poorly made initial decisions which require social welfare applicants to appeal, just to get what they are entitled to, can lead to stress and uncertainty for appellants. In some cases it can result in a lack of any income and even destitution on occasion. At the same time, ineffective systems also place unnecessary pressure on departmental officials and the officials of the Appeals Office while using up valuable and limited public resources.

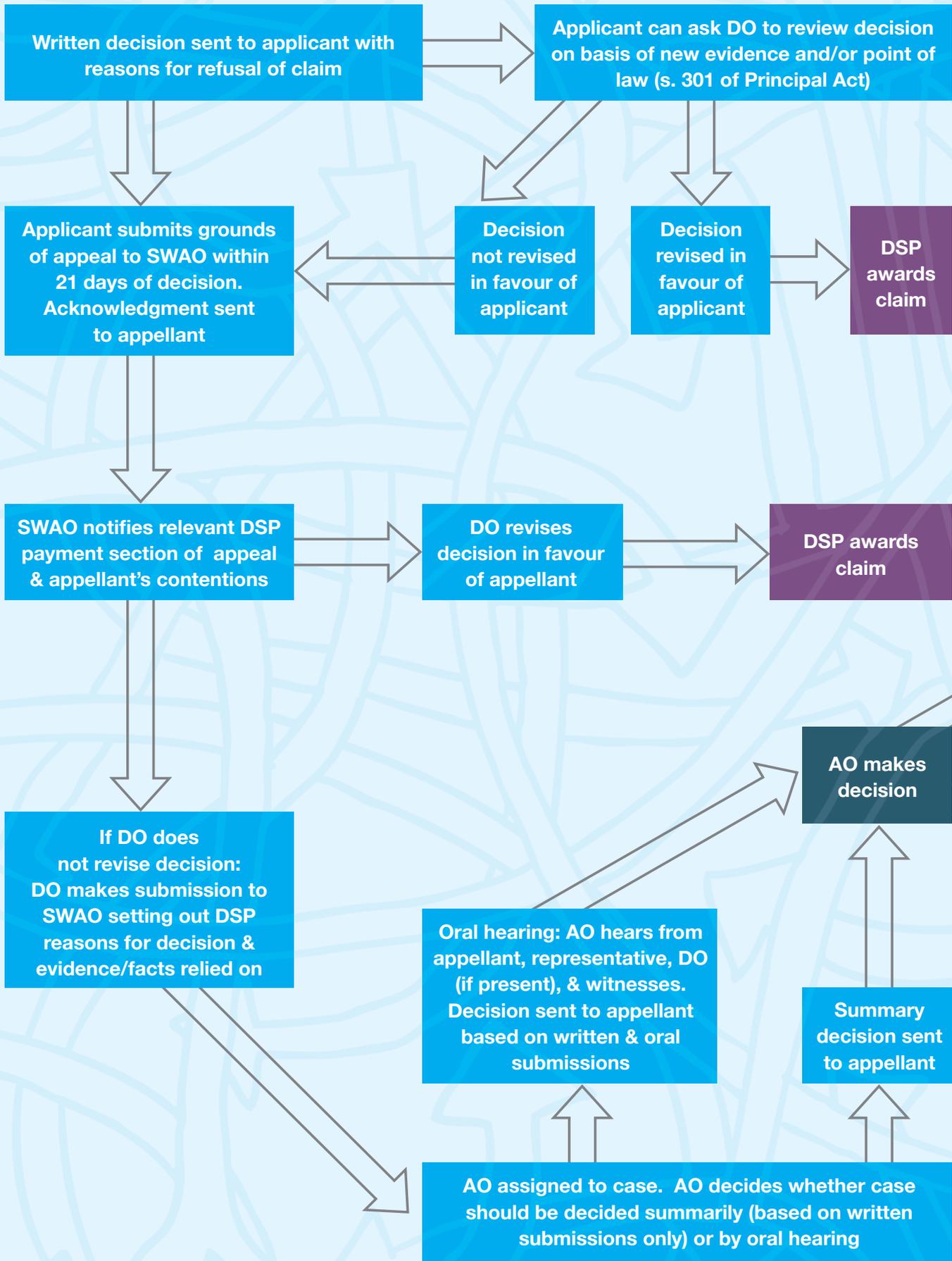
The current system does not offer an adequate remedy for appellants. There are lengthy delays. There is also a perception that it is not independent from the other sections of the Department of Social Protection. The Appeals Office, a quasi-judicial tribunal, does not always comply with fair procedures or strive to be consistently even-handed, thus leaving appellants at a disadvantage. Civil legal aid is not available for representation before the Appeals Office and, though civil legal advice is available, it is rarely if ever accessed. Social welfare claimants trying to assert their rights and entitlements, often without the necessary knowledge or expertise, are likely facing an uphill struggle in navigating an increasingly complex social welfare system without the safeguards they need to ensure fair treatment.

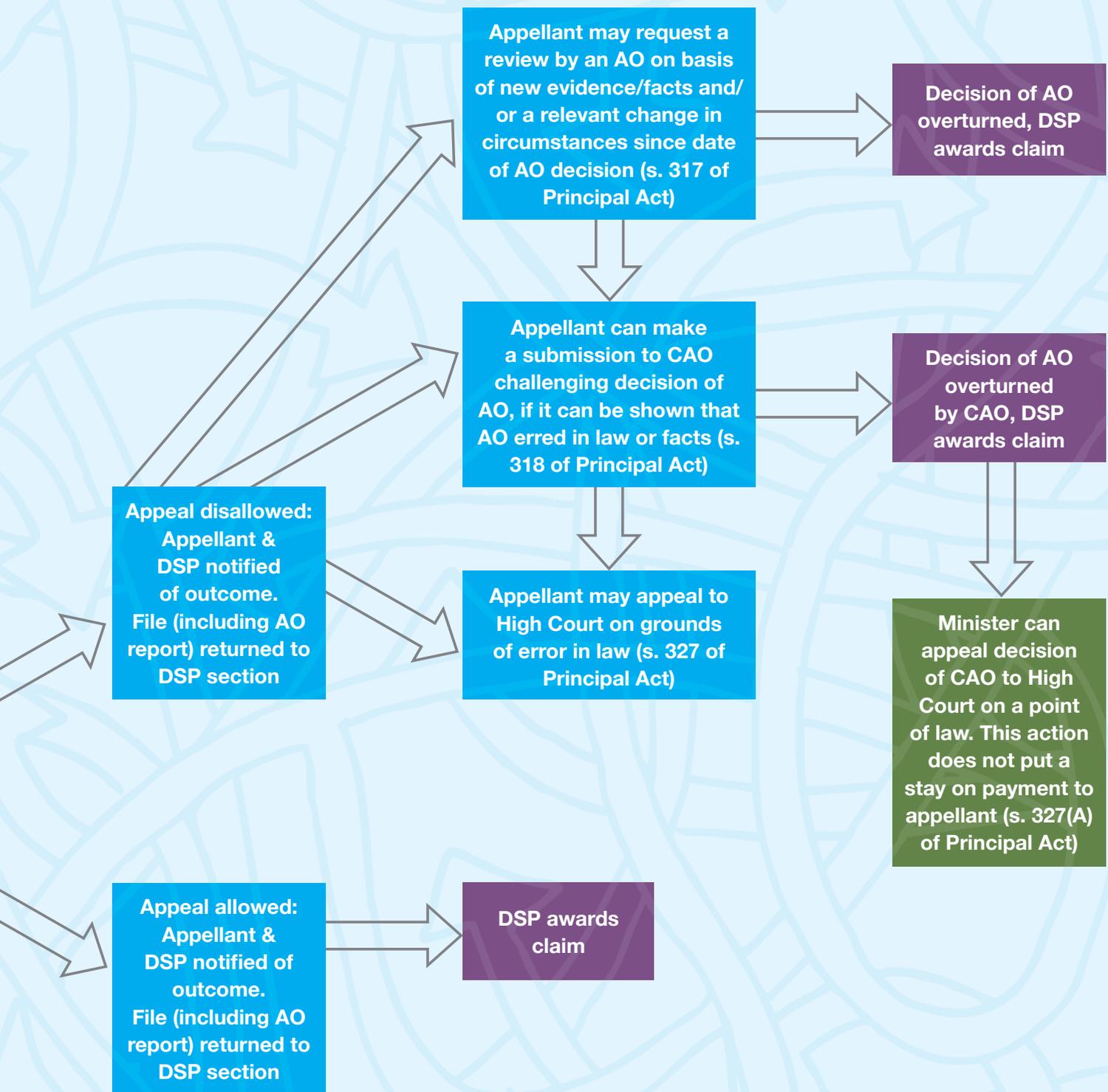
This is not to say that people are without advice and assistance. People can and do get help from the services provided by Citizens Information Centres or from non-governmental organisations advocating on behalf of social welfare claimants, but these services are also under pressure.

The report is divided into three chapters: the first chapter examines the law underpinning the system and how it operates in practice; the second analyses the compliance of the existing appeals system with both domestic and international human rights law; and the third chapter sets out the experience of advocates who engage regularly with the appeals system. FLAC's conclusions about the appeals system and recommendations to improve it form the final part of the report.

These conclusions focus on practical and measured recommendations for reform of the existing Social Welfare Appeals Office and mechanisms that would benefit both appellants and those who operate the system. FLAC is in no doubt that even in times of economic austerity, there must be due regard to fairness and justice. However, in addition to achieving fairness and justice, many of the recommendations will also result in better and more efficient administration. Clearer, better decisions made at the outset in conjunction with a fair and thorough appeals hearing, as well as greater transparency and openness overall, will have permanent benefits for society as a whole.

Social Welfare Appeals System





AO	Appeals Officer
CAO	Chief Appeals Officer
DO	Deciding Officer
DSP	Department of Social Protection
SWAO	Social Welfare Appeals Office



THE SOCIAL WELFARE APPEALS SYSTEM

Appeals Office - Key Facts

- Social welfare spending in 2002 = **€9.517 billion**; Social welfare spending in 2011 = **€20.968 billion**.
- Almost **1.5 million** people out of **4.6 million** receive a weekly social welfare payment.
- More than **2.248 million** people benefit from a social welfare payment - almost **49 per cent** of the population.
- Number of **Appeals Officers** for entire country: **39**.
- Number of live appeals in 2011: **51,515**, [more than 2.5 times that of 2007.]
- Oral hearings granted decreased from **70 per cent** of cases in 2004 to **35 per cent** of cases in 2011.
- Overall processing times for social welfare appeals (including summary decisions and oral hearings): **20 weeks in 2004** versus **32 weeks in 2011**.
- Average time to finalise an appeal following an oral hearing = **52.5 weeks**.
- Average time to reach a summary decision: **25.1 weeks**.
- Rate of overall successful appeals: **42 per cent**.
- The success rate at oral hearing = **48 per cent**; success rate following a summary decision = less than **25 per cent**.

All figures from the end of 2011 unless otherwise specified.

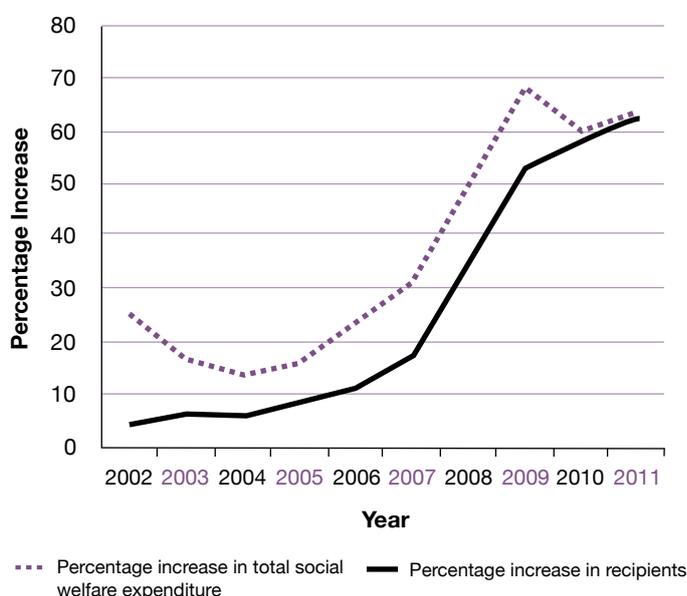
1.1 INTRODUCTION TO THE SOCIAL WELFARE SYSTEM

1.1.1 Government expenditure on social welfare

In 2011, spending on the Irish social welfare system accounted for 40 per cent of total gross government expenditure: €20.968 billion was spent in 2011, an increase of 0.6 per cent over 2010 (DSP 2012:2). Most of this money was spent on actual social welfare payments, whereas only three per cent was spent on administering the system (DSP 2012:2).

To illustrate the importance of the social welfare system in the current economic recession, Figure 1.1 shows the percentage increase since 2002 in the number of people receiving social welfare as well as the total percentage increase in social welfare expenditure since that time.

Figure 1.1: Percentage increase year on year in social welfare expenditure and recipients 2002 - 2011



Source: DSP annual statistical reports

The chart shows that while the number of social welfare recipients continues to increase, the rate at which expenditure is increasing has fallen in line with austerity measures. To put this in context, in its 2005 report, *The Social Welfare Appeals System*:

Accessible & Fair?, Northside Community Law Centre (NCLC) noted that in 2002, social welfare expenditure accounted for 28.8 per cent of gross government expenditure, (NCLC 2005: 13). By 2011, however, social welfare expenditure had increased to 40 per cent of total current government spending (DSP 2012:2). The social welfare budget in 2002 was €9.517 billion, but by 2011 this had more than doubled, with the government spending €20.968 billion on social welfare that year. There were almost 1.5 million people at the end of 2011 who were receiving a weekly social welfare payment. If we take into account the allowances received for their dependents, including spouses and children, this means that more than 2.248 million people were beneficiaries of the social welfare system, compared with almost 1.5 million people in 2002.¹ According to Census 2011, the estimated population stands at almost 4.6 million (CSO 2012: 9) which indicates that 48.9 per cent of the entire population is the beneficiary of a social welfare payment.

1.1.2

Social welfare payments and applications

The primary legislation governing the operation of the Appeals Office is Part 10 of the **Social Welfare (Consolidation) Act 2005**, from this point referred to as the ‘Principal Act’. Further provisions have been made in regulations, including the **Social Welfare (Appeals) Regulations 1998** from this point referred to as ‘the regulations’.

There are two main types of social welfare payments. The first relates to insurance contributions, paid from the Social Insurance Fund into which employers, employees and the self-employed pay. These are usually referred to as “benefits”² and made up 36 per cent of total payments in 2011 (DSP 2012:2). The remaining 64 per cent of payments make up the second

type, which are non-contributory payments issued directly out of state funds and are usually referred to as “allowances” (DSP 2012:2).

Individuals apply for all types of social welfare payments to the Department of Social Protection, where Deciding Officers deal with their claims. The person will receive the payment if an application is granted, but where an application is refused the applicant has the right to seek a review of the decision or to appeal it to the Social Welfare Appeals Office.

1.2

THE SOCIAL WELFARE APPEALS OFFICE (SWAO)

The Social Welfare Appeals Office is a quasi-judicial tribunal established to decide on appeals against refusals of social welfare applications. A tribunal is defined by leading administrative law experts Hogan and Morgan as a “body, independent of the Government or any other entity but at the same time not a court, which takes decisions affecting individual rights, according to some fairly precise (and usually legal) guidelines and by following a regular and fairly formal procedure” (Hogan & Morgan 2010:284).

Hogan and Morgan also discuss in general terms the rationale for having such an independent tribunal, established by statute. They indicate that the division of labour between a government department and a tribunal would allow the tribunal to “take all quasi-judicial decisions” which “would leave to the Minister and his Department decisions containing a high policy content, which are not susceptible to regulation by a code of law” (2010:285). In other words, the tribunal would make administrative decisions on how the law is implemented, whereas the department could develop necessary policy.

1 In 2011, some 597,333 families were in receipt of a Child Benefit payment in respect of 1,136,065 children. Some people in receipt of Child Benefit may also be in receipt of another payment, but the statistics do not make this distinction.

2 Child Benefit is a separate category, a non-means-tested payment made to parents of eligible children. However, it is not completely universal as some parents living in Ireland do not receive the payment because their immigration status does not allow them to satisfy the Habitual Residence Condition. FLAC’s guide to the Habitual Residence Condition is available online at www.flac.ie

The Appeals Office, in its *Guide to the Functions, Records and Procedures of the Social Welfare Appeals Office 2011*, describes a quasi-judicial tribunal as

...a tribunal which is outside the hierarchy of the courts and exercises a jurisdiction which is conferred by statute. Article 37 of the Constitution of Ireland enables the enactment of legislation to provide for the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, to a person or body not a judge or court appointed or established under the Constitution. (SWAO 2011b:19)

The legislation grants Appeals Officers based in the Social Welfare Appeals Office statutory powers to determine appeals, but the Office remains a section of the Department of Social Protection and is not a statutorily independent entity.

The Appeals Office was established by legislation in 1991; prior to this, appeals were made directly to the Minister via the Department (SWAO 2011a:10). In its 1986 report, the Commission on Social Welfare identified that one of the key difficulties with the previous appeals system was its perceived lack of independence, which at the time was

...reinforced not only by the fact that Appeals Officers are members of that Department but also, in the legal sense, because the legislative provisions governing appeals involve the Minister for Social Welfare to a significant extent in the appeals procedure. (CSW 1986:410)

While the Appeals Office now has “its own separate premises and staff”, (SWAO 2011a:10) it is described by the Department of Social Protection in its 2010 annual statistical report as:

... an office of the Department independently responsible for determining appeals against decisions on social welfare entitlement, insurability of employment issues...(DSP 2011a:7)

Current perceptions around the independence of the Appeals Office will be examined and assessed later in this report.

While the establishment of a separate appeals system on foot of the Report of the Commission on Social Welfare was recognised as a progressive step at the time,³ the position today is that the “appeals system has remained largely the same in the intervening 20 years” (SWAO 2011a:10) despite massive growth in the number of appeals and the office’s workload.

1.2.1 Structure of the Appeals Office

The Social Welfare Appeals Office is located on D’Olier Street in Dublin City Centre. The Chief Appeals Officer, appointed by the Minister for Social Protection,⁴ is responsible for the administration of the appeals system. She is assisted by the Deputy Chief Appeals Officer and an Office Manager.

Appeals Officers, statutorily appointed by the Minister for Social Protection,⁵ determine appeals while a number of administrative staff members provide clerical support.

3 See Oireachtas archived debates available online at www.oireachtas.ie.

4 The Chief Appeals Officer is appointed under s.305 of the 2005 Principal Act as is the Deputy Chief Appeals Officer.

5 See s.304 of the Social Welfare (Consolidation) Act 2005.

In its *Guide to the Functions, Records and Procedures of the Social Welfare Appeals Office* (SWAO 2011b),⁶ the Social Welfare Appeals Office cites a Supreme Court judgment from 1958⁷ setting out the duty of an Appeals Officer, which

is laid upon him by the Oireachtas and he is required to perform it as between the parties that appear before him freely and fairly as becomes anyone who is called upon to decide on matters of right or obligation.

In order to cope with rising numbers of appeals, the office has also recently used “experienced retired Appeals Officers strictly on a short-term basis to supplement the current resources”, eight of whom were employed on a part-time basis to make up the equivalent of three full-time officers (SWAO 2011a:15) but their contracts expired in December 2011 (Joan Burton TD, 24 April 2012). Between 2010 and 2011, a further 12 Appeals Officers were appointed to the Appeals Office as well as ten Appeals Officers from the Community Welfare Service of the Health Service Executive, who were subsumed into the Department when responsibility for administering Supplementary Welfare Allowance and other benefits was transferred from the Health Service Executive. This brings the current number of Appeals Officers responsible for deciding appeals for the entire country to 39 (SWAO 2012:17), alongside the Appeals Office secretariat of more than 40 clerical staff (SWAO 2012:17).

1.2.2

Operation of the Appeals Office

The number of social welfare appeals increased by 51 per cent between 2001 and 2010. Nonetheless, despite the increasing number of people making appeals, the budget for the Appeals Office has been cut in line with austerity measures, as demonstrated in Table 1.1.

Table 1.1: Workload of Appeals Office compared with Budget Estimates for Appeals Office, 2002 - 2011⁸

Year	Total No. Of Live Appeals	Exchequer Budget Estimate for Appeals Office €000
2002	21,800	2218
2003	21,380	2276
2004	19,414	2620
2005	19,122	2782
2006	19,504	2599
2007	19,568	*
2008	23,556	2902
2009	33,795	3237
2010	48,440	2771
2011	51,515	2984

Sources: Social Welfare Appeals Office annual reports and Department of Finance Budget Estimates for Public Services

While the budget of the Appeals Office has been reduced since its largest sum granted in 2009, the number of new social welfare appeals received by the Appeals Office each year continues to mount. It reached a high of 32,432 appeals in 2010, a leap of 25 per cent over the previous year (SWAO 2011a:2). When added to the number of appeals carried over from the previous year, the total number of live appeals with the Appeals Office in 2010 was 48,440, which is up 43 per cent on 2009, with a budget for the administration of the Appeals Office reduced by 14 per cent. In 2011, the number of new appeals decreased slightly to 31,241. However, when added to the number of appeals carried over from the previous year, the total workload of the Appeals Office in 2011 actually increased by 6.4 per cent to a record high of 51,515 live appeals (SWAO 2012:2).

The estimated budget allocation for the Appeals Office in 2011 shows an 8 per cent increase over 2010. However, the fact that the 2009 budget was 8.5 per cent higher than in 2011 for a workload that was 34 per cent lower puts this increase into perspective. There was no separate estimate given for the Appeals Office in the estimates for Budget 2012.

⁶ Available online at www.socialwelfareappeals.ie, last accessed 23 July 2012.

⁷ *McLoughlin v Minister for Social Welfare* (1958) I.R. 5.

⁸ There is no budget estimate given for the Appeals Office in the Estimates for Public Services for 2007 or 2012.

1.3 THE SOCIAL WELFARE APPEALS PROCESS: A STEP-BY-STEP OVERVIEW

1.3.1 Refusal of a social welfare application

If a person applies to the Department of Social Protection for a social welfare payment and is refused, then he or she is entitled to appeal this refusal. A payment may be refused if the Deciding Officer in the Department of Social Protection, or the Department's representative in the case of the Supplementary Welfare Allowance scheme,⁹ finds that the applicant has not satisfied the qualifying criteria or is not eligible for the payment. The Department's *Appeal Submission Guidelines*¹⁰ instruct Deciding Officers to "observe fair procedures and the principles of natural justice at all stages of the process" including the "rule against bias... and right to a fair hearing" (DSP 2010a).

In most cases, a refusal can be appealed to the Social Welfare Appeals Office. However there are some exceptions where there is no right of appeal, including refusals of Exceptional or Urgent Needs Payments as well as Back to School Clothing and Footwear Allowance.

Decision-makers must provide claimants with a written letter of refusal under Article 191 of the **Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007** [S.I. No. 142 of 2007].

The first step in making an appeal is to obtain a **written refusal** from the decision-maker, which he or she is legally obliged to provide. The DSP's *Appeal Submission Guidelines* explicitly state that there is no

valid right of appeal without a written decision of a Deciding Officer (DSP 2010a). The refusal letter should contain reasons for the refusal. The decision should be based on evidence and "all relevant issues/questions should be addressed at the start. 'Piece-meal' consecutive decisions on the same claim should be avoided" (DSP 2010a).

1.3.2 Review of first instance decision by Deciding Officer

Having received a written refusal, a claimant has the right to ask for an initial review of the refusal by the original decision-maker or by a more senior person in the relevant payment section, before launching a full appeal. The Department's *Appeal Submission Guidelines* state that a refused applicant should be informed of the right to seek a review (DSP 2010a). For the review, the applicant should submit any relevant new or additional material that he or she feels may help the decision-maker to reconsider his or her decision.

The other way for the review mechanism to be used is where the Deciding Officer can revise his or her own decision once the claimant has lodged an appeal with the Appeals Office. However, at this stage a review can only have a favourable outcome otherwise the full appeal will go ahead.¹¹ There is also an option for the Deciding Officer to refer an application directly to an Appeals Officer for determination.¹²

On receiving notice of an appeal, the Appeals Office will notify the relevant Deciding Officer, who will confirm that he or she made a negative decision on the application to which the person is entitled to appeal (DSP 2010a). The Appeals Office will require the Deciding Officer to re-examine the application. The decision may be revised in part or in full if there is new evidence, if there is a mistake in relation to the law or facts in the case or if there has been a relevant change in the appellant's circumstances.

⁹ The Supplementary Welfare Allowance scheme and its related supplements were previously administered by the Health Service Executive. From 1 October 2011, this function has transferred to the Department of Social Protection. Community Welfare Officers who administered the payment are now employees of the Department of Social Protection and are referred to as the Department's representatives.

¹⁰ Available online at www.welfare.ie/ (last viewed 24 August 2012).

¹¹ See s.301(3) of the Principal Act.

¹² See s.303 of the Principal Act.

Whenever an appeal is lodged, the Chief Appeals Officer is legally required to formally notify the Minister of Social Protection.¹³ There is in turn a statutory obligation on the Minister to

furnish to the Chief Appeals Officer a statement, by or on behalf of the Deciding Officer, showing to what extent the facts and contentions advanced in the grounds of appeal are admitted or disputed. Any information, document or item in the power or control of the Deciding Officer that is relevant to the appeal must also be furnished. (SWAO 2011b:8)

In other words, the original decision-maker who refused the application has to submit a statement containing all of his or her reasons for the refusal after being notified that an appeal has been lodged. The statement must outline what elements of the application are accepted or disputed. The applicant's file will also be forwarded to the Appeals Officer at this stage. It will not be automatically forwarded to the appellant but if he or she applies for it under the Freedom of Information Acts (see section 1.4 of this report for more information about this), it will be handed over. In practice, however, the appellant does not usually see the decision-maker's submission in advance of the appeal being decided as the FOI request may have been made before the submission was drafted or sent on to the Appeals Office. According to the Appeals Office Guide, "the Department may undertake further investigation of any new facts or evidence" and the "appellant will be advised of any additional evidence adverse to his/her case which arises from such further investigation and will be afforded an opportunity to comment on it" (SWAO 2011a:8).

A Deciding Officer may positively revise a first-instance decision at this stage if the appeal documentation contains more information than the original application. The appeal will then be withdrawn and recorded as a revision by the Deciding Officer in the Chief Appeals Officer's annual report. The Minister for Social Protection has indicated that the high success rate on appeal

...is a strong indication that many of the appeals are not fully presented with the fullest amount of information that would enhance the making of a decision by the person who decides initially and, subsequently, on appeal. (Joan Burton TD, 20 July 2011)

However, the responsibility should not rest solely with the appellant to provide complete and adequate information at the outset; the decision-maker also has to ensure that all relevant issues and questions are addressed when considering the initial application, as outlined in guidelines issued to Deciding Officers by the Department of Social Protection (DSP 2010a). The guidance also instructs Deciding Officers to consider all of the arguments put forward in the appeal when reviewing their decisions. Furthermore, he or she may not introduce new grounds or reasons for refusal at this stage.

The Chief Appeals Officer's annual report gives statistics on the number of decisions reviewed by the Deciding Officer once an appeal is lodged. It is open to the Deciding Officer to revise his or her decision at this stage, and the number of decisions overturned in favour of the appellant at this stage represents a substantial percentage of the overall positive decisions recorded by the Appeals Office. Alternatively, an applicant may request the Deciding Officer to review his or her decision before an appeal is registered with the Appeal Office, but the figures for such requests are not included in the annual report.

The statistics suggest that better decision-making at first instance would greatly reduce the number of appeals which the Appeals Office has to process; it would also likely reduce the time that an applicant has to wait to access a payment to which he or she is entitled. In 2011, some 42 per cent of successful appeals resulted from the original decision-maker re-examining his or her initial decision. In 2010, 61 per cent of successful appeals were due to a revision by the Deciding Officer.

13 See s.301(3) of the Principal Act.

The Chief Appeals Officer, in her 2009 annual report, also commented on the potential negative impact that incorrect decisions at first instance can have on the entire appeals process:

Appeals Officers are conscious of the fact that their decisions may ultimately be challenged in the High Court and that any shortcomings or deficiencies at the initial decision making stage in the Department have the potential to undermine the entire decisions and appeals process. (SWAO 2010a:9)

In 2010, the Chief Appeals Officer reiterated the importance of the initial decision and highlighted the engagement between the Decisions Advisory Office, a section of the Department of Social Protection responsible for providing advice to Deciding Officers to ensure consistency and quality in decision-making, and the Social Welfare Appeals Office “to ensure that Deciding Officers have all the facts available to make a properly informed decision and that, where it is warranted, a revised decision is made before the case goes to full appeal” (SWAO 2011a:14).

1.3.3 Making an appeal to the Appeals Office

In order to appeal a refusal, the person making the appeal, an ‘appellant’, must state the reasons why he or she believes the decision was wrongly made.¹⁴ An appeal may be made on the grounds that the decision-maker erred on the facts or circumstances of the case or that he or she made an error in law. The appeal is formally made to the Chief Appeals Officer who refers it to an Appeals Officer.¹⁵

An appeal form or ‘notice of appeal’ is available on the Appeals Office website or from the local social welfare office. The appeal should be made within 21 days of the receipt of the refusal letter but the Chief Appeals Officer may exercise discretion and accept appeals after this time.¹⁶ Here, however, it should be noted that

...[i]n exercising discretion under this provision, factors to which the Chief Appeals Officer would have regard would include the reasons for the delay, the length of the delay (the longer the delay the more cogent should be the reason for the delay), the question at issue, the prospects of success and the interests of justice. (SWAO 2011b:7)

The Appeals Office will acknowledge the appeal but there are delays in registering new appeals (Joan Burton TD, 6 March 2012). According to the *Guide to the Functions, Records and Procedures of the Social Welfare Appeals Office 2011*, the appeal is logged on a computerised register of appeals (SWAO 2011b:7) and an appeal number assigned to the case. Notice of the appeal will be given to “any other person who appears to be concerned, i.e. a person with a material interest in the case” (SWAO 2011b:8). Deciding Officers will be informed but Social Welfare Inspectors or any known representative of the appellant may also be informed.

The appellant should submit all documentary evidence to be considered along with the notice of appeal, but in practice “documentary evidence submitted subsequent to the notice of appeal will be considered by the Appeals Officer” (SWAO 2011b:7). In fact appellants may not have access to all documents forwarded to the Appeals Officer by the Deciding Officer until after a Freedom Of Information application is made, or further evidence may arise due to a change in circumstances, the length of the delay in making a decision or because new evidence has come to light. The important right of access to a person’s own information and records is explained more fully in section 1.4 on Freedom of Information.

14 See Article 9 of the 1998 Regulations.

15 See s.311(1) of the 2005 Principal Act.

16 See Article 9 of the 1998 Regulations.

1.3.4

Determination of an appeal

When a Deciding Officer has been notified about an appeal being lodged but does not revise his or her decision, then both the file and the Deciding Officer's submission will be sent to the Social Welfare Appeals Office. The Chief Appeals Officer will then assign the case to an Appeals Officer (SWAO 2011b:8). The Appeals Officer may consider the appeal *de novo*, or as if it were being decided for the first time,¹⁷ and "is not confined to the grounds on which the initial decision was based" (SWAO 2011b:12) although the legislation and guide do not appear to require an Appeals Officer to do this; it is at his or her discretion.

An Appeals Officer may decide the appeal on the basis of the documentary evidence submitted without need for an oral hearing.¹⁸ However, the regulations provide for an oral hearing to be held where an Appeals Officer considers it necessary.¹⁹ An appellant can request an oral hearing but this is not stated on the appeal form and many appellants may not be aware that they can do so. The appellant has no automatic right to an oral hearing but it is generally granted if requested; indeed, if an appeal decision is subsequently challenged, it is likely that any court would take a dim view of the fact that a request for an oral hearing was refused.

While there is no set test for when an oral hearing is deemed necessary, the *SWAO Guide* (SWAO 2011b:9) refers to the Supreme Court judgment given by Mr Justice Henchy in *Kiely v Minister for Social Welfare*,²⁰ in which he stated:

An appeal is of such a nature that it can be determined summarily if a determination of the claim can fairly be made on consideration of the documentary evidence. If, however, there are unresolved conflicts in the documentary evidence, as to any matter essential to the ruling of the claim, the intention of the Regulations is that those conflicts be resolved by an oral hearing.

The Decisions Advisory Office and the Social Welfare Appeals Office have devised a checklist providing guidance to Deciding Officers on how to prepare documents as well as making their own additional submission to be sent to the Appeals Office when an appeal is lodged. In preparing the submission for an appeal, one of the questions listed is whether the appellant requested an oral hearing (DAO 2009). Also, in a High Court decision²¹ from 1997 it was stated that "account should also be taken as to whether an oral hearing was requested". As indicated above, it seems in practice that an oral hearing is rarely refused if the appellant requests one. However, this means little if the appellant does not know about this option in the first place.

Both of the information leaflets issued by the Appeals Office²² state that the Appeals Officer may decide to hold an oral hearing. However, neither document contains any reference to the appellant's ability to request an oral hearing. Leaflet SW 56 states:

The Appeals Officer may decide to hold an oral hearing of your appeal, and will invite you to attend. On the other hand, the Appeals Officer may be able to deal with your case on the basis of written evidence you provided. (SWAO 2010b)

17 See s. 311 of the 2005 Principal Act.

18 Article 13 of the 1998 Regulations.

19 Article 14 of the 1998 Regulations.

20 [1977] 1 I.R. 267.

21 *Galvin v the Chief Appeals Officer and the Minister for Social Welfare* [1997] 3 I.R. 240.

22 Namely the *Social Welfare Appeals Office - An Introduction* (SW 56) (SWAO 2010b) and *Appeals Hearings* (SW 53) (SWAO 2010c).

In 2011, only 35 per cent of decisions from Appeals Officers were made following an oral hearing (SWAO 2012:3). Where an oral hearing is not deemed necessary, the Appeals Officer will make a summary decision, i.e. he or she will decide the appeal solely on the written submissions and documents before him or her.

1.3.4.1 The oral hearing

If the Appeals Officer decides to hold an oral hearing it will be held in private either in the Appeals Office headquarters in D'Olier House in Dublin or, if the appellant lives outside Dublin, in a hotel or other convenient venue in the local area, used by the Appeals Office. The setting is quite informal and is unlike a courtroom.

The appellant must attend the hearing in person and may bring along a representative by prior arrangement with the Appeals Officer. While it appears that the Appeals Officer's consent must be obtained for another person to attend the hearing, Hogan and Morgan in their book on Administrative Law in Ireland argue that any refusal to allow an appellant's representative to attend might "amount to an unreasonable exercise of his discretion and/or a violation of the principles of constitutional justice" (Hogan & Morgan 2010:306).²³ In practice the Appeals Officer will usually agree to a representative being present.

The Deciding Officer will sometimes attend the hearing, or another representative from the Department of Social Protection may attend, but there is no obligation to do so. To begin, the Appeals Officer will introduce all present at the hearing. He or she will outline the Deciding Officer's reasoning contained in the initial letter of refusal as well as the appellant's grounds for appeal.²⁴ The Appeals Officer will also give details of the Deciding Officer's response to the grounds of appeal.

The Deciding Officer's submission will not be issued to the appellant after the hearing unless the appellant specifically requests it under Freedom of Information legislation.

Further, an Appeals Officer has the power to require any other person he or she deems essential to attend an oral hearing and to provide any relevant documents in his or her possession.²⁵ The Appeals Officer must inform any such person in writing of the request. In cases where it is relevant, social welfare inspectors or medical assessors may be asked to attend.

The legislation grants the Appeals Officer power to "take evidence on oath and administer oaths to persons attending as witnesses at the hearing" (SWAO 2011b:10).²⁶ A person who fails to attend a hearing or who attends but refuses to give evidence or produce necessary documents is guilty of an offence and is "liable on summary conviction to a fine not exceeding €1,500".²⁷ The appellant may bring her or his own witnesses, but should notify the Appeals Officer beforehand. The appellant may also ask the Appeals Officer to require particular witnesses to attend. The appellant and/or witnesses may be reimbursed for reasonable travel and subsistence expenses including a loss of earnings.²⁸

When any person, including the appellant, who has been called to attend the oral hearing fails to do so, the Appeals Officer can take any appropriate steps to decide the appeal.²⁹ The regulations also allow the Appeals Officer to make a determination despite the failure of any of the parties to attend when they were requested to do so.³⁰

While civil legal aid is not available for social welfare appeals, a representative from a non-governmental organisation, Citizens Information Centre or other support body may come with the appellant to advocate on his or her behalf.

23 The same quote from the earlier 1998 edition of Hogan & Morgan is cited on page 20 of the Northside Community Law Centre report (2005).

24 As indicated above, when an appeal is made, the Deciding Officer makes a submission in response to the grounds of appeal outlined by the appellant and may give a more detailed explanation for his or her reasons for refusing the application. As already set out, the Deciding Officer's submission is sent to the Appeals Office in advance of the hearing, but the appellant is not generally given a copy prior to the appeal, although the Appeals Officer may summarise its contents at the hearing outset.

25 See s.314 of the Principal Act.

26 See s.313 of the Principal Act.

27 See s.314(3) of the Principal Act.

28 See s.316 of the Principal Act.

29 See Article 16 of the 1998 Regulations.

30 See Article 17 of the 1998 Regulations.

As outlined above, the appellant must notify the Appeals Officer in advance if he or she intends to bring a representative. The appellant may also be represented by a lawyer but should note that legal costs will not be covered by the Appeals Office. The Appeals Officer may make a nominal award of expenses (for travel, for example) to a representative³¹ but only in relation to the actual hearing.³² An appellant may bring a witness on his or her behalf, but again must give advance notice to the Appeals Office; the Appeals Officer will then decide whether or not to hear the witness.

Following an oral hearing, as well as issuing a decision, the Appeals Officer will submit a report on the proceedings to the Appeals Office which is kept on the appellant's file. It is not routinely issued to the appellant unless requested under Freedom of Information legislation. Where the appeal is allowed, the report may sometimes contain little more than a record of who attended the appeal and the decision. Where the appeal has been refused, however, the Appeals Officer's report can be of considerable assistance in deciding whether to challenge the decision and in preparing any such challenge.

1.3.4.2 Summary decisions

A summary decision is a decision made without an oral hearing and based on the documents and evidence on file. The documentary evidence which the Appeals Officer will consider

may include reports of Departmental (or Health Service Executive as may be) Investigating Officers and, where appropriate, Medical Assessors, the grounds of appeal including any documentation submitted with it and the submission by or on behalf of the officer who made the decision. Other documentary evidence could consist of correspondence from an employer as to the occurrence of an occupational accident or in regard to how a person's employment terminated. (SWAO 2011b:13)

Documentary evidence may also include further written submissions by the appellant or his or her representative.

The Chief Appeals Officer's annual report revealed that in 2010, Appeals Officers dealt with 69 per cent of cases summarily (SWAO 2011a:3) in comparison with 41 per cent the previous year (SWAO 2010a:3). Responding to a parliamentary question in July 2011, the Minister for Social Protection stated that one reason for encouraging a higher rate of summary decisions was to reduce the length of time an appellant has to wait for a decision. Noting the high rate of successful appeals (42 per cent in 2010), she said:

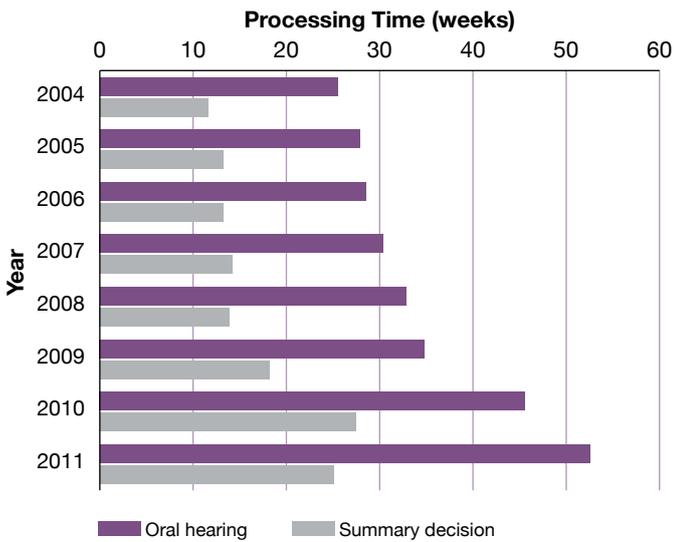
If we could get more of the appeals dealt with by summary examination of the files and decision by the appeals officer that would significantly reduce the time, particularly when those people will go on to have an oral hearing and will have the appeal granted in any event. (Joan Burton TD 30 March 2011)

It is clear from Figure 1.2 (next page) that there is a significant difference between the length of time taken to process cases involving summary decisions and cases where there is an oral hearing. However, figures for previous years show that there is a considerably higher rate of success where an appellant has an oral hearing (see section 2.4.2.2).

31 See s.316(1)(b) of the Principal Act.

32 See s.316(2)(b) of the Principal Act.

Figure 1.2: Appeals processing times 2004 - 2011³³



Source: Social Welfare Appeals Office annual reports

While efforts have been made to reduce delays in the current system, it is important that this does not interfere with the right to fair procedures or hinder an appellant from putting his or her case as fully as necessary. In her annual report for 2010, the Chief Appeals Officer noted the greater emphasis on deciding appeals in a summary fashion where possible, but also referred to the need to ensure that decisions were made in line with fair procedures and due process (SWAO 2011a:10). The process will be examined in more detail in this context later in section 2.4 of this report.

1.3.5 Appeals Officer’s decision

The Appeals Officer has the power to decide the issue as if it was being decided for the first time,³⁴ not being confined to the grounds relied on by the original decision-maker. The Appeals Officer will consider all of the available evidence, including any evidence introduced at the oral hearing, and make a determination on the appeal. The Appeals Officer sends his or her decision on to the Chief Appeals Officer, who will then send a letter containing the decision to the appellant, any other concerned person, e.g. a legal or other representative,

and the Minister. Where the decision is not in favour of the appellant, the letter “will include a note on the reasons for the decision” (SWAO 2011b:12).³⁵ The decision will be placed on the appellant’s file and sent back to the relevant section.

The Appeals Officer will also write a report on the appeal hearing and his or her findings, but as there is no set format, these reports may differ in style and content depending on the author. The letter issued to the appellant will not include a copy of this report, although the appellant may request it under Freedom of Information legislation. In this case, the appellant has to apply to the relevant section of the Department rather than to the Appeals Office.

The appeal decision letter can be confusing, as appellants sometimes think that because the letter is sent in the Chief Appeals Officer’s name, it means she has already reviewed their case and they cannot seek any further review of the decision. As noted above, the letter actually contains the decision of the Appeals Officer, not the Chief Appeals Officer. The letter is sent on behalf of the Chief Appeals Officer and is signed by a member of the administrative staff rather than the Appeals Officer who actually made the decision. Thus an appellant will only know the name of the Appeals Officer who decided his or her case if he or she attended an oral hearing or if he or she requests the Appeals Officer’s report, another marker for the lack of transparency in the process.

In fact, as explained in the next section, the appellant has a further right to a review by the Chief Appeals Officer after the Appeals Officer issues his or her decision.³⁶ This is despite the fact that the legislation refers to the decision of an Appeals Officer as final.³⁷ Indeed there is also provision for appeal to the High Court on a point of law.

³³ Processing times prior to 2004 are not broken down into times for oral hearing and summary decisions.

³⁴ Section 311(3) of the Principal Act.

³⁵ See Article 19 of the 1998 Regulations.

³⁶ Section 318 of the Principal Act.

³⁷ Section 320 of the Principal Act.

1.3.6

Revision of an Appeals Officer's decision

As already stated, there are exceptions to the rule that an Appeals Officer's decision is final and conclusive:

1.3.6.1 Section 301(b): Revision of Appeals Officer's decision by a Deciding Officer

The legislation provides that a Deciding Officer for the Department may "revise any decision of an appeals officer where it appears to him or her that there has been any relevant change of circumstances since the decision was given".³⁸ The change of circumstances can be in favour of or against a claimant, for example where there is evidence of welfare fraud or overpayment as well as underpayment. In these circumstances, this new decision is also open to appeal in the same way as the original decision.

In circumstances where the Deciding Officer revises the decision based on false or misleading evidence given by the appellant, then the new decision will take effect from the date of the original decision unless the Deciding Officer determines otherwise.³⁹ In other cases where new evidence or facts come to light which are not of a fraudulent nature, the Deciding Officer can exercise his or her discretion to determine the date from which the revised decision will run, taking into account the new facts, evidence and circumstances of the case.⁴⁰

1.3.6.2 Section 317: Revision of an Appeals Officer's decision by an Appeals Officer

The appellant can request a review by an Appeals Officer by writing to the office and stating the reasons why he or she believes the decision is incorrect or outlining some change in circumstances. The legislation states that "[a]n appeals officer may, at any time revise any decision of an appeals officer...".⁴¹ The wording here is a bit confusing, because in practice the Appeals Officer who made the decision usually reviews his or her own decision, unless he or she is unavailable to

do so. The Appeals Officer can revise his or her decision where it can be shown that a mistake was made in relation to new evidence or new facts which have come to light, or where there has been a relevant change in circumstances since the decision was made.

Where the Appeals Officer revises his or her decision due to false or misleading evidence given by the appellant, whether in written or verbal form, then the new decision will take effect from the date of the original decision.⁴² However, the Appeals Officer can exercise his or her discretion to determine that the original decision stands for any period which does not relate to the false or misleading statement. In other cases where new evidence or facts come to light which are not of a fraudulent nature, the Appeals Officer can exercise his or her discretion to determine the date from which the revised decision will run taking into account the new facts, evidence and circumstances of the case.

1.3.6.3 Section 318: Review by the Chief Appeals Officer

Section 318 of the Principal Act provides for the Chief Appeals Officer to review an Appeals Officer's decision where that decision was based on a mistake in relation to facts or law. The Chief Appeals Officer will make her conclusions based on the documents on file. While the procedure established under this section is referred to as a review, in essence it is another chance for the appellant to have his or her case considered and potentially have an adverse decision overturned.

When invoking this mechanism, the appellant should write to the Chief Appeals Officer stating why he or she thinks the decision of the Appeals Officer was wrong. The Chief Appeals Officer will then review the written evidence on file, including the Appeals Officer's report and any subsequent submissions made by the appellant before reaching a decision. If the review has a "material interest for some other person concerned" then that other person will be given an opportunity to respond (SWAO 2011b:13).

38 Section 301(b) of the Principal Act.

39 Section 302(a) of the Principal Act.

40 Section 302(b) of the Principal Act.

41 Section 317 of the Principal Act.

42 Section 319(a) of the Principal Act.

This mechanism does not require an oral hearing, but in certain cases the Chief Appeals Officer will decide to set one up (particularly in cases where a summary decision was made, although her office does not maintain statistics on such cases) (Gleeson, CAO, 17 January 2012). There is also no provision for each “side” to comment on the other “side’s” submissions at this stage, if any are made.

While the previous Chief Appeals Officer considered quite broad policy issues in reviews under Section 318, there is some evidence that the current Chief Appeals Officer regards Section 318 reviews as more limited in scope and basically designed to ensure that the Appeals Officer has considered all relevant material and that there have been no significant errors in procedure.

The onus is on the appellant to demonstrate how the Appeals Officer erred in his or her decision. There is no set time within which a decision will be made, as this will depend on the circumstances and complexity of the individual case, which is reviewed by the Chief Appeals Officer herself and may require further research. As a result there can be very long delays in obtaining a decision in a Section 318 review.

The Chief Appeals Officer’s mechanism should offer a simpler and less costly method of reviewing Appeals Officers’ decisions than appeals to the High Court and, unlike the statutory appeal to the High Court provided by the Social Welfare Acts, it allows decisions to be challenged on errors of fact as well as law.

The Minister for Social Protection can appeal to the High Court on a point of law if the Chief Appeals Officer decides not to revise an Appeals Officer’s decision⁴³ but it seems that the appellant cannot appeal in such circumstances.⁴⁴ An appeal by the Minister does not mean that a stay is put on the payment while a decision is made.⁴⁵

1.3.7

Section 327: Right of appeal to the High Court

Section 327 of the Principal Act provides for the right to appeal the decision of an Appeals Officer, or a decision that has been revised by the Chief Appeals Officer, to the High Court on a point of law. Notably, this avenue of appeal has not been used in many cases. No legal costs are awarded to either party in this type of appeal no matter who wins it, unless the High Court specifically orders it.⁴⁶ This means that even successful appellants will have to pay their own legal costs, which would be likely to swallow up any award that is made. Importantly, while civil legal aid is not available for representation before the Social Welfare Appeals Office, it should be available for an appeal to the High Court in social welfare cases only on a point of law, provided the appellant meets the qualifying conditions.⁴⁷

If an appellant believes that the Appeals Officer or Chief Appeals Officer has erred on a point of law, then he or she should seek legal advice on whether there are grounds for an appeal to the High Court.

1.3.8

Judicial review

An appellant can seek a judicial review in the High Court of a decision made by an Appeals Officer (or a Deciding Officer) if he or she believes that fair procedures were not followed or that making the decision exceeded the officer’s statutory powers. Judicial review “may be defined as the means whereby the courts examine the legality of all public actions including their own” (De Blacam 2009:3). The court will only deal with the way in which the case was carried out, however, examining whether the correct procedures were followed. It will not decide on the substantive issue involved or the facts of the case.

43 Section 327A of the Principal Act.

44 However, since there is a limit of 21 days within which a person must appeal to the High Court (or seek an extension of time) it is unclear whether a person must exhaust the Appeals Office mechanism by using the Chief Appeals Officer’s review under s.318, as this would mean that he or she would be out of time to make a statutory appeal. The appeal to the High Court is against the decision of the Appeals Officer rather than the decision of the Chief Appeals Officer. The current Chief Appeals Officer is of the view that an appellant can go straight to the High Court without using the s.318 review but this would seem to be an anomaly within the legislation.

45 Section 327A of the Principal Act.

46 See Order 90 of the Rules of the Superior Courts on the Social Welfare (Consolidation) Act 1981.

47 For more information on the Irish civil legal aid system, please see FLAC’s guide at www.flac.ie (last accessed 27 Jul 2012).

Furthermore, even if an applicant is successful, the outcome may be simply that the case is sent back to the Social Welfare Appeals Office for re-consideration.

The Appeals Office has outlined its interpretation of the role of the courts in relation to reviewing the decision of an Appeals Officer (2010a:14). It refers to the test set down in *The State (Keegan) v. Stardust Compensation Tribunal*⁴⁸ which is that a court will not overturn the decision of a tribunal unless it is “plainly and unambiguously flying in the face of fundamental reason and common sense”. The *Guide to the Functions, Records and Procedures of the Social Welfare Appeals Office 2011* also refers to a decision by the Supreme Court in which Chief Justice Hamilton stated that

it would be desirable to take this opportunity of expressing the view that the Courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based on an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case with a high degree of expertise and provide coherent and balanced judgements on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review.⁴⁹

However, in the more recent case of *Meadows v. Minister for Justice, Equality and Law Reform*,⁵⁰ the Supreme Court widened the scope of judicial review and moved away from the very strict doctrine of deference to the executive and to specialised administrative tribunals demonstrated in the *Keegan* and *Denny* cases.

Judicial review is a helpful tool which can be used to ensure that administrative decisions are properly made to the highest standard in accordance with law. Through this mechanism, the High Court has the power to review and quash any decisions which are incompatible with the law, although it “is not concerned with the merits, but rather with the legality of the decision under review” (Hogan & Morgan 2010:442).

The courts have reviewed the decisions of Appeals Officers where procedural mistakes have been made, in such cases as *Murphy v. Minister for Social Welfare*.⁵¹

1.4 FREEDOM OF INFORMATION

When appealing a social welfare decision, it is undoubtedly very useful for the appellant to have access to all of the information held on his or her file. That way, he or she will have the same information as both the Appeals Officer and the original decision-maker. In order to obtain this data, the appellant must make an application under the Freedom of Information Acts 1997 – 2003 otherwise referred to as ‘FOI’. This law entitles individuals to access their own personal records held by public bodies or government departments. Records include documents held in both paper and electronic formats.

Freedom of Information (FOI) Acts 1997 – 2003

The appellant can make an FOI application by writing to the relevant payment section asking for copies of all documents and records held by the Social Welfare Services Office in connection with his or her application. There is no fee when requesting personal records and people making FOI applications do not have to give reasons for so doing.

48 [1986] I.R. 642.

49 *Henry Denny & Sons (Ireland) Limited T/A Kerry Foods v. Minister for Social Welfare* [1998] 1 I.R. 34.

50 [2010] IESC 3.

51 [1987] I.R. 295.

The Freedom of Information application must include:

- the name and address of the appellant, including his or her former address if it has changed since first applying for the payment;
- the appellant’s Personal Public Service (PPS) number;
- the type of payment;
- the date on which the application for the benefit or allowance was first made; and
- any other details relevant to the application, such as reference to specific documents required.

The Freedom of Information Officer of the relevant service or department should acknowledge receipt of the FOI request within two weeks and a decision on the request should be issued within four weeks. Otherwise, a lack of response can be treated as a refusal. The request for documents may be granted in part or in full. If a request is refused or information is withheld, the appellant can request a review by a more senior member of staff in the relevant section and this should be completed within three weeks. Following this, there is a further right of appeal to the Information Commissioner.

An appellant may request his or her file at any stage of the process. However, if the file is requested as the appeal is lodged then it may not contain the Deciding Officer’s submission. The appellant can also request this document before or after the appeal.

1.5 THE OFFICE OF THE OMBUDSMAN

Established by law in 1980, the Office of the Ombudsman investigates complaints about the administrative actions of public bodies, including the Department of Social Protection and the Social Welfare Appeals Office. It is not a further right of appeal on the substantive issue, but rather the office will investigate whether correct procedures were followed in accordance with the law and any relevant regulations.

The appellant will have to exhaust the administrative appeals system in place before the Ombudsman’s office can investigate a complaint, unless the complaint relates to lack of correspondence. An investigator from the office will look at the file

and determine whether there is a valid complaint and whether the public body’s action has been detrimental to the complainant. The investigator will then contact the relevant public body and try to resolve the problem informally. Where the complaint is deemed valid, the Office of the Ombudsman may recommend actions to rectify the situation or to compensate the complainant. These may include asking the public body to review its actions, change a decision or explain why it acted in this way.

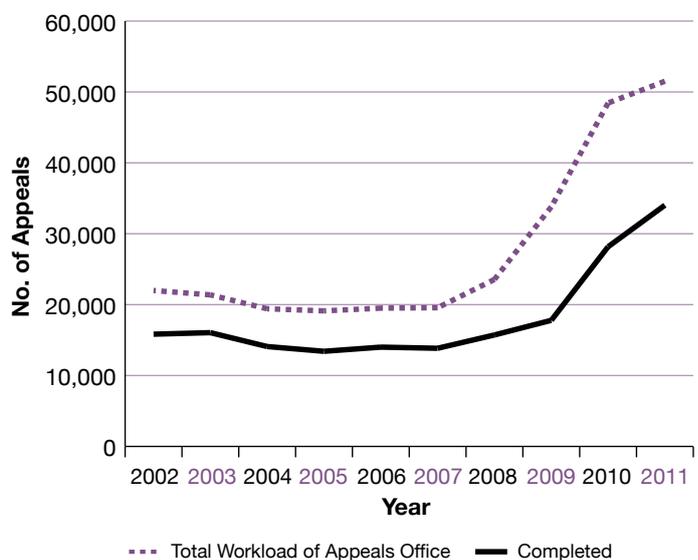
In 2011, the Office of the Ombudsman received 1135 complaints about the Department of Social Protection, which made up 31.5 per cent of all complaints to the Ombudsman that year (Ombudsman 2011:105).

1.6 THE CURRENT SITUATION OF THE APPEALS OFFICE

1.6.1 Increase in the volume of appeals

To gain an accurate overview of how the appeals system currently operates, it is important to note the marked increase in the workload of the Social Welfare Appeals Office in recent years, as illustrated in Figure 1.3.

Figure 1.3: Total workload of Appeals Office and number of completed appeals 2002 - 2011



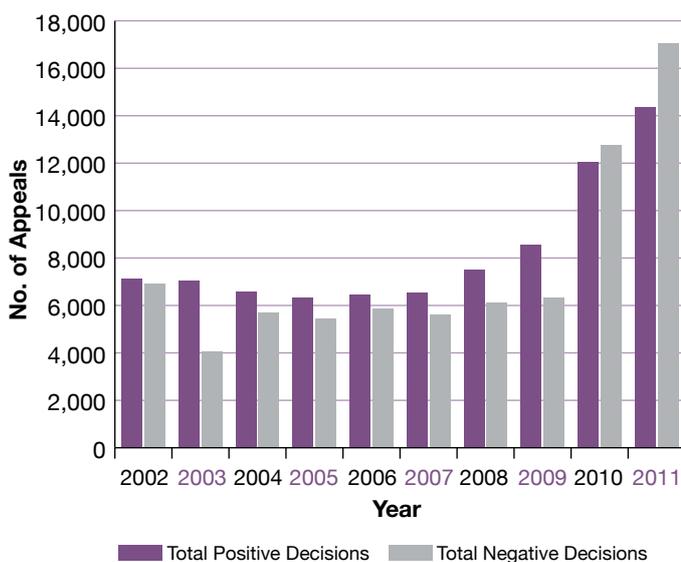
Source: Social Welfare Appeals Office annual reports

Up until 2007, the Social Welfare Appeals Office dealt with about 20,000 appeals annually. However, in 2011 the number of appeals received was more than double the 2007 total. When added to the number of cases carried over in 2011, the workload increased almost three-fold in comparison over the five years. The percentage of cases completed has fluctuated from 72 per cent in 2002 to 66 per cent (34,027 of 51,515 appeals) in 2011, although this represents an improvement on the completion rate for 2010 which stood at 58 per cent (SWAO 2012:3). The Chief Appeals Officer noted that the number of appeals completed in 2010 marked a “significant increase” while also highlighting the need to “balance the drive for efficiency with the need to ensure due process in terms of the rights of appellants and adherence to the requirements of natural justice” (SWAO 2011a:1).

1.6.2 Outcomes of appeals

While the high rate of success at the Deciding Officer review stage has been noted, the overall success rate is also significant. As well as illustrating the overall increase in appeals during the last ten years, Figure 1.4 clearly shows the consistently high rate of success on appeal.

Figure 1.4: Outcomes of appeals processed by the Appeals Office 2002-2011



Source: Social Welfare Appeals Office annual reports

In 2011, the rate of negative decisions by the Social Welfare Appeals Office exceeded the number of successful appeals, but the success rate still remained high at almost 43 per cent. However, prior to 2010 more than half of the appeals processed by the Social Welfare Appeals Office consistently had positive outcomes, re-emphasising the need for better first instance decision-making.

1.6.3 Processing times and delays

People seeking to have refusals of social welfare claims overturned can be adversely affected by lengthy delays. In recent years, delays in processing appeals have risen very substantially, mainly due to the sheer volume of appeals received by the Appeals Office, as noted by the Chief Appeals Officer in her 2010 annual report (SWAO 2011a:1). In 2011, average processing times rose from 24 weeks in 2009 to 32.5 weeks; the longest overall processing times to date.

There are no time limits within which the Deciding Officers or the Appeals Office must deal with the file before them. Delays occur both at Department level, as well as in the Appeals Office itself. In contrast average delays caused by appellants are consistently two weeks.⁵² While the Chief Appeals Officer can exercise her discretion to extend the time to make an appeal, appellants are normally required to make it within a specified period of three weeks. No similar time limits attach to any action of the Deciding Officers or Appeals Office in relation to the appeal.

At Department level, Deciding Officers can fail to send on files and submissions promptly. In 2011, the Department took an average 12.9 weeks to pass on the information to the Appeals Office (SWAO 2012:3). In previous years, the Department’s procedures have taken as long - or in some instances even longer - to process than the Appeals Office.

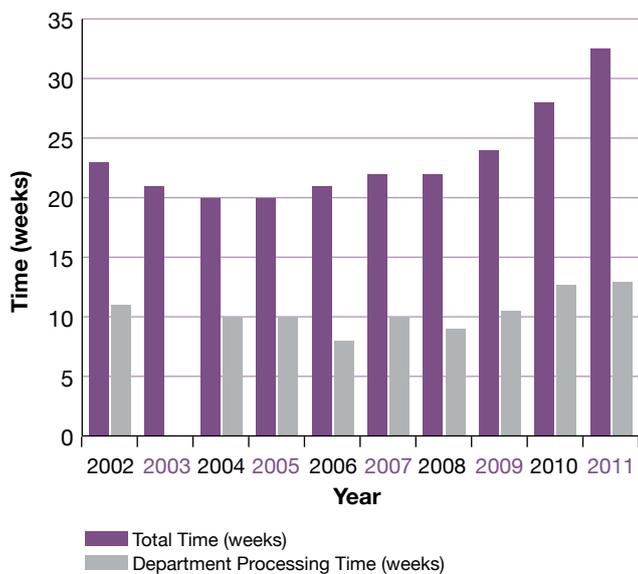
52 See Social Welfare Appeals Office annual reports 2001 – 2011.

In correspondence with FLAC about steps taken to reduce delays in the Department of Social Protection in forwarding files to the Appeals Office, the Decisions Advisory Office stated:

Every effort is made by Deciding Officers to submit relevant papers to the SWAO in a timely fashion. Sometimes, however, delays occur, for example where the Department is awaiting information from the customer, other Departments or other national and foreign institutions. (DAO 2012)

Figure 1.5 shows the average Department processing times compared to the average time taken for the whole appeals process.

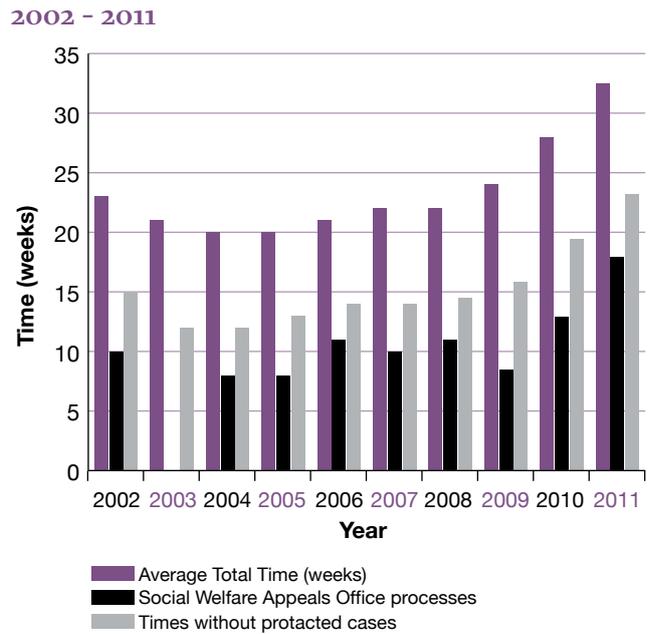
Figure 1.5: Department of Social Protection processing times for social welfare appeals



Source: Social Welfare Appeals Office annual reports

While there is no breakdown of the actual time taken to adjudicate on and issue a decision from the Appeals Office, the average time taken to complete procedures within the Social Welfare Appeals Office rose from 8.5 weeks in 2009 (SWAO 2010:3) to almost 18 weeks in 2011 (SWAO 2012:3). This time includes an average of processing times for both oral hearings and summary decisions, although the time taken to process an oral hearing is much longer. Figure 1.6 illustrates the difference in processing times over the last ten years.

Figure 1.6: Appeals Office processing times 2002 - 2011



Source: Social Welfare Appeals Office annual reports

However, the times charted do not in fact accurately reflect the actual time some appellants may have to wait. They represent an average of the overall time, which in some cases can take more than a year. In 2011, the average processing time for an appeal which required an oral hearing was 52.5 weeks (SWAO 2012:3).

1.7 CONCLUSION

A high proportion of incorrect first-instance decisions corrected at appeal stage, coupled with lengthy delays, means that some people may be deprived of their social welfare entitlements for a prolonged period of time, sometimes over a year. In certain instances, a person may apply for a basic Supplementary Welfare Allowance payment or an Exceptional or Urgent Needs Payment to tide them over while a live appeal is pending. However, in other instances people may not be granted such an interim payment; for example, where the appeal centres on a person's habitual residence. This may mean that an appellant experiences hardship as, in certain cases, he or she cannot access any payment at all while awaiting a decision on an appeal.

While the Minister for Social Protection has stated that appeals against refusals of Supplementary Welfare Allowance are prioritised, (Joan Burton TD, 28 March 2012) the average times of six weeks for a summary decision or 17 weeks for an oral hearing are simply much too long for someone to wait for a so-called safety-net payment while dependent on charity or the support of family or friends.

Such long delays in the appeals process indicate that both the Department of Social Protection and the Appeals Office need more efficient procedures as well as more resources to cope with demand for their services. Along with the required submissions, social welfare files should be forwarded to the Appeals Office within a set timeframe to facilitate quicker processing and reduce unnecessary delays. Also, in the interest of fairness, the appellant should be sent a copy of his or her file along with the Deciding Officer's submission at the same time as it is sent to the Appeals Office.

The statistics show that more than 50 per cent of all positive decisions are reached each year by the Deciding Officer reviewing his or her original decision. Coupled with this is the overall high rate of success on appeal. This indicates that improved procedures need to be put in place for better decision-making at first instance. This would greatly reduce the pressure on the Social Welfare Appeals Office, while also ensuring that delays are kept to a minimum.

**A HUMAN
RIGHTS
ANALYSIS OF
THE SOCIAL
WELFARE
APPEALS
SYSTEM**



Most human rights and fundamental freedoms are enshrined in a number of domestic and international legal instruments. These oblige the State to fulfil its duties to the individual by protecting, promoting and respecting rights, ranging from unenumerated rights in the Irish Constitution to rights covered by international treaties signed and ratified by the State.

While some instruments are examined here in greater detail than others, all of the instruments and mechanisms included could be used to guide the State in protecting the rights to social security and fair procedures and to highlight breaches where they occur. Some of these are under-utilised, which is why more information on related case-law or reports is not available. It is hoped that by raising awareness of the existence of the various tools available, all relevant actors will gain a greater understanding and insight into potential avenues for protection and redress which to-date have been largely neglected.⁵³

Social security is a very basic but essential human right, given the importance of a minimum standard of income to ensure that a person can live with dignity. The Irish social welfare system is designed to ensure that no one falls into destitution and to “[a]chieve a more inclusive society through the provision of income and other support services” (DSP 2011b:12). A person’s ability to access his or her entitlement to a social security payment can impact on a number of fundamental freedoms, including the right to health, the right to respect for privacy and family life and the rights to education and to work. Thus social security provides a safety net so that people in Ireland can live free of destitution and hardship, particularly those people at higher risk of poverty due to disadvantage, social status, age, gender or disability.

The right to social security is outlined at the outset of the chapter to provide a context for the procedural rights analysed directly afterwards. Due process and effective remedies must be adhered to under both domestic and international human rights law. This chapter analyses the appeals process in detail in order to ascertain whether fair procedures are followed by the Appeals Office and looks at whether or not the current system offers an effective remedy for people trying to access their right to social security.

2.1 DOMESTIC LEGAL FRAMEWORK

2.1.1 The Irish Constitution (Bunreacht na hÉireann)

The Irish Constitution is the basic law of Ireland, adopted on 29 December 1937. It guarantees a number of fundamental rights, including the right to fair procedures and due process under Article 40.3 of the Constitution. This particular provision has also been held to contain a number of ‘unenumerated’ fundamental rights, a concept first recognised in *Ryan v Attorney General*.⁵⁴ In the later case of *McGee v Attorney General*,⁵⁵ Mr Justice Walsh stated that, “[i]n particular, the terms of Article 40.3 expressly subordinate the law to justice” and explained that the law does not create rights as such but that certain fundamental rights are inherent in the natural order of things. According to Mr Justice Walsh, Articles 41, 42 and 43 recognise that

justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection.

53 For a detailed outline of useful mechanisms other than the ECHR, see *Using International Standards before the ECHR: UN and Council of Europe Instruments*, a paper delivered at the PILA/PILS 2012 Conference by Michael Farrell, FLAC’s Senior Solicitor. The paper is available online at www.pila.ie (last accessed 24 August 2012).

54 [1965] I.R. 294, also known as the ‘water fluoridation’ case.

55 [1974] I.R. 284.

2.1.2

European Convention on Human Rights

Ireland signed the European Convention on Human Rights (ECHR) in 1950 and ratified it in 1953. This instrument of the Council of Europe has since been incorporated into Irish law through the enactment of the European Convention on Human Rights Act 2003. The ECHR Act defines an organ of the State in s.1 as

a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised.

Both the Department of Social Protection and the Social Welfare Appeals Office, as a quasi-judicial tribunal, are “organs of the State” by this definition.

Section 3(1) of the ECHR Act 2003 holds that “every organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions”. Therefore the rights enshrined in the Convention, which include the right to life, the right to a fair hearing, the right to private and family life as well as the right to an effective remedy and a prohibition on discrimination, must be considered in all aspects of the Department of Social Protection’s work, including that of the Social Welfare Appeals Office.

2.2

REGIONAL AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Ireland is a member of the Council of Europe, the United Nations and the European Union. All of these bodies have relevant human rights instruments to which the State is a party. While international human rights law is not binding unless specifically incorporated into Irish domestic law, it can have persuasive value.

2.2.1

Council of Europe instruments

Ireland was a founding member of the Council of Europe in 1949 and is a signatory to a number of its instruments, three of which are relevant in the context of social welfare and the appeals process:

- The European Convention on Human Rights and Fundamental Freedoms (1950)
- The European Social Charter (revised) (1999)
- The European Code of Social Security (revised) (1990)

As mentioned previously, the **European Convention on Human Rights** is now part of Ireland’s domestic framework following the enactment of the European Convention on Human Rights Act 2003. The **European Court of Human Rights** was established in 1959 to adjudicate on alleged breaches in Council of Europe member states of the rights enshrined in the Convention. The court is based in Strasbourg in France and since 1998 it sits full-time. It can accept applications directly from individuals but only where domestic remedies have been exhausted.

The **European Committee of Social Rights** (ECSR), a committee of the Council of Europe, assesses Member States’ compliance with the provisions of the European Social Charter in terms of domestic legislation and practice. The Charter protects a number of human rights, including the rights to health, education, housing, employment, and legal and social protection as well as the right to non-discrimination. States that are parties to the Social Charter are obliged to report periodically to the European Committee of Social Rights on their implementation of the Charter. The Committee makes concluding comments in relation to national reports or can issue decisions in the case of complaint.

Ireland has also ratified the **Additional Protocol to the European Social Charter** providing for a system of complaints regarding breaches of the Charter. Ireland has consented to protect, promote and respect most of the rights enshrined in the Charter, including the right to social security (Article 12), the right to social and medical assistance (Article 13), the right to benefit from social welfare services (Article 14) and the right to protection against poverty and social exclusion (Article 30).

There are also safeguards in place for particular groups, including people with disabilities (Article 15), families (Article 16), children (Article 17), migrant workers (Article 19) and older people (Article 23). However, it must be noted that the State has not signed up to all provisions of the European Social Charter. It has opted-out of some provisions, including the right to housing (Article 31), the right to give time off to nursing mothers (Article 8(3)) and the right to information and consultation for workers (Article 21).

The **Council of Europe Commissioner on Human Rights** monitors human rights implementation across all member states and also works in thematic areas. The position of the Commissioner is described as “an independent institution within the Council of Europe, mandated to promote the awareness of and respect for human rights in 47 Council of Europe member states”.⁵⁶ Responding to austerity measures across Europe, in 2011 the then Council of Europe Commissioner for Human Rights Thomas Hammarberg highlighted his concern that

[t]he protection of social rights is being further tested during the current economic crisis. As with other human rights they are enshrined in treaties agreed by governments, one being the European Social Charter. The challenge is to ensure that these agreements are enforced in practice. This requires informing people about their rights and giving them an opportunity to complain when they find their rights violated. (Hammarberg 2011:211)

The State is also a party to the **Revised European Code of Social Security**, under which the State has to make periodic reports to the Council of Europe on its progress in providing social security benefits. This instrument aims to ensure certain minimum standards of social security in every contracting state, but it recognises the diverse social security systems of each. Article 75 of the Code refers to a right of appeal free of charge in the “competent jurisdiction” when a benefit is withdrawn, suspended or withheld.

⁵⁶ See website of the Council of Europe’s Commissioner for Human Rights at: http://www.coe.int/t/commissioner/Activities/mandate_en.asp (last accessed 30 July 2012).

⁵⁷ Both instruments include a specific right to social security.

2.2.2

United Nations Human Rights Instruments

Ireland became a member of the United Nations in 1955. The State is party to a number of international human rights treaties of the United Nations, including:

- Universal Declaration of Human Rights (1948)
- UN International Covenant on Civil and Political Rights (ICCPR) (1966)
- UN International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

The State signed the ICCPR and ICESCR in October 1973 and ratified both in December 1989. It has also ratified the Optional Protocol on Civil and Political Rights and has been examined three times by the UN Human Rights Committee under the ICCPR. In March 2012, Ireland also committed to ratify the Optional Protocol on Economic, Social and Cultural Rights. This will allow for a complaints mechanism to the UN in relation to any violation of rights contained in ICESCR. By ratifying the UN instruments, the State is bound to respect, promote and protect the rights enshrined in each.

Ireland has also ratified the UN Convention on the Rights of the Child (CRC) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) which have also some relevance to social security protection.⁵⁷

2.2.3

EU Charter of Fundamental Rights

The European Union (EU) Charter of Fundamental Rights became binding on EU member states, including Ireland, in December 2009. The rights contained in the Charter reflect those enshrined in the ECHR, but it also includes a specific right to social security. However, it must be noted that the EU Charter of Fundamental Rights is relevant only in relation to actions of EU institutions or bodies or where national authorities are applying EU law; in other words, where a person is exercising EU rights, such as a migrant worker exercising his or her freedom of movement or someone complaining about gender or racial discrimination.

2.3 SOCIAL SECURITY AS A FUNDAMENTAL HUMAN RIGHT

In Irish constitutional law there is no specific right to social security. Nevertheless, in his book *Social Security Law in Ireland* (2010), former Irish Expert on Social Security for the Training and Reporting on European Social Security (trESS) network Mel Cousins discusses whether Article 45 of the Constitution, headed *Directive Principles of Social Policy*, enshrines a right to social security. Article 45 provides that the State should protect “the economic interests of the weaker sections of the community” and contribute where necessary to support “the infirm, the widow and the orphan”. However, as Cousins also points out, the same article states that matters of social policy do not come within the jurisdiction of the courts (2010:29). He then considers whether the right to social security is included in the constitutional right to property:

Given the status that has been attached to property rights in Irish constitutional jurisprudence, this could provide important additional weight to the rights of social welfare claimants. However, the very wording of the Article and the philosophical approach underlying it would argue against a statutory right to a welfare payment being elevated to a ‘natural right, antecedent to positive law’. (Cousins 2010:30)

The Irish courts have recognised that a statutory pension⁵⁸ and a statutory right to a renewal of a tenancy⁵⁹ can both be considered property rights under the Constitution. In the case of *Minister for Social, Community and Family Affairs v. Scanlon*,⁶⁰ the Supreme Court indicated that there was no constitutional right to a social welfare payment. However, in the subsequent case of *In re Article 26 and the Health (Amendment) Bill 2004*, the Court appeared to confine *Scanlon* to cases where a claimant incorrectly received a welfare payment. Therefore, when a claimant has a vested right to a social welfare payment, or in other words, when he

or she has satisfied the conditions of eligibility and is entitled to assert his or her right to payment, that right may then be regarded as a property right.⁶¹

Nonetheless, the right to social security is a right explicitly included in international human rights law and has been firmly established as a personal property right within the scope of the European Convention on Human Rights. Article 1 of the First Protocol to the ECHR states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.

The European Court of Human Rights has held that the right to property extends to social security payments, although it does not create an entitlement to acquire property; an entitlement to that property must already exist in line with criteria set out in legislation. To put it a different way, the right to a particular social welfare payment must already exist in domestic law and a person must be capable of satisfying the requirements set out in legislation in order to come within the scope of the Convention and assert that right. It is the refusal to grant a payment to someone who meets the eligibility criteria for a particular payment which results in a potential breach of that right:

58 See *Lovett v. Minister for Education* [1997] 1 I.L.R.M. 89.

59 See *Shanley v. Commissioner of Public Works in Ireland* [1992] 2 I.R. 477.

60 [2001] 1 I.R. 64; [2001] 2 I.L.R.M. 342.

61 For a more in-depth discussion on the judicial treatment of social welfare rights, including cases improving access to welfare payments, see Chapter 4 of Whyte (2001).

In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid—subject to the fulfilment of the conditions of eligibility—as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.⁶²

While the European court referred to the Convention in terms of the civil and political rights it sets out, it also recognises that “many of them have implications of a social or economic nature”.⁶³

The Irish courts have also examined the provision of welfare in terms of Article 8 of the ECHR and the right to family life. In *Doherty v. South Dublin County Council*,⁶⁴ Mr Justice Charleton stated that in certain extreme circumstances which infringed the human rights of the person(s) affected, the State may need to intervene:

It may be that there is a positive duty cast upon public authorities to intervene under Article 8, consistent with the proper disposal of available resources, where special circumstances cause a direct interference of a serious kind in family life and where the subject of that interference has no available means to alleviate the absence of that right. (paragraph 36)

However, he went on to state that any such positive duties are not absolute and the particular conditions of the persons concerned would have to be taken into account when “criticising the failure to act”.⁶⁵ In this case, he held that there had been no violation of the applicants’ rights.

For its part, the European Social Charter not only emphasises the indivisibility of civil, political, economic, social and cultural rights, it also explicitly sets out the right to social security in Article 12 of the Charter.

Other international instruments which contain a right to social security include Article 34 of the European Charter of Fundamental Rights as well as Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), under which the State makes periodic reports to the United Nations.

While the Irish judiciary has been reluctant to accept that economic, social and cultural rights are justiciable (that is, capable of being argued in court), the UN Committee on Economic, Social and Cultural Rights has been very clear about the domestic application of the Covenant by signatory States:

It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society. (UN CESCR 1998:4)

62 *Stec v. United Kingdom* (2005) 41 E.H.R.R. SE18.

63 *Stec v. United Kingdom* (2005) 41 E.H.R.R. SE18. See also *Gaygusuz v. Austria* (1997) 23 E.H.R.R. 364 and *Sali v. Sweden*, admissibility decision of 10 January 2006.

64 [2007] IEHC 4 (Charleton J., Unreported, 22 January 2007).

65 For similar cases, see *O'Donnell (a minor) v. South Dublin County Council* [2007] IEHC 204 (Laffoy J., Unreported, 22 May 2007) and *O'Donnell & Others v. South Dublin County Council & Others* [2008] IEHC 454 (Edwards J. Unreported, 11 January 2008).

As social security is viewed as an economic right with a particular impact on some of the most marginalised people in Irish society, it is important that its significance as a fundamental right is not discounted.

2.4 RIGHT TO FAIR PROCEDURES IN RELATION TO SOCIAL WELFARE APPEALS

Given the quasi-judicial nature of the Social Welfare Appeals Office, the right to fair procedures is one of the most important aspects of any human rights analysis of the appeals process. This right is recognised by the Irish Constitution and has been interpreted by the Supreme Court as applying to administrative bodies adjudicating on appeals against refusals of social welfare appeals:

This Court has held...that Article 40, s. 3, of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally... but they may not act in a way as to imperil a fair hearing or a fair result.⁶⁶

Article 6(1) of the European Convention on Human Rights (ECHR) also provides for a right to fair procedures:

In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It is worth noting that the ECHR does not require the initial hearing to be fully compliant with Article 6 if there is a further right of appeal, such as an appeal to a higher court which would be compliant. However, the Chief Appeals Officer's review mechanism would not meet the requirements of Article 6 as it is even less transparent than the initial appeals process.

The Chief Appeals Officer herself does not consider the review mechanism as a further right of appeal although she can review the decision in light of both the law and the facts of the case. While there is a statutory right of appeal to the High Court or the possibility of a Judicial Review, these cannot deal with the facts of the case, only the law or procedure so the process may not fulfil all of the requirements of a fair procedure enshrined in Article 6.

The obligation contained in s.3(1) of the ECHR Act 2003 on "every organ of the State" to "perform its functions in a manner compatible with the State's obligations under the Convention provisions" requires that fair procedures are followed. The Social Welfare Appeals Office clearly falls within the definition of an "organ of the State" set out in s.1 of the same Act.

In order to consider whether an appeals process complies with the right to fair procedures, it is necessary to take into account the various elements which have been considered by the European Court of Human Rights under Article 6 of the Convention, including:

- the independence of the tribunal and its employees
- equality of arms between the parties and equal access to information
- the right to an oral hearing
- legal assistance and representation for appellants
- precedent and consistency in decision-making and
- reasonable processing times and no excessive delays in the appeals process.

Article 47 of the EU Charter of Fundamental Rights (which has binding effect on its Member States including Ireland) also enshrines a right to fair procedures and effective remedies where a matter of EU law is involved. The language mirrors that of Article 6(1) of the ECHR, but it also contains a reference to access to legal advice, representation and availability of legal aid where necessary.

66 *Kiely v. Minister for Social Welfare* [1977] I.R. 267 at para.18

2.4.1

An independent and impartial tribunal

Both actual independence as well as the perception of independence to individuals appealing a social welfare refusal is essential for a robust system which commands public confidence. An appeal should be decided on the applicable law and the individual circumstances of the case, not by policy directions from the Department of Social Protection.

Case study 1

In 2008 and 2009, FLAC took a series of cases to the Social Welfare Appeals Office to challenge the blanket exclusion of asylum seekers from access to social welfare payments. This exclusion was due to the application of the Habitual Residence Condition (HRC) as a qualifying condition for means-tested social welfare payments and Child Benefit. In a number of cases, Appeals Officers held that a person in the asylum process could satisfy the Condition. The Department of Social and Family Affairs (now the Department of Social Protection) challenged the successful appeals and asked the Chief Appeals Officer to review the decisions under s.318 of the Social Welfare (Consolidation) Act 2005 (the Principal Act). FLAC also asked the Chief Appeals Officer to review some unsuccessful appeals, so that a total of nine cases were under review. The Department relied on a Supreme Court decision in the case of *Goncescu & Others v. Minister for Justice, Equality and Law Reform*⁶⁷ which it argued meant that no-one in the asylum process could be regarded as resident in the State. Accordingly, the Department argued, no asylum seeker could satisfy the HRC. The Department had sought advice from the Attorney General but only referred to part of it in its submissions to the Chief Appeals Officer. In June 2008, this position was also included in revised *Guidelines for Deciding Officers on the Habitual Residence Condition* and some Appeals Officers relied on this policy direction to refuse appeals

from asylum seekers who claimed that they were habitually resident.

Following the review of the cases, the then Chief Appeals Officer held in all of the cases before him that the *Goncescu* case “did not have a social welfare relevance and that the judgment pre-dated the introduction of the habitual residence legislation.”⁶⁸ He clarified that the advice from the Attorney General’s office, quoted by the Department, was that time spent by applicants in the asylum process could not be considered as ‘residence’ and could not count towards satisfying the Habitual Residence Condition. But the Chief Appeals Officer noted that the Department had not quoted another portion of the advice, which said that time spent in the State was only one of the five factors used in determining habitual residence and that people could also qualify under the other four criteria.

In the cases in which Appeals Officers had held against asylum seekers being able to satisfy the Habitual Residence Condition, they were obviously influenced by the *Guidelines for Deciding Officers* drawn up by the Department and the somewhat selective version of the Attorney General’s advice given in the Guidelines, despite the fact that the actual legislation did not exclude any particular category of person and instead set out specific criteria which a person must satisfy.

In this series of decisions, the Chief Appeals Officer stated that he did “not believe there was any intention in framing the [Habitual Residence Condition] legislation to exclude a particular category (such as asylum/ protection seekers) from access to social welfare benefits. If there was any such intention the relevant legislative provisions would have reflected that intention and removed any doubt on the issue”, but this was not the case.

67 [2003] IESC 49.

68 Taken from the review by the Chief Appeals Officer in a series of cases taken by FLAC. See FLAC’s *Briefing Note on the Habitual Residence Condition*, September 2009 available online at www.flac.ie/ (last viewed 24 August 2012).

As far back as 1986, in its report on how best to develop and improve the social welfare system, the Commission on Social Welfare recommended that a separate, independent appeals office be set up with an independent chairperson. This recommendation stemmed from a public perception of the appeals structure then in place “as simply an extension of the Department of Social Welfare” (CSW 1986:410). At that time, appeals against refusals of social welfare applications were made directly to the Minister which was considered to be an unsatisfactory arrangement. Following the recommendation of the Commission on Social Welfare, the Social Welfare Appeals Office was established in 1991. The Commission had recommended that the SWAO should be a separate executive office that “should be situated away from the Department’s offices” (CSW 1986:410).

While some of the recommendations of the Commission on Social Welfare were implemented, they did not achieve perceived independence from the Department. No independent chairperson was ever appointed as recommended by the Commission. The SWAO is described in the Department of Social Protection’s annual statistical report as “an office of the Department” and despite the fact that it is described as “independent”, (DSP 2011a:7) Social Welfare Appeals Officers are appointed by the Minister of Social Protection and serve at her pleasure.⁶⁹

In 2007, then Chief Social Welfare Appeals Officer Brian Flynn stated that there was a need to consider “providing statutory independence for the Social Welfare Appeals Office.” While he acknowledged that Appeals Officers are statutorily appointed officials and “undertake their function of determining appeal cases in an independent manner”, he recognised that, in relation to the Office, appellants

must have confidence in its independence and its ability to carry out its role independently of those responsible for the decision being appealed. If that confidence is not there, the role of the appeals service is diminished and weakened. (SWAO 2007:15)

However, commenting on the current structure in a letter to FLAC dated 17 January 2012, current Chief Appeals Officer Geraldine Gleeson stressed that

[w]hile the office itself does not have a statutory basis, nevertheless the appeals process has a statutory basis in primary and secondary legislation. The SWAO operates independently and that independence has been observed and nurtured over many years.

When asked by FLAC to give an opinion on whether she believes the office should be made statutorily independent so that it is no longer a division of the Department of Social Protection, Ms Gleeson responded:

The question is posed on the basis that the current set up is vulnerable to a perceived lack of independence on the basis that the office itself is not statutorily underpinned and therefore any new statutory body must not be vulnerable to any perception of dependence on the Department of Social Protection. There is no suggestion in the question posed by FLAC as to what structure they have in mind. For example, a legislatively independent appeals office which remains under the aegis of the Minister for Social Protection continues to run the risk of being seen as being too closely associated with the sponsoring Department. (Gleeson, CAO, 17 January 2012)

⁶⁹ See Section 304 of the Principal Act. The Department of Social Protection’s organisational chart makes it clear that the Appeals Office is an office of the Department in the same way that there is a separate office for legislation or human resources. The chart is available online at www.welfare.ie

In contrast to this view, a 2010 report published in Belfast by Law Centre NI referred to a 2001 report by a former British Court of Appeal judge, entitled *Tribunals for Users: One System, One Service*. Sir Andrew Legatt had been asked to review the British tribunals system and reported that

structural change was a key factor, in that the removal of tribunals from their sponsoring Departments to a Tribunals Service... would ensure their actual and perceived independence... (Law Centre NI 2010:23)

The Law Centre NI report specifically refers to the tribunal system in Northern Ireland where an applicant may appeal a negative decision of the Department of Social Development (the Department of Social Protection's Northern Irish counterpart) to an Appeal tribunal. Nevertheless, the same general principle applies to the Social Welfare Appeals Office and the relevance of the Legatt report in this jurisdiction has already been noted by Northside Community Law Centre:

The very fact that a department is responsible for the policy and legislation, under which cases are brought in the tribunal it sponsors, leads users to suppose that the tribunal is part of the same enterprise as its sponsoring department. (Leggatt cited in NCLC 2005)

As outlined above, the European Convention on Human Rights makes specific reference to fair procedures being observed by an "independent and impartial tribunal established by law"; but it is not clear, given the position of the Appeals Office as a section of the Department, that the necessary safeguards are in place to ensure its actual and perceived independence.

One issue which arises in this context is the appointment and independence of Appeals Officers as serving civil servants who have previously worked in another section of the Department of Social Protection. They are usually employed at a higher grade when transferred from another part of the Department to the Appeals Office (Gleeson, CAO, 17 January 2012). In some instances, a person from another section of the Department may be

transferred without applying for the position when there is an unmet demand for Appeals Officers, but this is not generally the case. An Appeals Officer may transfer back to another part of the Department of Social Protection after a period of time spent in the Social Welfare Appeals Office. This demonstrates the point that he or she remains an employee of the Department during his or her time in the Appeals Office.

In this context, Hogan and Morgan raise concerns about the Office's independence:

The system is administered by civil servants working in the Department of Social Welfare whose independence is not guaranteed by law and who, perhaps, are influenced by departmental policy considerations. (Hogan & Morgan 2010:308)

The authors of *Administrative Law in Ireland* acknowledge that the establishment of the office itself in 1991 and the creation of the position of Chief Appeals Officer have improved on the "perceived lack of independence" (Hogan & Morgan 2010:308). In this context, the Chief Appeals Officer has outlined one measure which the Appeals Office has implemented to try to overcome any potential institutional bias. She states that

[...]when an Appeals Officer is assigned, we would tend not to assign cases relating to the area where he most recently worked until he had gained some experience as an Appeals Officer so as to ensure a sufficient distance from his previous role. (Gleeson, CAO, 17 January 2012)

However, when asked to clarify if there is a target timeframe for how long this might take, or how the Chief Appeals Officer determines when the Appeals Officer is ready to deal with such cases, Ms Gleeson stated:

There is no hard and fast rule on this issue. A lot will depend on the range and depth of experience of the officer concerned and on his or her performance generally. (Gleeson, CAO, 16 March 2012)

Such apparent safeguards are discretionary and are part of the internal procedures and furthermore do not address the issue of an Appeals Officer returning to another part of the Department of Social Protection. Before the establishment of the current system, the issue of independence was considered in *McLoughlin v Minister for Social Welfare*⁷⁰ in which an Appeals Officer considered that he was obliged to take account of a direction given to him by the Minister for Finance. The Supreme Court held that

[s]uch a belief on his part was an abdication by him from his duty as an Appeals Officer. That duty is laid upon him by the Oireachtas and he is required to perform it as between the parties that appear before him freely and fairly as becomes anyone who is called upon to decide on matters of right or obligation.

Almost thirty years after *McLoughlin*, the Commission on Social Welfare also stressed the importance of independent adjudicators in 1986, recommending the establishment of an independent social welfare appeals system:

Appeals Officers should not only be independent from Ministerial control and direction but also perceive themselves to be so. Appeals Officers are seen as quasi-judicial officers whose task is to rule on any questions of law without being constrained by policy. (CSW 1986:410)

Following the establishment of the SWAO in 1991, successive Ministers for Social Protection (previously Social and Family Affairs, and prior to that Social Welfare) have appointed civil servants from their department as Appeals Officers. These officers remain all the while in the employment of the Department of Social Protection, which undermines the perception of independence of the office.

Professor Robert Clark, a former law professor at University College Dublin, has expressed concern about the influence that departmental policy considerations may have on an Appeals Officer when reaching his or her decision.

They are “felt to be steeped in the culture and traditions of the Department... and therefore, less likely to take an independent line on matters of policy or adjudication than an objectively independent tribunal would be” (Clark 1995:293).

However, the Department is clearly aware of how essential it is to maintain the perception of independence at all times, as demonstrated by the guidelines for Social Welfare Inspectors who may be required to attend a social welfare appeal hearing. The guidelines note the importance of the appellant having “confidence in the even-handedness of the proceedings” (DSP 2010b). Social welfare inspectors are instructed to “avoid any familiarity” with the Appeals Officer, and the guidelines stress that

[i]t is essential that no allegation can be raised that an investigator was presenting evidence to the Appeals Officer privately without the opportunity for the claimant to rebut it. (DSP 2010b)

The appointment of the Chief Appeals Officer and Appeals Officers by the Minister of Social Protection contrasts strongly with, for example, the appointment of the Ombudsman, who is nominated by both Houses of the Oireachtas and appointed by the President. The Office of the Ombudsman is not attached to any particular government department, instead reporting directly to the Oireachtas. This detachment from the administrative departments which she may be investigating is key to maintaining the Ombudsman’s independence of office. It is equally crucial for the perception of impartiality and independence that motivates public confidence in the system. And yet it must be borne in mind that despite the emphasis on the Ombudsman’s independence, she does not have the power to make binding decisions. The need for perceived and actual independence is even more significant in relation to decisions of an Appeals Officer on fundamental human rights which are legally enforceable.

70 (1958) I.R.5.

Article 6 of the ECHR also includes a reference to “an independent and impartial tribunal” to ensure compliance with fair procedures in civil law matters. The question of what constitutes an independent tribunal has been considered by the European Court of Human Rights, which has held that it

[...]is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law[...]it must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6(1) itself...⁷¹

In *Dauti v. Albania*,⁷² the European Court of Human Rights in 2009 looked at the requirement of independence in terms of fair procedures. The case related to the refusal of a claim for incapacity benefit which the applicant appealed to the Appeals Commission which consisted of medical practitioners appointed by the Albanian Ministry of Health. The Court looked at the make-up of the members of the appeals body and, noting that it contained “no legally qualified or judicial members”, found that the Appeals Commission did not constitute an independent and impartial tribunal:

The law and the domestic regulations contain no rules governing the members’ term of office, their removal, resignation or any guarantee for their irremovability. The statutory rules do not provide for the possibility of an oath to be taken by its members. It appears that they can be removed from office at any time, at the whim of the ISS and the Ministry of Health, which exercise unfettered discretion. The position of the Appeals Commission members is therefore open to external pressures. Such a situation undermines its appearance of independence.

In these terms, the Social Welfare Appeals Office appears to lack many of the requirements set down by the European Court of Human Rights to ensure independence of tribunal members. Appeals Officers do not have to be judicially or legally qualified; they simply have to undergo training as part of an induction. The Institute of Public Administration developed a customised three-day training course for Appeals Officers in 2007 and 2008 which all Appeals Officers completed at that time (SWAO 2007:14-15). The Chief Appeals Officer has also explained in her letter (dated 17 January 2012) that:

There is a training regime in place which occurs over a number of weeks and months after the officer is assigned. Where a number of Appeals Officers are assigned together, as has been the case in the last two years, the training takes the form of a classroom setup for a number of weeks. These sessions cover the entire appeals process, national & EU legislation and observing oral hearings and undertaking mentored case work. From time to time various training sessions are arranged, for example, a session relating to the quasi-judicial nature of the appeals service is arranged for January 2012.

The terms on which a Social Welfare Appeals Officer holds his or her post would appear to be similar to those described in the *Dauti* case, which were held to be unsatisfactory in the context of Article 6. Appeals Officers remain employees of the Department of Social Protection, subject to the same conditions of employment as their colleagues in other sections of the Department. The legislation allows for the appointment of Appeals Officers by the Minister for Social Protection but does not specify particular expertise or requirements or indeed a term. While the Chief Appeals Officer is of the view that people working within the Department of Social Protection are the most familiar with the social welfare system, schemes, legislation and regulation, there is no transparency around the appointment of Appeals Officers and no public appointment process.

⁷¹ *Belilos v Switzerland* (1988) 10 E.H.R.R. 466.

⁷² *Dauti v. Albania* (2009) App. No. 19206/05.

While the European Court of Human Rights has held that there is no automatic violation of Article 6 where tribunal members include civil servants with particular expertise,⁷³ it has also stated

[i]n order to determine whether a tribunal can be considered to be independent as required by Article 6 (art.6), appearances may also be of importance... Where in the present case, a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence.⁷⁴

The issue is therefore whether an Appeals Officer can be considered to be sufficiently independent from the Department of Social Protection when he or she is appointed by the Minister who heads that department and where that Minister is effectively a party to any social welfare appeal.

In the British case of *Begum (FC) v. London Borough of Tower Hamlets*,⁷⁵ a housing benefits case, the House of Lords considered whether the administrator of the scheme who refused housing benefits could be considered impartial or independent. If this was not the case, the House of Lords was to examine whether recourse to a court on appeal could ensure compliance with Article 6 of the ECHR and make up for any lack of independence or impartiality. While the court found that the decision-maker was “not an independent tribunal simply because she is an administrator and cannot be described as part of the judicial branch of government” (paragraph 27), it also found that recourse to the court in this instance was sufficient to satisfy Article 6.

However, in the case of *Tsfayo v. the United Kingdom*,⁷⁶ the European Court of Human Rights found there was a violation of Article 6, as the housing review board comprised councillors who were not independent of the executive and were in fact connected to one of the parties in the dispute.

The board had to decide on the facts of the case and did not require any specialist expertise. Given that the review board had questioned the credibility of the applicant and that it was not open to the High Court to rehear the evidence or make its own determination on the applicant's credibility, the European Court held that a violation of Article 6 had occurred, as “there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute”⁷⁷

In terms of the Appeals Office, the appellant may ask the Chief Appeals Officer to review a decision of the Appeals Officer on a question of fact or law. However, this is still within the same administrative structure. A statutory appeal can only be made in relation to the law. The facts cannot be examined. Similarly, an appeal on the facts cannot take place during a judicial review which will only examine procedural issues. In this context, the decision of an Appeals Officer and the subsequent statutory appeal or judicial review may not be an adequate remedy to lack of impartiality or independence on the part of the Appeals Office.

The Appeals Office thus differs in a number of ways from Northern Ireland's system of social welfare or social security appeals. Northern Ireland's Appeals Tribunal consists of one, two or three members who are not attached to the Department for Social Development. At least one of these will be legally qualified so that he or she can apply the law to the particular case. It may also include financial, medical or disability experts, depending on the type of payment under appeal (DSD 2010:9). Following on from an appeal, where leave is given by the Tribunal member(s) there is a further right of appeal on a point of law to the Social Security Commissioners who now have the status of judges and are independent of both the Department of Social Development and the Appeals Tribunal (DSD 2010:13). The independence of both the first-tier and second-tier appeal mechanisms from both the Department and each other demonstrates the importance attached to perceived and actual independence in such appeal structures.

73 *Ettl v. Austria* (1988) 10 E.H.R.R. 255.

74 *Sramek v. Austria* (1985) 7 E.H.R.R. 351 at paragraph 42.

75 [2003] UKHL 5.

76 (2009) 40 E.H.R.R. 2.

77 At paragraph 48 of the judgment.

2.4.2

Equality of Arms

The concept of equality of arms has been recognised by the European Court of Human Rights as a component of the right to fair procedures enshrined in Article 6 which applies in civil as well as criminal cases. It encompasses a number of elements which ensure that both sides have a fair and equal opportunity to present their case in proceedings. It may include equal access to relevant information or documentary evidence, the right for both sides to be heard or to resolve any conflicts in the evidence, and the right to legal representation. These issues will be explored in the following sections.

In *Dombo Beheer v. The Netherlands*,⁷⁸ the European Court of Human Rights found that:

certain principles concerning the notion of a “fair hearing” in cases concerning civil rights and obligations emerge from the Court’s case-law. Most significantly for the present case, it is clear that the requirement of “equality of arms”, in the sense of a “fair balance” between the parties, applies in principle to such cases as well as to criminal cases.

2.4.2.1 Equal access to information and both sides must be heard

A concern related to social welfare appeals is the inequality between the parties where appellants may not even be aware of their right to access their own personal social welfare files. The appellant may already have seen or possess a copy of some of the material in the file, such as the original application form and subsequent correspondence. However, the file may also contain internal information, such as Social Welfare Inspector reports, computerised records, internal correspondence and a copy of the Deciding Officer’s submission. These may reveal information useful to an appellant’s case. The appellant is entitled to apply for a copy of his or her file under the Freedom of Information Acts 1997–2003, but this is nowhere indicated on the letter of refusal which informs the appellant of his or her right to appeal the decision.

As outlined in the first chapter of this report, the original decision-maker has to submit a statement to the Appeals Office once an appeal is lodged.⁷⁹ This statement is sent to the Appeals Officer and may contain a more thorough explanation for the refusal than the explanation given to the appellant, although new reasons may not be introduced at this stage. This document is not generally sent to the appellant in advance of the hearing. Thus the appellant is at a disadvantage by not knowing the full case against him or her. In fact, it is not sent to the appellant even after the hearing, unless specifically requested under the Freedom of Information legislation.

When there is no oral hearing, the Appeals Officer will rely largely or solely on the written contentions contained in the Deciding Officer’s submission, which may undermine fairness if the appellant is not afforded a chance to respond to the more detailed explanation put forward by the Deciding Officer. In cases which are decided summarily, the appellant or a representative has no chance to rebut the decision-maker’s reasoning or assertions through written submissions when he or she has not seen the Deciding Officer’s submission. This not only means that the appellant does not have full access to all the material before the Appeals Officer, but also that he or she is not given the opportunity to respond to arguments made or material produced to the Appeals Officer. This could also be seen as an infringement of the principle of *audi alteram partem*, “the other side must be heard”, which is essential in ensuring that fair procedures are followed.

Even where an oral hearing is held, the appellant or a representative may not have the opportunity to rebut the Deciding Officer’s submissions if the Deciding Officer does not attend. Where the Deciding Officer is not present at an oral appeal hearing, the Appeals Officer will often summarise the Deciding Officer’s submission but Appeals Officers may vary in how comprehensively they do this.

⁷⁸ (1994) 18 E.H.R.R. 213.

⁷⁹ Under Article 10 of the 1998 Regulations.

This situation has some similarities with the position referred to by Mr Justice Henchy in *Kiely v. The Minister for Social Welfare*:⁸⁰

It would be contrary to natural justice if one side were allowed to shelter behind his controverted documentary evidence while the other side had to bring his witnesses to the hearing, where they might be required to give their evidence on oath and to be subject to cross-examination. The lack of mutuality and the potential for an unjust determination inherent in such a procedure would put it in conflict with the rule of *audi alteram partem*.

If the Deciding Officer elaborates on the reasons for his or her decision in a submission, then in the interests of fairness a copy should also be issued to the appellant at the same time as his or her social welfare file. Given that the Appeals Office has raised concerns about the quality of submissions received from Deciding Officers, coupled with the high number of decisions revised by the original decision-maker when an appeal is lodged (as already illustrated in section 1.3.2), it is clear that errors and inaccuracies do occur at this stage. While appellants are given the opportunity to give “grounds for appeal” on the social welfare appeal application form, if they do not know the basis of the Deciding Officer’s decision, they may not know what case they have to answer.

In terms of ensuring equality of arms in civil cases, the European Court of Human Rights has found that the concept

implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.⁸¹

This principle should apply whether the case is decided by holding an oral hearing or through written submissions.

Furthermore, where the appellant receives a negative decision on his or her appeal (whether it is decided by oral hearing or summarily) a short extract from the Appeals Officer’s report is included in the notification letter to the appellant but the full report is not sent to the appellant so that he or she can learn how the Appeals Officer arrived at his or her decision. According to the Chief Appeals Officer, the reason that the full report is not routinely sent to the appellant is because

[m]any reports will refer to documents and reports that are on the file and, without the file in such cases, a report will not give the complete picture. If reports were to be issued as a matter of course, we would need to ensure they are more comprehensive and can be fully understood in isolation from the information on file. This would add to processing times which are already under significant pressure. However, I would hope to move in this direction when the current pressure on the office eases. (Gleeson, CAO, 16 March 2012)

In a situation where many appellants may not know that such a report exists or that it can be obtained by a Freedom of Information application, this practice could effectively deny an appellant the chance to see a document which could be key to helping him or her to understand the decision. It may also influence his or her decision about whether to seek a review of the decision by the Chief Appeals Officer or to appeal to the High Court, not to mention in preparing such a review application or appeal. It also ignores the fact that in most cases the appellant will already be aware of the “complete picture” from the hearing of his or her appeal. And if the appellant is not aware of all of the documents, it raises a question as to why not. Furthermore, if the appellant does not know about certain documents or aspects of his or her case, then it would be possible to apply for the file under FOI legislation but this should not be necessary; the appellant should be automatically sent a copy of the file and any updated documents.

80 [1977] 1 I.R. 267.

81 *Dombo Beheer v. The Netherlands* (1994) 18 E.H.R.R. 213 at paragraph 33.

The number of Freedom of Information requests to the Appeals Office for personal information has more than tripled in recent times, from 51 formal requests in 2007 (SWAO 2008:14) to 178 in 2011 (SWAO 2012:17). Nonetheless, when compared to the 31,241 new appeals received in 2011 it shows that only a tiny percentage, less than 0.6 per cent, of appellants exercise their right to information under Freedom of Information legislation.⁸²

The figure for FOI requests does not reflect the number of people who may make a request for their social welfare file directly to the relevant payment division within the Department of Social Protection. However, in the context of access to departmental files, in his book on *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Professor Gerry Whyte highlights the *Kiely*⁸³ judgment which established “the very important right of the claimant in a welfare appeal to have access to the evidence relied upon by the deciding officer in coming to his or her conclusion” (Whyte 2001:126).

Whyte discusses the importance of access to information for the appellant:

As a result of judicial intervention, therefore, claimants pursuing an appeal have a constitutional right of access to any evidence relied upon by the deciding official in coming to his or her conclusion. At a time when the information given by the Department to welfare claimants about decisions affecting them was very perfunctory, this right was a very valuable weapon in the armoury of anyone taking a welfare appeal and, notwithstanding the fact that deciding officers are now required to furnish unsuccessful claimants with a written memorandum of the decision,⁸⁴ it remains as an important safeguard of a claimant’s right to due process. (Whyte 2001:126)

2.4.2.2 Right to an oral hearing

As outlined in section 1.3.4, an appeal may be decided in two ways: either by holding an oral hearing, or on a summary basis, that is, based on the written evidence without holding an oral hearing. The test for whether or not an oral hearing should be granted was set down by Mr Justice Henchy in *Kiely v. Minister for Social Welfare*⁸⁵ in which he stated that a decision could be made on the summary evidence unless there were “unresolved conflicts in the documentary evidence, as to any matter essential to the ruling of the claim”. In such instances an oral hearing affords the claimant an opportunity to explain him or herself and clarify any issues which may be misunderstood.

The courts have also considered the right to an oral hearing in subsequent cases. In *Galvin v. Chief Appeals Officer and Minister for Social Welfare*,⁸⁶ the appellant argued that the Appeals Officer - and subsequently the Chief Appeals Officer - made an incorrect decision which was not based on the actual evidence. The appellant, who had requested an oral hearing, was not granted the opportunity to refute incorrect evidence produced by the Department of Social Welfare. Mr Justice Costello found that, in the circumstances, “without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment on the issues which arose in this case”. In relation to when an oral hearing should be granted, he stated

[t]here are no hard and fast rules to guide an Appeals Officer or, on an application for judicial review, this court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being under-taken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested.

82 Some people may request their files outside of the Freedom of Information legislation, but this number is not recorded in the annual report.

83 [1977] 1 I.R. 267.

84 Footnote in original citation: See the Social Welfare (Consolidated Payments Provisions) (Amendment) (Miscellaneous Provisions) Regulations 1999 [S.I. No.139 of 1999].

85 [1977] 1 I.R. 267.

86 [1997] 3 I.R. 240.

The Appeals Office maintains that there is no “right” on the part of the appellant to an oral hearing. The Chief Appeals Officer has stated:

With regard to summary versus oral decisions, it is down to whether one can fairly decide the case on a summary basis and whether one feels, having examined the file, that one has enough information. For example, one would have to consider if the person elaborated on a question whether he or she might make a better case or explain it more fully. Obviously it is down to the individual appeals officer. (Gleeson, CAO, 21 March 2012)

Instead, an oral hearing is granted at the discretion of the Appeals Officer although the Chief Appeals Officer has publicly said that where an oral hearing is requested, it is generally granted (Gleeson, CAO, 21 March 2012). However, although the Appeals Office refers to the exercise of discretion, fair procedures enshrined in both the Constitution and the European Convention on Human Rights must be observed by all organs of the State, including a quasi-judicial body such as the Appeals Office.

The right to an oral hearing has been examined by Mark De Blacam SC in his book on Judicial Review (2009) in which he discusses the “pragmatic approach” to whether an oral hearing is necessary. He says that this “ultimately depends on whether or not it can be demonstrated that one is required in order to enable the applicant fairly and adequately to make his case” (De Blacam 2009:215). This practical approach was taken by Mr Justice Hogan in a 2011 case entitled *Lyons & Anor v. Financial Services Ombudsman*.⁸⁷ In that case, the judge had to decide whether the Financial Services Ombudsman had “erred in law in rejecting the necessity for an oral hearing in order to determine certain factual issues between the parties”. The Financial Services Ombudsman argued that he did not deem it necessary to hold an oral hearing. He felt all of the relevant points had been submitted in writing and that an oral hearing would “not serve any purpose” despite the fact that conflicting evidence had been put forward by both sides.

Mr Justice Hogan held that

[t]he assertion nevertheless that, simply because the witnesses on one side or the other adhere to their stated position in written statements, cross-examination is likely to be of no value is one which, time after time, experience has shown to be unfounded. No greater truth-eliciting process has been devised... In these circumstances, it is impossible to avoid the conclusion that the Ombudsman’s decision was vitiated by a serious error, negating as it did in the circumstances of this case the very substance of the appellant’s right to fair procedures.

The right to an oral hearing in social security cases has also come before the European Court of Human Rights in a case entitled *Salomonsson v. Sweden*.⁸⁸ In this case Mr Salomonsson applied for a disability benefit but was refused by the Social Insurance Office. Following a subsequent application and refusal, he appealed to the County Administration Court⁸⁹ and was refused leave to appeal. Despite conflicting factual evidence, he was not granted an oral hearing, although he had not specifically requested one. Following a new application which was also refused by the National Social Insurance Board, he appealed. The appellate body found that the medical evidence was inconclusive and ordered both sides to make written observations. The Court then granted Mr Salomonsson the payment but gave the Board leave to appeal. At this point Mr Salomonsson requested an oral hearing, but the Administrative Court of Appeal refused his request and gave him two weeks to make final written submissions.

87 [2011] IEHC 454.

88 (App. 38978/97), Judgment of 12 November 2002.

89 The appellate body which would equate to the Social Welfare Appeals Office in the Irish situation.

The European Court of Human Rights was asked to determine whether Article 6(1) of the Convention includes a right to an oral hearing and whether, in Mr Salomonsson’s case, this right was violated by the failure and/or refusal to grant him an oral hearing. The Court held that

the entitlement to a “public hearing” in Article 6§1 necessarily implies a right to an “oral hearing”. However, the obligation under Article 6§1 to hold a public hearing is not an absolute one. Thus, a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary... Furthermore, a hearing may not be necessary due to exceptional circumstances of the case, for example when it raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties’ written observations. (Paragraph 34)

So while an oral hearing may not be required in each case, where there is a dispute on either the facts or the law, the appellant has a right to an oral hearing to ensure that a decision is made in line with fair procedures, unless he or she expressly waives that right. The Court also discussed the situation whereby a person did not have an oral hearing at any step during the proceedings. It found that “unless there are exceptional circumstances... the right to a public hearing under Article 6§1 implies a right to an oral hearing at least before one instance”. (Paragraph 36)

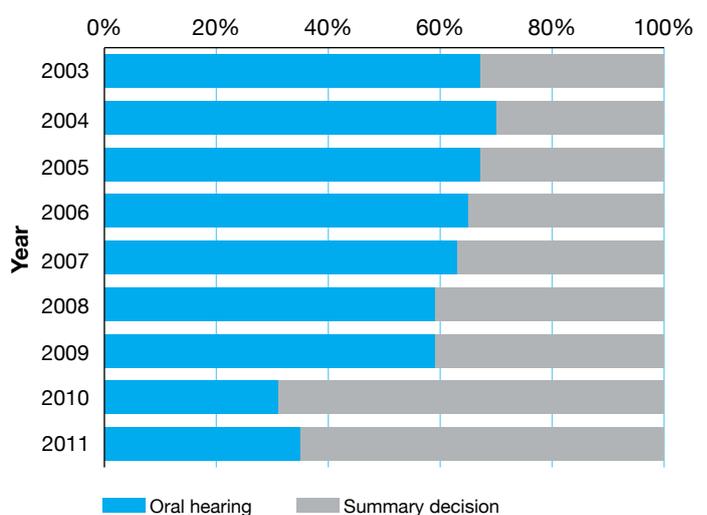
Both the Irish courts and the European Court of Human Rights are of the view that unless there is sufficient justification for not holding an oral hearing, it should be granted where there is a dispute between the parties as to the facts or law or where further clarification is necessary. This is an important point, given the greater trend towards reliance on summary decisions as outlined in the Chief Appeals Officer’s 2010 annual report (SWAO 2011a:10) and indicated by the Minister for Social Protection (Joan Burton TD 11 October 2011). The Chief Appeals Officer does acknowledge the need for any emphasis on summary decisions to be

“tempered... by the need to ensure that due process and fair procedures were adhered to” (SWAO 2011a:10).

To contextualise the pressure on the Appeals Office, in 2009 the number of appeals it received rose by 46 per cent. In 2010, the backlog carried over from 2009, coupled with a 25 per cent increase in the number of new appeals received, resulted in the office’s workload being a further 43 per cent higher than in 2009. While the number of new appeals lodged in 2011 dipped slightly, when added to the existing undecided appeals, the Appeals Office’s workload increased by a further 6.4 per cent to reach an unprecedented 51, 515 live appeals.

While the absolute number of appeals has risen dramatically, the percentage of decisions made summarily in 2010 and 2011 compared with previous years illustrates a clear policy change to favour summary decisions over oral hearings. Responding to a parliamentary question, former Minister for Social Protection Eamon Ó Cuiv TD stated in January 2011 that “more emphasis” was being put on “dealing with appeals on a summary basis” (Ó Cuiv, 18 January 2011). This policy has been continued by the current Minister Joan Burton TD (20 July 2011). The proportion of all cases decided summarily ranges from 30 per cent in 2004 to 69 per cent in 2010 and 66 per cent in 2011, as can be seen in Figure 2.1.

Figure 2.1: Percentage of finalised appeals by oral hearing versus summary decision 2003 - 2011⁹⁰



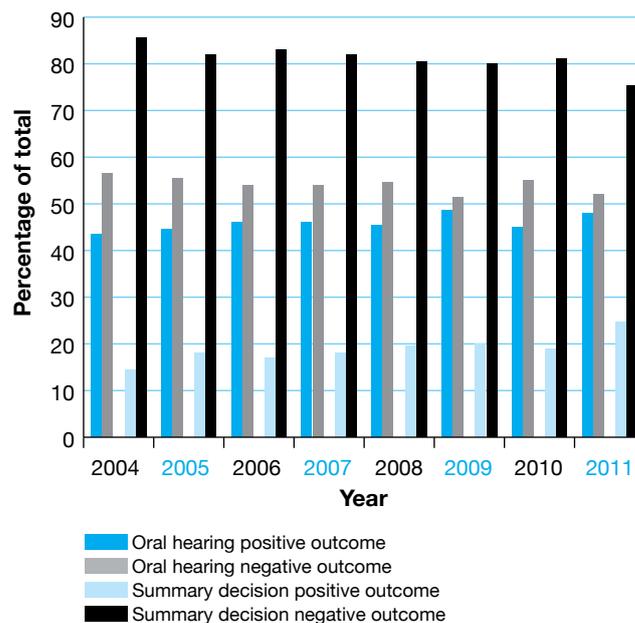
Source: Social Welfare Appeals Office annual reports

90 There is no breakdown available for finalised appeals in 2002 decided by either oral hearing or summary decision.

Speaking before the Joint Oireachtas Committee on Social Protection in October 2010, Deputy Chief Appeals Officer Dan Kavanagh referred to the need to “increase productivity” by making more summary decisions (Kavanagh, Deputy CAO, 27 October 2010). While the steep rise in live appeals overall may provide the rationale for dealing with more appeals summarily, the exceptionally large percentage increase in summary decisions must give rise to concern that the rights of some appellants may not be fully protected. Statistics from the Appeals Office annual report for 2010 suggest that the shift in emphasis towards more summary decisions has resulted in the vast majority of additional appeals received being decided in this fashion. While reducing the number of oral hearings may cut waiting times, it is important that this is not done at the expense of due process and a fair hearing for all appellants.

Another reason why the right to an oral hearing is so important is that statistics from the Appeals Office consistently demonstrate that there is a higher rate of success on appeal in cases where an oral hearing is held compared to the success rate when a decision is made on the written evidence only. From 2004 to 2009 the total number of positive decisions, which includes both those decided by summary decision as well as those decided after oral hearings, was greater than the number of negative decisions. However, in 2010 and 2011 the percentage of overall positive decisions fell to 42.7 and 42.2 per cent respectively from 48 per cent in 2009. Despite the fact that the rate of success at oral hearings remains consistently high (ranging from a low of 45 per cent in 2008 to a high of 49 per cent in 2009), the proportion of appeals decided in this way has dropped significantly. In 2011, oral hearings were granted in only 8821 cases out of a total of almost 25,390 cases decided on by Appeals Officers, or in other words an oral hearing was granted in only 35 per cent of cases. This is in contrast with a much higher figure of 59 per cent in 2009.

Figure 2.2: Outcomes of oral hearing and summary decisions 2004 - 2011⁹¹



Source: Social Welfare Appeals Office annual reports

One possible reason for a high rate of success by appellants at oral hearing was put quite succinctly by Professor Gerry Whyte in *Social Inclusion and the Legal System: Public Interest Law in Ireland*:

At an oral hearing, misunderstandings or assumptions that underpin decisions of the welfare authorities come to light more easily and can be corrected by the claimant. (Whyte 2001:127)

91 There is no breakdown available of outcomes of oral hearings and summary decisions prior to 2004.

Whyte also refers to a decision by the US Supreme Court which sheds additional light on why an oral hearing might be more successful than a summary decision. In *Goldberg v Kelly*,⁹² Mr Justice Brennan stated:

Written submissions are an unrealistic option for most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mould his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. (at p. 269)

Therefore, it might be argued that an appellant who is not familiar with the social welfare legislation, who lacks adequate legal advice or representation, or who is not fully aware of all of the documents provided to the Appeals Officer by the officials in the relevant payment section, may be placed at a distinct disadvantage. In research conducted in Northern Ireland, the Social Security tribunal members themselves

regarded paper hearings as unlikely to be successful for appellants, because tribunals have to make a decision on the same evidence as was available to the decision maker; appellants tend not to appreciate what additional evidence may be required to raise a successful appeal. (Law Centre NI 2010:33)

Without the opportunity to present his or her case in person, the appellant's complete case may not be disclosed and the Appeals Officer may make an assumption or base his or her decision on a wrong interpretation of the facts. Given that appellants are not asked whether they require an oral hearing and also that hearings are now granted less and less frequently unless specifically requested, some appellants may be at a distinct disadvantage.

2.4.2.3 Right to assistance and legal representation

The right to representation is another element of fair procedures intended to achieve a balance in any legal proceedings where one side may be at a disadvantage. As pointed out by the late professor of law and author of a leading text on the Irish Constitution, John M. Kelly, because it is not absolute, this right will depend on the circumstances of the case:

Where the good name and livelihood of a person is liable to be affected by an administrative decision, the constitutional right to fair procedures guarantees that such person is entitled to legal representation and to cross-examine. These rights are not, however, absolute and, in particular, the full panoply of these rights may not apply at a preliminary stage of an inquiry... there may be special circumstances where the presence of a lawyer is unnecessary, save in cases of last resort. (Kelly 2003:645)

Professor Kelly also made it clear that a right to be legally represented may not mean that there is a right to legal aid. A person making an appeal to the Appeals Office cannot avail of representation through the state civil legal aid scheme because it does not provide representation before most tribunals.⁹³ However, the Legal Aid Board is not precluded from offering legal advice to social welfare appellants. Despite this fact, the Board's annual reports show no advice work in this area in the three years between 2008 and 2010 (LAB 2009:14; 2010:14; 2011:19). Most social welfare applicants do not have the means to engage a private lawyer and traditionally many legal professionals have not engaged in this type of work. Some appellants instead seek the assistance of a non-governmental organisation, a Citizens Information Centre or a lay advocate. The Citizens Information Board states in its 2012 Pre-Budget Submission that 465,000 queries, or 47 per cent of the total queries to its services, were related to a problem with social welfare (CIB 2011:2). Other social welfare appellants may make an appeal without any assistance or representation whatsoever.

92 397 US 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

93 See s.27 of Civil Legal Aid Act 1995 and the decision in *Corcoran v. Minister for Social Welfare* [1991] 2 I.R. 175.

Representation or assistance is not limited to attendance at an oral hearing. It can also include helping a person to prepare the written appeal which may include organising documentation, making written submissions, or preparing the facts and any legal evidence for the case. The right to fair procedures encompasses the right to assistance in preparing any case.

An appellant may bring a representative or advocate to an oral hearing, although the Appeals Officer has to give his or her consent, but the “failure... to accede to a request to grant legal representation in an appropriate case would probably amount to an unreasonable exercise of his discretion and/or a violation of the principles of constitutional justice” (Hogan & Morgan 2010:306).

In his 2006 Annual Report, the former Chief Appeals Officer commented:

My Office’s experience in recent years of representatives from Citizens Information Centres attending appeal hearings was quite low and, in that regard, I urged information providers to think about getting more involved in the appeals process on behalf of their customers. Even if their attendance amounted to nothing more than moral support for an individual who may well feel intimidated by the process itself, it would be well worth while. (SWAO 2007:15)

This recognition from the head of the Appeals Office of the value of assistance from advocates for some appellants shows an understanding that the process can be intimidating from the appellant’s perspective. The current Chief Appeals Officer has indicated that the Appeals Office continues to give presentations and training to staff from the Citizens Information Centres (Gleeson, CAO, 16 March 2012), but there is no detail about what this may entail. While she states that representation is a decision for the appellant, she recognises that “competent representation may well assist some clients where they don’t fully understand the issues involved because of low levels of education or literacy problems or where they are very concerned about an issue, for example, where there may be a large overpayment at stake” (Gleeson, CAO, 16 March 2012).

The UN Committee on Economic, Social and Cultural Rights has stated that when exercising a right to social security, “[l]egal assistance for obtaining remedies should be provided within maximum available resources” and “legal assistance” should be available “for obtaining legal remedies” (UNCESCR 2008:20).

While assistance and representation may make a positive difference to the outcome of an appeal in a number of ways from the point of view of the appellant, the Law Centre NI has also noted in terms of an oral hearing that “[t]he advantage of representation in being able to focus the hearing on the justiciable issue(s), clarifying and expediting the process was also regarded as a significant advantage for the tribunal” (Law Centre NI 2010:33).

The Appeals Office does not keep statistics on the number of people who are represented at appeal stage. However, Northside Community Law Centre expressed concerns in its 2005 report that while increased representation at appeals might result in more formal procedures being adopted, a “lack of representation may be disadvantageous to appellants” (NCLC 2005:22).

In 1993, British civil justice expert Professor Dame Hazel Genn wrote about the need for representation at tribunals similar to the Social Welfare Appeals Office. She analysed arguments put forward against legal representation at tribunals, including the UK Social Security Appeals Tribunal as it then was, stating:

The absence of legal aid is generally explained or defended on the ground that tribunal procedures have been so designed that applicants should be able to bring their cases in person and without legal representation. Tribunal procedures are generally flexible; strict rules of evidence do not apply; applicants are permitted to tell their story in their own words; and tribunal chairs are free to take a more interventionist role than judges in court. Indeed it is argued not only that legal representation is unnecessary in tribunals, but that the presence of lawyers might undermine the speed and informality that are the hallmarks of tribunal procedures. (Genn 1993:399)

However, Professor Genn’s research looked at the impact of representation and found that the “presence of a skilled representative increased the probability that a case would succeed” (Genn 1993:400). The researchers also interviewed tribunal officers who noted the advantages for the decision-maker in having a “skilled representative” who could present relevant information and evidence for the client. This would save the tribunal official time he or she would otherwise have spent on eliciting the information or leading the appellant through his or her case. The representative would be more detached from the details of the case than the client him or herself, and therefore more able to present it in a succinct way. The benefits of representation at appeal stage were echoed in research from Northern Ireland on the tribunal system which indicated that

[w]hile tribunals are designed to be used by people who are not represented, in some [cases]... the law is so complex that while the conduct of the hearing can be facilitative, it may not erode the disadvantage of a lack of competent legal representation. (Law Centre NI 2010:12)

But representation at oral hearings is not the only aspect of this issue. The information and advice given to an appellant prior to a hearing or when making written submissions can have a significant impact on the outcome of an appeal. Consequently, the low take-up of social welfare legal advice from law centres needs to be addressed by the Legal Aid Board to ensure greater access for appellants to fair procedures and effective remedies.

Where a person is reliant on social welfare, he or she will probably not be able to afford assistance and representation, which will likely limit the help available. Further, given the current cuts in funding to the voluntary sector, there is less capacity among non-profits to carry out this type of work, especially given the huge increase in the number of people taking social welfare appeals. Indeed, where a qualified legal representative becomes involved, he or she may have to work on a *pro bono* basis (for free) as a representative may only be able to

recover token expenses rather than the full cost of work done. This undoubtedly limits the amount of work done in this field by legal professionals and other advocates. However, in the case of *O’Sullivan v. Minister for Social Welfare*,⁹⁴ the issue of costs for a solicitor representing an appellant at a social welfare appeal hearing was considered when the Appeals Officer granted only the standard expenses. Mr Justice Barron said:

The basic question must be was it reasonable to have legal representation? If it was, then there may be reasons for awarding costs even if the appeal fails. In such circumstances where the appeal succeeds then costs should be allowed save where the principles of fairness require otherwise.⁹⁵

In an earlier case, *Corcoran v. Minister for Social Welfare*,⁹⁶ Mr Justice Murphy held that a person did not have a constitutional or automatic right to legal aid or to be paid his costs in a social welfare appeal (Hogan & Morgan 2010:307). In *O’Sullivan*, Mr Justice Barron held that an Appeals Officer could not limit his or her own discretion to award costs by allocating a standard fee of £30. However, a change in the law subsequently neutralised the *O’Sullivan* decision by restricting the Appeals Officer’s discretion to the award of expenses only.⁹⁷

The removal of legal aid in social welfare cases sparked huge debate and criticism in England and Wales, where previously legal aid was provided for advice on welfare payments in about 135,000 cases annually (Law Society of England and Wales 2011:3). With the passing of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in May 2012, however, social welfare benefits cases will be completely excluded from the scope of legal aid. The Act is due to take effect from April 2013.

However, the previous provision of legal aid in such cases illustrated both the importance and the efficacy of providing advice for social welfare claimants where they cannot access their entitlements.

94 [1997] 1 I.R. 464.

95 *O’Sullivan v. Minister for Social Welfare*, cited in Hogan and Morgan (2010:307).

96 [1991] 2 I.R. 175.

97 See s.34 of the Social Welfare Act 1996 which is now s.316 of the Social Welfare (Consolidation) Act 2005.

While civil legal aid was not usually granted to provide representation before tribunals in the UK, many people were able to benefit from advice and assistance to prepare their cases (Justice Gap 2011:11).

Liberty, an independent British human rights and civil liberties organisation, has highlighted the potential negative impact of withdrawing legal advice from social welfare claimants, a “significant proportion” of whom “may have poor levels of education and low standards of literacy” (Liberty 2011:16). Liberty pointed out that the lack of legal aid in this area of law may result in low success rates for appellants and that in the realm of social welfare applications, “legal help at an early stage has a significant part to play in resolving issues before they reach the court steps” (Liberty 2011:16).

Furthermore, research by the Citizens Advice Bureau in England, cited in Liberty’s policy submissions in advance of the LASPO Act, found that providing legal aid for social welfare applicants resulted in savings in the long-run as people could avoid expensive legal costs at a later date (Liberty 2011:19). One of the Bill’s most vocal opponents, former UK Legal Aid Minister Lord Bach, described the cuts as an “attack on poor people, the vulnerable and disabled” and stated “it is wicked, mean and verging on the unconstitutional because without advice and the ability to get advice, there is no justice for these people” (*Legal Voice* 2012).

Thus provision of advice and assistance at the preliminary stages of an appeal could expedite the process as well as being more cost-effective for the State in the long-term. However, as pointed out by a number of research studies, including the Law Centre NI’s report on tribunals, representatives assisting social welfare appellants must have adequate knowledge and experience of the issues at hand, something which advocates and lawyers may not necessarily have unless they specialise in administrative or specifically social welfare law:

The experience of tribunal members was that quality of representation was hugely variable, but it was also clear that the quality of representation was not dependent on the representative being legally qualified: in some cases, the worst types of representation were seen to be provided by lawyers who did not understand the area or the nature of tribunal proceedings, and who presented cases as they would at court... but for social security appeals tribunals... good quality representation from advice organisations with specific knowledge and expertise was generally seen as superior to representation from private solicitors. (Law Centre NI 2010:35-6)

To ensure that Article 6 of the ECHR is meaningful and effective, the European Court of Human Rights has read in a right of effective access to the courts.⁹⁸ In *Airey v Ireland*,⁹⁹ it was held that

Article 6 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory... or by reason of the complexity of the procedure or of the case.

The Court also found a breach of Article 6 in that case on the basis that Mrs Airey had been denied legal aid in a judicial separation case. This was a matter which involved complex points of law, required the presentation of evidence and could only be heard before the High Court. It was significant that in all previous such petitions, applicants had enjoyed legal representation. Against that backdrop the European Court of Human Rights concluded that without legal assistance, Mrs Airey would be unable effectively to present her own case.

⁹⁸ *Golder v. UK* (1975) 1 E.H.R.R. 524.

⁹⁹ *Airey v. Ireland* (1979) 2 E.H.R.R. 305.

Also in the later case of *Steel and Morris v. United Kingdom*,¹⁰⁰ Ms Steel and Mr Morris were sued by McDonald's fast-food chain for defamation following the distribution of anti-McDonald's leaflets. The pair was denied legal aid as defamation was excluded from the scope of legal aid. The European Court held that the applicants' right to a fair trial had been violated. It stated that the requirement to furnish legal assistance contained in Article 6 will depend on "what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively". However, it is for the state to determine how it will provide any legal assistance that is required.

While ideally a person should be able to represent him or herself in a social welfare appeal, the reality is that the appellant may have to deal with complex issues of law which require explanation or legal assistance. As outlined above, a number of factors must be considered in deciding whether or not it is fair to expect appellants to represent themselves before such a body.

2.4.3

Precedent and consistency in decision-making

In its 2005 report on the social welfare appeals process, Northside Community Law Centre highlighted the need to publish decisions of social welfare appeals officers:

One of the difficulties experienced by anyone wishing to take an appeal is the problem of working within a vacuum. Appeals Officers decisions are not published leading to an absence of any system of *stare decisis*. If the regulations are to be applied fairly and consistently, some type of system of precedence is required – none exists at the moment. (NCLC 2005:19)

Stare decisis is the legal principle that courts should follow earlier decisions where a specific point of law has been considered and decided upon;

in other words, where a precedent has been established.

In *Atanasov v. Refugee Appeals Tribunal*,¹⁰¹ the Supreme Court considered the capability of a quasi-judicial tribunal to ensure consistency in its decisions, as well as ensuring fair procedures are followed. The case concerned the access of asylum applicants coming before the Refugee Appeals Tribunal to previous decisions of that body. The court considered

whether an appellant before the Refugee Appeals Tribunal is legally and/or constitutionally entitled to access previous decisions of the Tribunal in which similar and, therefore, relevant issues of law arose.

The court held that the principles of fair procedures under constitutional and natural justice were not met where "relevant previous decisions are not available to an appellant" and where "he or she has no way of knowing there is such consistency". Mr Justice Geoghegan looked at the importance of consistency of decision-making in such tribunals, stating:

It is not that a member of a tribunal is actually bound by a previous decision but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary.

The Judge went on to consider the "equality of arms" issue and the lack of knowledge of previous decisions both by Tribunal members and appellants which could lead to inconsistent and unfair decisions. He described the situation whereby appellants did not have any access to previous decisions which would be of benefit to their individual cases and said that "such a secret system is manifestly unfair". He went on to say that this "unfairness is compounded if... the presenting officers as advocates against the appellants have full access to the previous decisions".

100 [2005] 41 E.H.R.R. 403. This case is sometimes referred to as the "McLibel" case.

101 [2006] IESC 53.

The necessity to publish decisions of “legal importance” was discussed in the *Atanasov* case but the Supreme Court did not deem it appropriate to specify how best to do this, stressing that as long as applicants to the Tribunal are given “reasonable access in whatever form the Tribunal considers fit to previous decisions”, the Tribunal would meet the requirement to ensure fair procedures.

However, arguments about equality of arms and fair procedures similar to those accepted in *Atanasov* in relation to asylum decisions were rejected in relation to social welfare decisions by Mr Justice Hedigan in *Jama v Minister for Social Protection*.¹⁰² This case dealt specifically with the issue of publishing decisions by Social Welfare Appeals Officers. FLAC represented the applicant in that case, who was a refugee seeking to have her application for Child Benefit backdated to the birth of her son following the declaration of her refugee status. She sought access to decisions of the Appeals Office which might be relevant to her case and called on the Minister for Social Protection to publish relevant decisions of the Appeals Office or to make these accessible to appellants.

The situation in *Jama* was relatively similar to that in *Atanasov*, given that both bodies are quasi-judicial tribunals where principles of fair procedure and constitutional and natural justice should be upheld. However, the judge held that decisions on social welfare applications were very different to decisions on the political situation in a country from which a person is seeking asylum, effectively holding that lesser standards should apply in social welfare decisions. In fact, however, both tribunals seek to make decisions on individual claims which must meet certain requirements laid down in legislation; fairness and consistency of decision-making is an important feature in both cases, even if social welfare appeals are generally less formal and often turn less on legal principle.

In the *Jama* case, Mr Justice Hedigan rather controversially relied on the anticipated cost of establishing a database of decisions to which a social welfare appellant would have access, despite the applicant’s arguing that only decisions that raised significant issues of law or practice need be recorded. He said:

Public policy in this regard, notably in these straitened times, must surely outweigh a right of access to such information.

By contrast, another High Court judge in the same year took a different approach in the *Lyons*¹⁰³ case (discussed in section 2.4.2.2 of this report) when he held the Financial Services Ombudsman had been wrong not to grant an oral hearing where there was conflicting written evidence. Mr Justice Hogan arrived at his decision despite the “many inconvenient consequences (including, perhaps, considerable resource implications at a time of austerity) for the Ombudsman’s office”.¹⁰⁴

The Appeals Office had argued that decisions of Appeals Officers and the Chief Appeals Officer do not constitute binding precedents. It had also acknowledged, rather inconsistently, that a number of “[i]mportant decisions are recorded and reported in the annual report for the assistance of the public and Appeal Officers alike.”

However, Case Study 2 raises a number of issues, including the fact that Appeals Officers do sometimes rely on previous decisions of their colleagues, including the Chief Appeals Officer. Another issue is that where an important point of law and/or policy is determined, this is not always included in the annual report as it is not clear how particular cases are selected for inclusion in it.

102 [2011] IEHC 379.

103 [2011] IEHC 454.

104 At paragraph 36 of the judgment.

Case study 2

The series of social welfare cases mentioned in Case Study 1 also highlighted the issue of precedent and consistency in decision-making. It became apparent that there were inconsistencies in decisions of Appeals Officers and their interpretation of the Habitual Residence Condition (HRC) in relation to this group of people. Some Appeals Officers held that an asylum seeker could be found to be habitually resident based on their individual circumstances, while other Appeals Officers held that they could not meet the requirement under any circumstances.

One appellant had obtained a copy of the Appeals Officer's decision in her case which relied on a previous decision of the Chief Appeals Officer in a very similar case, where he had held in favour of the appellant. This decision was cited by FLAC in a number of later social welfare appeals. The Department of Social and Family Affairs (now Social Protection) objected on the basis that an Appeals Officer's decision did not set a precedent for other cases. FLAC argued that this approach could lead to inconsistency of decision-making and might impede the appellant's right to fair procedures, given that like applications should be treated alike.

The Department requested that the Chief Appeals Officer review a number of positive decisions in cases where this issue arose and FLAC requested a similar review of five negative decisions involving the same issue.

The Chief Appeals Officer held that the legislation did not provide for a blanket exclusion of asylum seekers, or any category of people, from access to social welfare benefits where they could satisfy the criteria for habitual residence and held that each case had to be determined on its own merits.

On the issue of Appeals Officers referring to previous decisions of their colleagues, the former Chief Appeals Officer stated that the Appeals Office did not regard appeal decisions as setting a precedent and that it was inappropriate to refer to other appeal cases in decisions. However, he also

acknowledge[d] the point made by FLAC that there is value in issues of general principle and approach being identified in previous appeal determinations which may provide guidance and assistance to appellants in the context of their own appeals.¹⁰⁵

The Chief Appeals Officer issued his final decisions in this series of reviews in December 2009. One week later, the social welfare legislation was amended to exclude a number of categories of people, including asylum seekers, from being able to satisfy the Habitual Residence Condition. However, despite the significance of these cases in establishing a point of policy and clarifying the law in this area, none of these cases were included in the subsequent annual report of the Appeals Office nor did it acknowledge the role of these decisions in changing the law.

¹⁰⁵ Outcome of a Review of an Appeals Officer's decision in accordance with section 318 of the Social Welfare Consolidation Act 2005 by the Chief Appeals Officer, dated 14 August 2009. The review was requested by the Child Benefit Section of the Department of Social and Family Affairs following a positive decision of an Appeals Officer. The appellant was represented by FLAC.

The fact that social welfare appeal decisions are not published leads to a lack of clarity for appellants, as noted by the UN Special Rapporteur on Human Rights and Extreme Poverty following her visit to Ireland in January 2011. Magdalene Sepúlveda recommended in her report that

[t]he transparency of the social protection system should be enhanced so that beneficiaries have access to clear information about the criteria and process by which decisions are made. The decisions of the Social Welfare Appeals Office should be published in a form which allows for broad dissemination and understanding among existing and potential beneficiaries. Efficiency in making and publishing decisions should be a priority... (OHCHR 2011:12)

Social welfare expert Mel Cousins, in an article on the *Jama* case,¹⁰⁶ refers to the British Upper Tribunal's "excellent database of decisions" and contrasts this with the less impressive record of Irish courts and quasi-judicial bodies in publishing decisions:

Irish courts and tribunals do not provide many examples of good practice. There are frequently long delays before decisions of the Irish High Court are on-line and many are still not in paragraphed format (to allow easy reference); on-line (or any) access to Circuit Court decisions is practically non-existent; the RAT confines access to decisions to 'appeal applicants' legal representatives'; the Employment Appeals Tribunal provides open access to all decisions but without any categorisation making location of relevant decisions very difficult; the Revenue Appeals Commissioners publish very few decisions; and so on.

Cousins examined Mr Justice Hedigan's judgment in the *Jama* case and concluded that:

Obviously the issues involved in the refugee appeals process are factually very different from those involved in most social welfare appeals. Nonetheless the social welfare appeals system involves the interpretation of a complex code of law and issues of legal interpretation frequently arise. It is difficult to see that the advantages of access to decisions outlined in *Atanasov* would not also apply in relation to social welfare appeals and that, in an appropriate case, a social welfare appellant should not also be entitled to access to relevant decisions as a matter of constitutional justice. (Cousins 2012)

He refers to a previous High Court case, *ESB v. Minister for Social and Family Affairs*¹⁰⁷ in which the Appeals Officer had to decide an issue following a change in procedure by an employer. While the particular facts of the case are not relevant here, it is interesting to note that, upholding the Appeals Officer's decision, Mr Justice Gilligan stated that the Appeals Officer in reaching her decision had to "discern whether there were new facts or evidence which would warrant an alteration of the decisions taken over the years by previous appeals officers". He found that she had considered the case properly and had taken into account "the significance of all the new facts which had emerged since this issue was last examined by an Appeals Officer". This would suggest that where an Appeals Officer or Officers determine a point of law or interpret the application of a policy, the evidence of previous decisions should be available and that settled interpretations can and should be followed in subsequent cases unless there is a significant change that alters the situation.

One of the reasons given by the Department in the *Jama* case as to why the Appeals Office did not publish its decisions was that it did not record or keep a systematic database of decisions either electronically or in hard copy.

106 Available online at http://works.bepress.com/mel_cousins/20/. Last accessed on 5 April 2012.

107 [2006] IEHC 59.

The Chief Appeals Officer has noted in her 2010 annual report that the number of Appeals Officers who retired in 2009 resulted in the appointment of an “unusually high number of new Appeals Officers” in 2009 and 2010. She also referred to measures taken to combat the “loss of experience”. These included appointing more experienced Appeals Officers as mentors to newly appointed officers and introducing a new central repository for reports of decisions which would, however, only be available to Appeals Officers and not to appellants. While the introduction of a new computerised system to record and organise decisions is a welcome development, it will not, as it stands, address the issues around transparency and accessibility for appellants. It does, on the other hand, negate the argument that it would be impossible or extraordinarily difficult to make this information available.

At a meeting of the Joint Oireachtas Committee on Jobs, Social Protection and Education in March 2012, the Chief Appeals Officer stated that comparisons drawn between the Social Welfare Appeals Office and other bodies which publish their decisions were not “appropriate”, as there were “issues of scale”. She explained that in 2010, “the Social Security Commissioners [in Northern Ireland] finalised 141 decisions, the Refugee Appeals Tribunal finalised 2,783 and the Equality Tribunal finalised 322 whereas the SWAO finalised 28,166 decisions in the same period” (Gleeson, CAO, 21 March 2012). Then Committee member Seán Kyne TD gave the example of the single appeals body attached to the Workplace Relations Commission announced by Minister for Jobs, Enterprise and Innovation. This body is intended to “provide and maintain on the internet a searchable database of decisions and their underlying reasons for adjudicators and the general public” (Seán Kyne TD, 21 March 2012). The Chief Appeals Officer responded by stating that:

It takes a lot of work to make a file anonymous so that nobody, not even a family member, could recognise the case when we publish reports in the annual report. It is a huge task given the numbers involved. We will examine the system that the Minister, Deputy Bruton, is putting in place and it will be interesting. (Gleeson, CAO, 21 March 2012)

The Blueprint to Deliver a World-Class Workplace Relations Service reiterated that the Department of Jobs, Enterprise and Innovation will establish and maintain a database of decisions. Either party to the appeal can seek anonymity which will be considered and, if granted, then names and identifying features will be redacted before publication (DJEI 2012:19). The document also explained the rationale for publishing decisions:

In order to aid consistency in decision-making a database of decisions will be maintained and made available through www.workplacerelations.ie. Periodic reviews of decided cases will be undertaken by the Registrar. These will be categorised and made publicly available. This will be of benefit to those considering making a complaint or who have had a complaint made against them and to those providing information to employers and employees. (DJEI 2012:19)

However, in relation to the publication of case studies in the Appeals Office annual report and on the website, Ms Gleeson said she did

accept that the number of cases relative to the caseload is extremely small but, up to now, we simply did not have the capacity to do more. I fully accept that expanding the number of case studies available would be of benefit to our customers and their representatives. For 2012, I have put in place measures to increase the number of cases made available on the website and to better select the cases, particularly where issues arise that have implications broader than just the particular case such as where a legal or interpretative issue arises. (Gleeson, CAO, 21 March 2012)

In correspondence with the Department, FLAC asked if there would be more consistency in decision-making if previous decisions could be more easily recorded and accessed in a database.

The Decisions Advisory Office responded that “the holding of such a database might over time compromise the principle that every case is decided on its merits” (DAO 2012). It also felt that consistency is “achieved through the provision of training, guidelines and advice to Deciding Officers” (DAO 2012). The Decisions Advisory Office was also asked if it would be helpful to the office if decisions of Appeals Officers which clarified a point of law or an important matter of practice were published and circulated. The Office replied:

Scheme areas and Local Offices are generally aware when cases are returned following appeal and Deciding Officers discuss anything unusual as a matter of routine. Cases of particular interest are also published by the Social Welfare Appeals Office in its annual report and on its website and are accessible to all. In addition, the regular meetings held between Department officials and the SWAO are also useful for discussing issues of interest and can result in changes in forms, procedures, guidelines etc. (DAO 2012)

This response indicates that important decisions establishing a point of law or practice are not brought to the attention of decision-makers in any systematic way. While the Decisions Advisory Office states that Deciding Officers may discuss these decisions, it is not clear if a decision which may have implications across a number of payment schemes will be reported internally on a wider scale. The Appeals Office holds regular formal and informal meetings with representatives from the Department, which is the respondent in almost all appeals. However, a similar arrangement has not been established for meetings with appellants’ representatives. This reinforces perceptions that there is an imbalance in the nature of the relationship between the Appeals Office and other parts of the Department versus the relationship that it has with appellants and their representatives.

However, it seems that the *Jama* case and the persistent calls for access to prior decisions for appellants may be having an effect. If there is a

substantial increase in the number of case studies published, that will undoubtedly help to reduce the inequality between appellants and the Department and improve appellants’ ability to present their case. However, it is still unclear whether the selection process will ensure that all potentially relevant cases will be made available.

2.4.4

Reasonable processing times and delays

The emphasis on making decisions summarily can be partly explained by the need to reduce the lengthy delays in the appeals process. However, while there is a need for efficiency, this should not be done at the expense of due process and fair procedures. Delays in themselves must be looked at in line with fair procedures; the question as to what constitutes an “unreasonable delay” is discussed below.

While the concept of fair procedures requires decisions to be given within a “reasonable time”, there is no set timeframe for what may constitute “reasonable” in this context. Instead the impact of delay on the individual’s rights needs to be considered. As Ovey and White outline in their book, *The European Convention on Human Rights*:

The object of the provision in Article 6(1) is to protect the individual concerned from living too long under the stress of uncertainty and, more generally, to ensure that justice is administered without delays which might jeopardise its effectiveness and credibility (Ovey & White 2006:187-8).

A list of relevant criteria to be considered when assessing “reasonable time” has been developed by the Council of Europe in its publication, *Social Security as a Human Right: The protection afforded by the European Convention on Human Rights*. Such criteria include

the complexity of the case, the behaviour of the applicant and the conduct of the competent authorities. In this last regard, account is taken of the nature of the matter at stake for the applicant. (Council of Europe 2007:13)

Where the “matter at stake” is access to a social welfare payment which constitutes the applicant’s principal source of income, this will be a material factor in determining the reasonableness of any delay.¹⁰⁸ In *Salesi v. Italy*,¹⁰⁹ the European Court of Human Rights rejected the State authorities’ argument that the applicant’s conduct should be taken into consideration when the applicant had not requested that they expedite the case. The Italian Government also sought to rely on an “argument based on the backlog of cases in the appellate court” but the Court held that

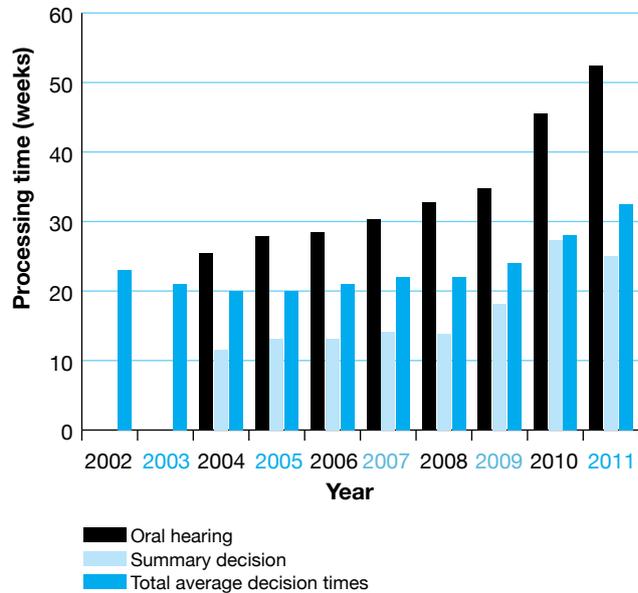
it must not be forgotten that Article 6 para. 1 (art. 6-1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements.

Thus while it now takes longer to process social welfare appeals because of the increase in the number of appeals, it is not enough for the Social Welfare Appeals Office to explain these delays by referring to the backlog of cases, unless the State can show that the backlog was not reasonably foreseeable and that it took prompt remedial action.¹¹⁰ The Chief Appeals Officer herself has described the delays as “unacceptable” but also acknowledged that “by definition, the appeal process cannot be a quick one” (Gleeson, CAO, 21 March 2012).

In *Ayavoro v. Health Service Executive*,¹¹¹ Mr Justice O’Neill did not find that the applicant had suffered destitution because of the delay in processing his case. Nonetheless, he did state in passing that the welfare authorities were not entitled “to make onerous demands [for information] which kept an impecunious person out of benefit for an unconscionable period of time which, in the case of impecuniosity, would ... be a very short time indeed.” This reasoning presumably could also be applied to social welfare appeals.

Figure 2.3 illustrates the increase in the total average processing times as well as indicating the difference in waiting times for an oral hearing compared to the time taken to process a summary decision.

Figure 2.3: Average processing times for appeals 2002 - 2011¹¹²



Source: Social Welfare Appeals Office annual reports

As discussed previously,¹¹³ given that appellants who are given an oral hearing are more likely to be successful than those appeals where the Appeals Officer decides the case on written evidence only, it is important to ensure that people are not discouraged from asking for an oral hearing. One reason for this is that the appeal will be processed more quickly if a decision is made solely on the written evidence. Furthermore, the decision on whether to hold an oral hearing or decide a case on the documentary evidence alone should not be based on a desire to clear the backlog of appeals. Each case should be considered fully and on its merits and the Appeals Officer should identify whether there are issues which need further clarification or which would benefit from an oral hearing, and should take into account the wishes of the appellant.

108 *Mocie v. France* Application no. 46096/99.

109 (1993) 26 E.H.R.R. 187.

110 *Salesi v. Italy* (1993) App. No. 13023/87; *Buchhov v. FRG* (1981) 3 E.H.R.R. 59.

111 [2009] IEHC 66, (6 February 2009).

112 Only overall processing times were given for 2002 and 2003 and no breakdown for summary decisions and oral hearings.

113 In section 2.4.2.2 of this report.

General Comment 19 of the UN Committee on Economic, Social and Cultural Rights also specifies that social welfare payments should “be provided in a timely manner” in order to comply with the fundamental right to social security contained in the UN Covenant on Economic, Social and Cultural Rights.

With the current delays in the appeals process, a person may not receive the payment to which he or she is actually entitled for more than a year after applying for it. If that person is solely reliant on that payment, with no access to any other income, or is not granted Supplementary Welfare Allowance in the interim, he or she could end up in a precarious position, accruing debt and/or facing destitution. In these circumstances, although appellants may receive arrears of payment following a successful appeal, it is arguable that the process neither complies with fair procedures nor provides an effective remedy. Payment of arrears may not even clear debts incurred or money borrowed to sustain the appellant while he or she is waiting for a final decision. Periods of deprivation due, for example, to non-receipt of Child Benefit cannot be fully compensated by a subsequent payment of arrears.

2.5 RIGHT TO AN EFFECTIVE REMEDY

The right to an effective remedy is enshrined in Article 8 of the Universal Declaration on Human Rights, which refers to an effective remedy before “competent national tribunals” in cases where “fundamental rights granted... by the constitution or by law” are violated.

The UN Committee on Economic, Social and Cultural Rights, discussing the right to social security, explains that it also encompasses a right to a remedy and to accountability where a person has been unable to access social security:

Any persons or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national and international levels. (CESCR 2008:20)

Article 13 of the European Convention of Human Rights also sets out this right:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The European Court of Human Rights stated in *Kudla v. Poland*:¹¹⁴

If Article 13, is as the Government argued, to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by Article 6(1), individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court’s opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened... the Court considers that the correct interpretation is that that provision guarantees an effective remedy before a national authority for an alleged breach of the requirements under Article 6(1) to hear a case within a reasonable time.

114 (2002) 35 E.H.H.R. 198. Cited at page 467 of Ovey & White 2006).

So the remedy must be effective not just in name; it must actually afford an adequate and appropriate remedy in real terms. Ovey and White explain that “the tendency of respondent governments has been simply to point to some procedure available in the national legal order” when asked to satisfy Article 13 of the European Convention on Human Rights (2006:465). In *Conka v. Belgium*,¹¹⁵ the European Court of Human Rights stated:

The ‘effectiveness’ of a ‘remedy’ within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the ‘authority’ referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.

Putting Article 13 of the ECHR in an Irish context, there is a further right to review a decision of an Appeals Officer by the Chief Appeals Officer, as well as a right to a statutory appeal to the High Court. Although each of these remedies has its own drawbacks, the Irish machinery for appealing social welfare decisions might seem on the surface to comply with the formal requirements of the Convention. This is all the more so because, in certain cases, there may also be an option to judicially review the process. The Irish courts have stated that they should be “slow to interfere with the decisions of expert administrative tribunals”.¹¹⁶ However, in cases where Appeals Officers have clearly made a mistake in law, the court has quashed the decision.¹¹⁷

If a process only works with ever-increasing delays, however, the remedy may not be effective. Given that people applying for a social welfare payment usually have little or no other source of income, and in light of the current delays in the social welfare appeals process, it becomes clear that the available remedies (such as judicial review or a statutory appeal to the High Court) may not be deemed “effective” where a person has to endure lengthy delays without any recourse to an appropriate payment. Such delays include both delay at appeals stage and any subsequent delay in accessing the High Court.

115 (2002) 34 E.H.R.R. 1298.

116 *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34.

117 *Murphy v. Minister for Social Welfare* [1987] I.R. 295.

PERSPECTIVES ON THE SOCIAL WELFARE APPEALS PROCESS



3.1 BACKGROUND TO SURVEY

In 2011 FLAC undertook some primary research to gain an insight into the social welfare appeals process. A survey was designed with the objective of exploring advocates' own level of experience and knowledge on the operation of the social welfare appeals system, Freedom of Information legislation and further rights of appeal or review. FLAC also planned to create a specific survey for Appeals Officers to examine the operation and efficiency of the system as well as looking at the provision of adequate support and the need for representation for appellants. As the purpose of the research was to gain an understanding of the perception of the process in general, it was decided not to survey individual appellants at this stage.

In conducting our research on the appeals process, FLAC envisaged consulting with Appeals Officers as well as advocates who provide assistance to social welfare appellants on whether they consider that the process provides an accessible, fair and independent means of reviewing social welfare decisions. Our aim was to present a balanced view of the operation of the social welfare appeals system from the perspective of the system's administrators alongside appellants' advocates.

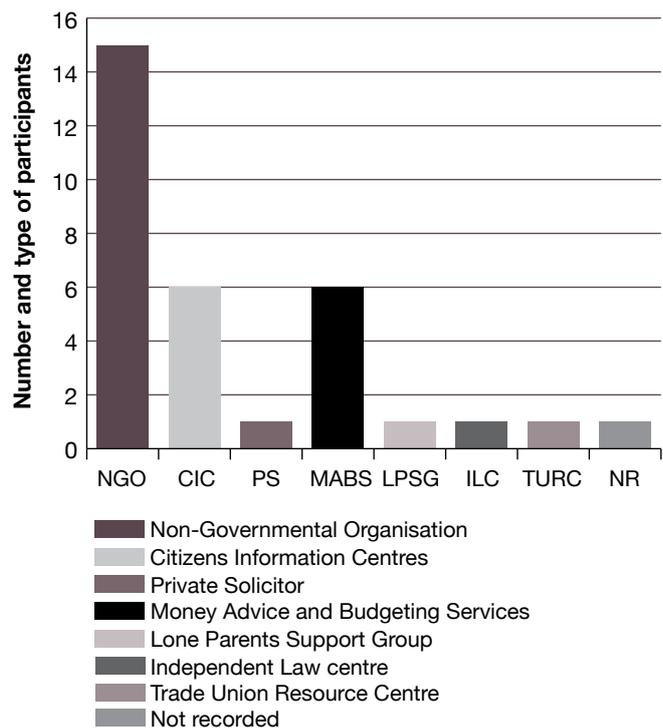
FLAC met with the Chief Appeals Officer and Deputy Chief Appeals Officer to request permission to survey Appeals Officers. Unfortunately FLAC was denied permission to either survey or interview the Appeals Officers. Instead, FLAC corresponded directly with the Chief Appeals Officer and her responses have been incorporated into the report where appropriate. We also contacted the Decisions Advisory Office, a section of the Department of Social Protection responsible for ensuring consistency and quality in social welfare decision making. The Decisions Advisory Office meets with the Appeals Office quarterly, or more frequently if needed. FLAC sent a series of questions to the Advisory Office in relation to social welfare application and appeals processes and the responses are included below where relevant.

With the Appeals Officers unavailable to participate in a survey, we assembled a list of potential advocacy organisations and individuals to target and the survey was sent to the following list:

- independent law centres;
- organisations to which FLAC provides second-tier legal advice on social welfare;
- Citizens Information Centres;
- Money Advice and Budgeting Service (MABS);
- lawyers on the Public Interest Law Alliance (PILA) register;
- organisations who attended PILA training sessions on social welfare appeals.

We received 32 completed surveys. Approximately half of the participants were based in Dublin (17) with representation also from the rest of Leinster (4), Munster (7), Connaught (2), Ulster (1) and one unrecorded location. While this sample does not purport to be representative of all advocates working on social welfare appeals, it does demonstrate the perception of the Social Welfare Appeals Office amongst people who are familiar with its operation and offers some recommendations for improvement. Figure 3.1 illustrates the various respondents to the FLAC survey.

Figure 3.1: Number and type of participants in FLAC survey



N=32

The survey consisted of 34 questions in total (see Appendix 2). Advocates were asked about their own level of experience and knowledge on the operation of the social welfare appeals system, Freedom of Information legislation and further rights of appeal or review.

Participants were asked to describe their experience of first-instance decision-making to ascertain whether claimants had difficulties in obtaining written refusals so as to appeal a negative decision. We also asked about the success rate when advocates requested reviews by Deciding Officers of their decisions, so it could be compared with the success rate when the Appeals Office requested such reviews.

Advocates were also asked about their knowledge and use of various mechanisms, including reviews by an Appeals Officer (section 1.3.6.2), reviews by the Chief Appeals Officer (section 1.3.6.3), statutory appeals to the High Court (section 1.3.7) and/or complaints to the Ombudsman (section 1.5). A section was also included on Freedom of Information to see if advocates used this legislation and if so, in what context and if they found it useful (sections 1.4 and section 2.4.2.1)

Through the survey, we also asked advocates to identify any apparent advantages or disadvantages of oral hearings and summary decisions respectively, in line with our research on the perceived benefits of oral hearings (section 2.4.2.2) and delays experienced when awaiting one.¹¹⁸ In relation to oral hearings, the survey also looked at the set-up of the hearing and whether advocates found it appropriate (section 1.3.4.1). Given the recent decline in the number of oral hearings we wanted to ascertain whether advocates routinely requested them. If that was the case, we asked whether they had noticed a difference in the number granted in recent times (section 2.4.2.2) or a decline in the number of positive decisions following such hearings (section 1.6.2).

The survey also sought to assess advocates' perception of Appeals Officers - whether they appeared impartial and acted independently, and how advocates viewed their knowledge and expertise (section 2.4.1). Advocates were asked to express their views on the independence of the SWAO and how it might improve its operation.

They were also asked to rate how fair they considered the current system to be.

3.2 FIRST INSTANCE DECISION-MAKING

Before assessing the operation of the appeals process, the advocates were asked to comment on the initial decision-making process. Here FLAC asked if they ever had to request a written refusal for a client in order to be able to appeal a social welfare decision. While this written refusal should be issued as a matter of course, some 20 of 32 respondents (63 per cent) replied that they had been required to make such a request. In a quarter of those cases, the advocate had made more than ten such requests, with one person having had to request a written refusal in more than 50 cases.

When asked about the quality of first-instance decision-making, not a single respondent felt that the correct decision is always made at first instance, although as one pointed out:

Obviously I only see individuals who have been refused payment so this perception may be skewed.

While a quarter of respondents felt that a correct decision was made at the initial stage in more than half of the cases with which they dealt, the majority of participants (18 out of 32, or 56 per cent) felt that a correct decision was given in less than half of the cases they encountered.

Almost all advocates (30 out of 32) had used the option of requesting a review of a refusal by a Deciding Officer, with five (16 per cent) of these always requesting a review before advising a client to lodge an appeal. More than half of those surveyed requested a review regularly or occasionally, but as one person stated:

¹¹⁸ 'Summary' decisions in this context means decisions made solely on written material without an oral hearing.

Often we have to lodge an appeal and request a review at the same time – as the CWO will not pay SWA unless they see appeal has been lodged.¹¹⁹

The results of the survey indicate that most of these decisions were not overturned when a review was requested. Five advocates (17 per cent) stated that the review was never successful. Some 17 respondents (57 per cent) who had requested a review on behalf of a client prior to the appeal reported success in less than half of their clients' cases. Only one person had a positive result from all requests made. Seven (23 per cent) of those surveyed who had sought a review said that a decision had actually been revised by the Deciding Officer in more than half of the cases where a review was requested.

Nonetheless, given that a review by the Deciding Officer is often quicker than an appeal, the survey results suggest that the review mechanism may be a useful alternative to an appeal in some cases when a client receives a refusal of a social welfare payment. In 2011, some 6035 decisions, representing 18 per cent of cases finalised by the Appeals Office that year, were overturned by the initial decision-maker following an application for an appeal. The annual report does not, however, include statistics on the number of reviews requested by the claimant before he or she makes an appeal. Therefore it is not known how many of these are successful to allow comparison with the number of successful reviews by the initial decision-maker when a formal appeal has been lodged.

In relation to first instance decision-making, the Chief Appeals Officer has commented:

Quality and consistency of decision making is an extremely important issue for the Appeals Office both in relation to initial decision making by the Department and the decisions of Appeals Officers... There is no doubt that good feedback between the Appeals Office and the Department can and does lead to improvements in initial decision making. The Decisions Advisory Office provides the main, but not only, forum for such feedback. In some cases a more targeted forum is used where an issue or issues might relate to a particular scheme area or issue. Clarity in the decisions which issue from the Department can also help to minimise appeals and this is an aspect on which we have made representations to individual scheme areas. (Gleeson, CAO, 16 March 2012)

In a previous letter to FLAC, she also outlined that the “most important aspect of the application process from the SWAO point of view is that all relevant information is elicited and is available to the original decision maker and that decisions are clearly explained” (Gleeson, CAO, 17 January 2012).

FLAC also asked the Decisions Advisory Office whether the application process for social welfare applications could be made simpler and if this might have a positive impact on decision-making in the first instance. The Advisory Office responded that the

DSP [Department of Social Protection] is always mindful of the need to make all applications processes as simple and as easily understood as possible, and keeps this under review on an ongoing basis. (DAO May 2012)

119 The survey was carried out in September 2011 just before the transfer of Community Welfare Officers (CWOs) to the Department of Social Protection.

The Advisory Office also stated that:

Every effort is made to ensure that applicants provide all of the necessary information at the time of their initial applications. Application forms include instructions for completion along with tick box checklists so that applicants may check that they have included all the information and supporting documentation required. Claim forms and other communications are reviewed regularly to ensure that all relevant information and guidance is clearly stated and appropriately highlighted. (DAO May 2012)

Addressing the Joint Oireachtas Committee on Social Protection held in March 2012, Chief Appeals Officer Gleeson referred to measures “designed to achieve better first instance decision making” which include a pilot scheme initiated by the Department of Social Protection “whereby when a decision goes back to the Department a different deciding officer will examine it”. She also mentioned a change in the Domiciliary Care Allowance scheme, where there is a “new more detailed form being piloted which obtains more information from parents of children with medical difficulties” (Gleeson, CAO, 21 March 2012).

While the measures initiated by the Department of Social Protection are welcome, in the course of this survey advocates also made suggestions to improve the standard and efficiency of first-instance decision-making, including:

- More staff training;
- Consistency in the interpretation of and clarification of guidelines and legislation;
- Transparency within the system;
- Better monitoring of decisions;
- More user-friendly application forms eliciting an appropriate level of detail to avoid incomplete applications;
- Better communication with the client, using personal interviews rather than “making a desk decision”;
- Less use of template letters or “box ticking exercises” and better examination of personal circumstances in relation to applications.

3.3.

THE ADVOCATE EXPERIENCE OF THE APPEALS PROCESS

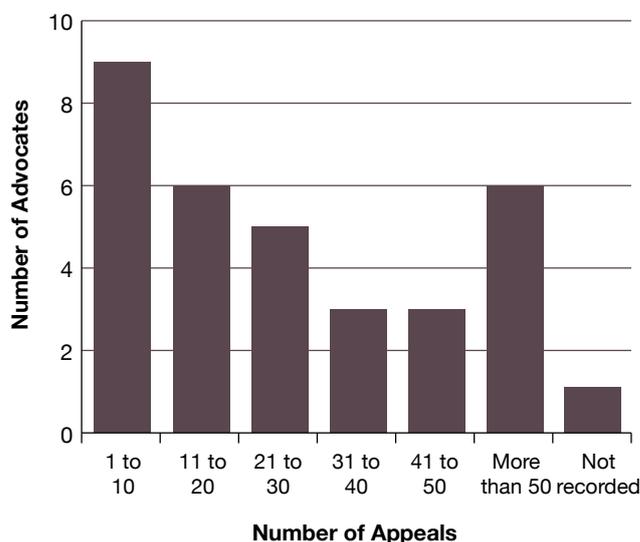
3.3.1

Advocates’ type of experience and level of knowledge

FLAC asked advocates about their own experience of the system. The majority of those surveyed had some or quite a lot of experience of the social welfare appeals system; 17 advocates (53 per cent) had been involved in social welfare appeals for between one and five years while 12 (37.5 per cent) had been doing appeals for more than five years. Only two people had been involved in the area for less than a year.¹²⁰

In addition, advocates recorded the total number of appeals in which they had been involved, as indicated in Figure 3.2, which demonstrates their high level of engagement with the social welfare appeals process.

Figure 3.2: Number of appeals taken by advocates



N=32

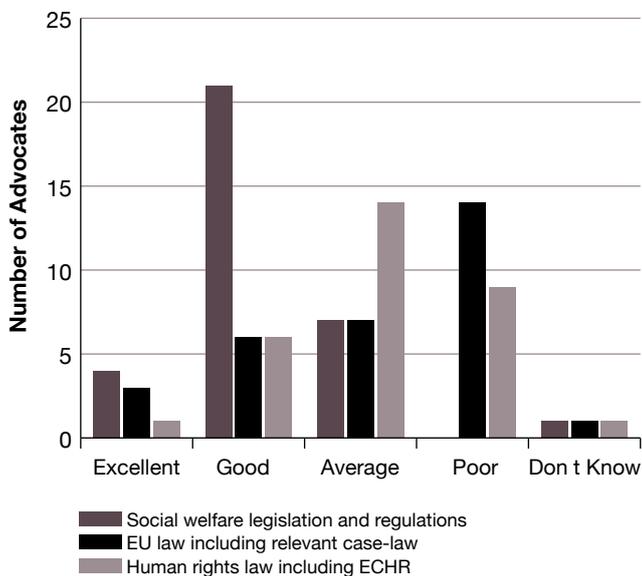
Advocates were also asked about making written submissions and the types of arguments they use. While three people said they mainly base their arguments on the individual facts of the case, all the remaining 29 respondents said they use both the law and the facts of the case to make their arguments.

120 One participant did not record how long he or she had been involved in making appeals.

Asked to describe their grasp of legal arguments made in cases, five people described their knowledge as ‘excellent’, 18 said they had a ‘good’ understanding of the legal issues at stake and six felt that they had an ‘adequate’ grasp. Only one person felt that his/her familiarity with the legal arguments in appeals was ‘less than adequate’.

In terms of their own legal knowledge, advocates were asked to break this down into three distinct topics. As can be seen in Figure 3.3 while most people were confident in their knowledge of social welfare legislation and regulations, they were less confident in their understanding of EU law and human rights standards and treaties. This includes the European Convention on Human Rights which, as already explained, is now part of domestic law. Some advocates stated that they required more training in EU law and recent cases while one person indicated that “ongoing training in relation to social welfare to keep up with the changes in legislation” would be useful. Other respondents called for training on the social welfare appeals system itself as well as on human rights law.

Figure 3.3: Advocates’ assessment of own legal knowledge

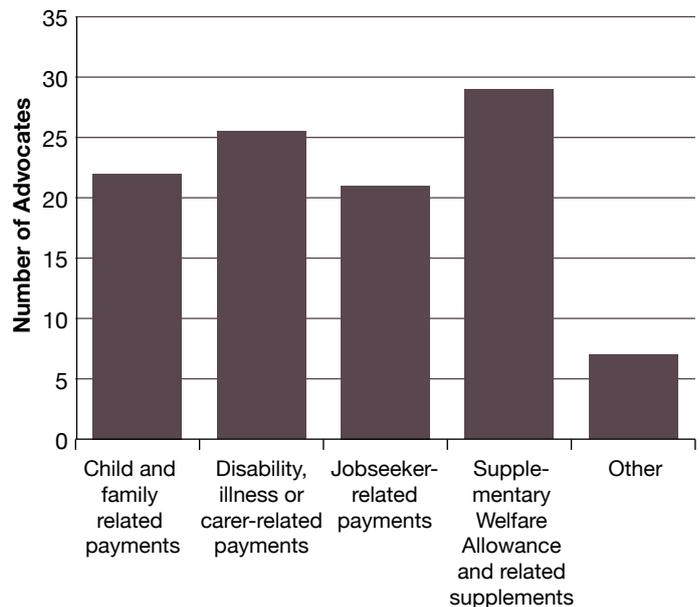


N=32

Advocates indicated that they receive legal assistance, information and advice in a variety of ways – they were not restricted to indicating only one source of advice. Eleven advocates stated that they got help from a private solicitor or barrister for free (*pro bono*) while 10 others stated that they sought help from an independent law centre.¹²¹ Fourteen advocates received assistance from a legal non-governmental organisation, three had an in-house legal officer and fifteen people sought assistance from other sources such as colleagues, on-line resources, independent consultants, support panels, Citizens Information Centres or other organisations.

The survey also examined the type of payment scheme being appealed. Supplementary Welfare Allowance and its related supplements was most frequently cited, but there was a wide-ranging spread across the different payment types, as can be seen in Figure 3.4:

Figure 3.4: Types of payment being appealed



N=32

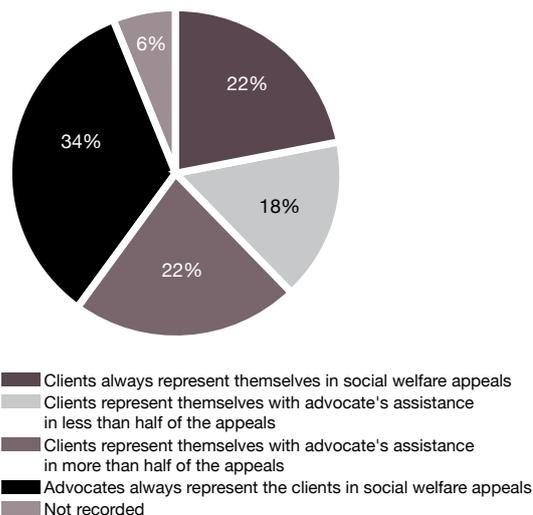
121 There are a limited number of independent law centres, all based in Dublin with one planned for Limerick and a dedicated Children’s Rights Centre also to be established in 2012. As of July 2012, the existing centres are: FLAC (Dublin 1), Northside Community Law Centre (Dublin 17), Ballymun Community Law Centre (Dublin 11), Irish Traveller Movement Law Centre (Dublin 2 - dedicated to Travellers’ rights), Mercy Law Centre (Dublin 8 - predominantly on housing/social welfare rights), Immigrant Council Of Ireland (Dublin 2 - immigrants’ rights), and Irish Refugee Council (Dublin 2 - refugee and asylum rights).

More than a third of the 31,241 appeals received by the Appeals Office in 2011 (38 per cent) were in relation to a disability, illness or carer-related payment (SWAO 2012:7). However, this was prior to the Supplementary Welfare Allowance scheme being transferred from the Health Service Executive to the Department of Social Protection, so it does not include first-instance Supplementary Welfare Allowance appeals, which are now made directly to the Appeals Office.

Regarding the type of assistance offered by advocates in appeals, respondents were asked at what stage of the appeal the client would come to them for help. While 59 per cent reported that clients come to them for initial information or advice about entitlements before making a social welfare application, 56 per cent indicated that clients also required assistance in making an application for a social welfare payment. However, 71 per cent of respondents noted that more clients presented needing help with an appeal than with making the initial application. Arguably this may be due to the nature of the organisations involved, as some people may not realise that they can seek help to make the initial application or they only look for help when they are refused a payment and are unsure as to how to proceed.

In relation to the type of assistance that the respondents offered, as demonstrated by Figure 3.5 this ranged from assisting a person with making his or her appeal but with the client always representing him or herself (seven advocates, or 22 per cent), to always representing the client when involved in a social welfare appeal (11 advocates, or 34 per cent). Some organisations offer advice and information as well as helping a client to make the social welfare claim and to make a subsequent appeal where the application is rejected. Others may not be able to attend social welfare appeal hearings due to time constraints, lack of resources or capacity, or because it is not possible for the advocate due to the time or place of the oral hearing.

Figure 3.5: Type of assistance provided



N=32

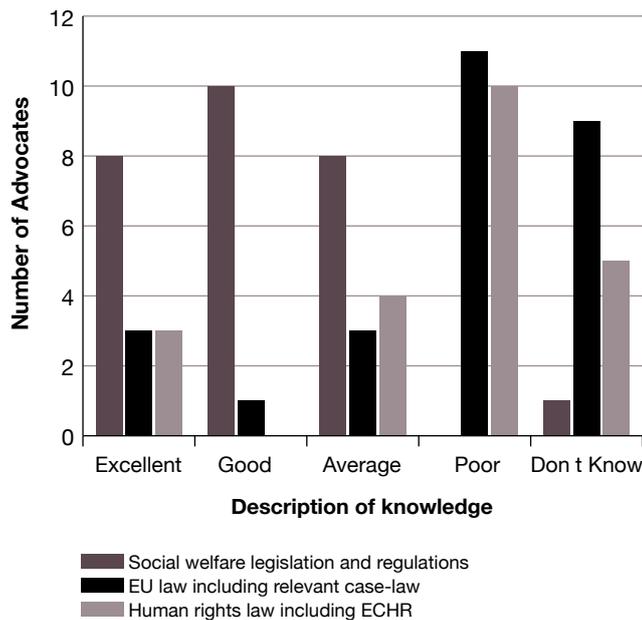
3.3.2 Advocates - perception of Appeals Officers

Most of the participants in the survey had appeared before a number of different Appeals Officers and when asked about their impressions of Appeals Officers' knowledge, experience and understanding of the issues under appeal, they responded positively. Of 27 participants who had attended oral hearings, seven described the Appeals Officer(s) as excellent, ten as good and eight as average. Nobody described the Appeals Officers' performance as poor while two people did not supply an answer to this question.

In terms of Appeals Officers' legal knowledge, advocates were asked about their perception of the officers' understanding of the different types of law they may encounter during the course of a social welfare appeal and the responses are set out in Figure 3.6 below. Of the 27 advocates who had attended an oral hearing, 18 (or 67 per cent) considered the Appeals Officers' knowledge of social welfare law to be excellent or good, only eight (30 per cent) thought it was average and nobody thought it was poor.

By contrast, however, the Appeals Officers' knowledge of relevant EU case-law or human rights law, including obligations under the European Convention on Human Rights, did not fare as well given that most advocates either thought it was poor or else did not know how to rate it. A small number of people said the Appeals Officers' knowledge of both areas was excellent and a similar number thought it was average.

Figure 3.6: Advocates' perception of Appeals Officers' knowledge of different areas of law



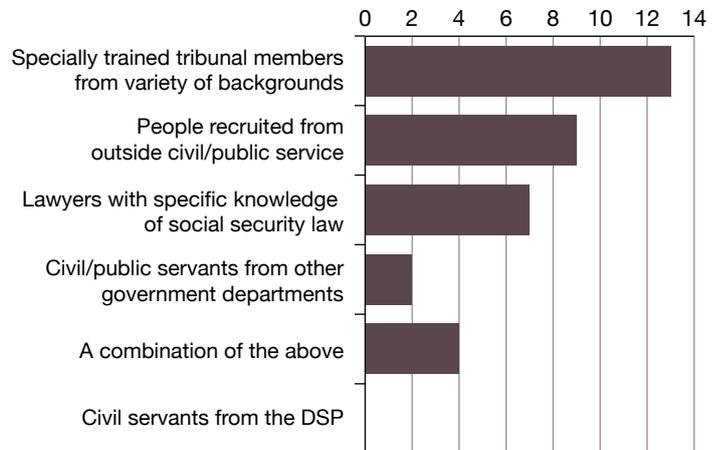
N=27 advocates who had attended an oral hearing

There were mixed results on the question of Appeals Officers' impartiality; almost half of respondents who answered this question (48 per cent, or 13 of the 27 who answered) considered the Appeals Officers to be completely impartial, but ten advocates (37 per cent) felt that they were biased in favour of the Department of Social Protection. No one thought that Appeals Officers were biased in favour of appellants and four people did not record an answer.

Advocates were asked whether or not they felt that the system would operate better if Appeals Officers were recruited from different backgrounds and were given several options. One of these was that the status quo be preserved with officers remaining civil servants recruited only from the Department of Social Protection, but no one felt that this was the best choice. Instead, respondents considered

the following alternatives in Figure 3.7 might strengthen the system:

Figure 3.7: Options for recruiting Appeals Officers



N=27 advocates who had attended an oral hearing

One advocate felt that the best option for Appeals Officers would be “[t]ribunal members recruited independently with requisite experience and legal training who have requisite knowledge of social welfare law”. However, another person felt that “no matter what experience people have you will find the prejudices both good and bad will come into effect”. Someone else commented that it did not matter “as long as selection process was not influenced by political affiliation”. Finally, one advocate indicated that the preferred option might be:

Perhaps lawyers with specific knowledge of social security law and specially trained tribunal members from variety of backgrounds. Would inspire confidence with regard to knowledge and impartiality.

As outlined in Chapter 2, when Appeals Officers are assigned to the Appeals Office, they are usually not assigned cases “relating to the area where [they] most recently worked” until they are more experienced (Gleeson, CAO, 17 January 2012).

There is a sense from the advocates that a different recruitment process would enhance confidence in the appeals system. The responses from the advocates indicate that they believe the system would work better if Appeals Officers were recruited from outside the civil service, in particular from outside the Department of Social Protection.

3.3.3

Advocates' experience of oral hearings and summary decisions

The statistics included in the Chief Appeals Officer's annual report repeatedly demonstrate a higher success rate on appeal where a person has an oral hearing (section 2.4.2.2). In order to ascertain the advocates' perception of the differences between appeals decided by oral hearing or on the summary evidence only, the survey included a list of questions about the number of each type of appeal they had been involved in and also the outcome of these appeals. The results of the survey showed a similar pattern to that in the annual report as more than half of the advocates involved in oral hearings reported at least a 75 per cent success rate in these cases compared to just over a third of appeals succeeding when only written submissions were made in the particular case.

The advocates were asked how often they had requested an oral hearing and 27 out of 32 (84 per cent) had requested an oral hearing at some point. Nine of these respondents (28 per cent) always requested an oral hearing and ten (31 per cent) regularly did, whereas seven (22 per cent) occasionally requested a hearing and one person (3 per cent) stated that an oral hearing was rarely requested. Five advocates (16 per cent) responded that they had never requested an oral hearing but there is no further information as to the reasoning for this. One person indicated that "some clients do not want an oral hearing".

The survey also looked at whether the requests for oral hearings were usually granted¹²² and it seems that in the experience of 12 out of the 27 advocates (44 per cent) who had requested an oral hearing, a hearing was always held when it had been requested. A further seven advocates (26 per cent) reported that an oral hearing was granted when asked for, in more than half of the cases with which they had dealt. Less than a quarter of respondents indicated that a hearing was granted in fewer than half of their cases although one respondent noted a change in practice:

Always up to 2010, but since then oral hearings appear to be given only rarely.

This statement reflects the reduction in the number of oral hearings taking place as a percentage of the total number of appeals as already outlined. However, where oral hearings are requested they are still usually granted, as stated by the Chief Appeals Officer at the meeting of the Joint Oireachtas Committee on Jobs, Social Protection and Education on 21 March 2012.

In terms of the actual hearing itself, the majority of respondents felt that the venues provided by the Appeals Office, including both the main Appeals Office headquarters and conference rooms in hotels, were appropriate. When asked to describe the formality of the proceedings 13 of the 27 advocates (48 per cent) who had attended an oral hearing felt they were formal whereas 12 advocates (44 per cent) considered them to be informal while the other two advocates who had attended oral hearings did not record an answer. This is relevant given the position outlined by the Chief Appeals Officer that the proceedings should be "as informal as possible in the circumstances" (Gleeson 16 March 2012).

Advocates were asked to identify the advantages and disadvantages of both oral hearings and summary decisions. The results are set out in tables 3.1 and 3.2 below and each includes a list of possible advantages and disadvantages in relation to oral hearings and summary decisions respectively, which we provided to advocates asking them to mark all answers which they felt were applicable. These options are not exhaustive but are intended to give an indication of how advocates perceive the advantages and disadvantages of each type of appeal. The number of people who agreed with a particular statement is recorded in brackets after each option.

In relation to oral hearings, most advocates felt that there were multiple advantages or disadvantages to having an oral hearing so they marked more than one item on the list. The majority of respondents considered the greatest advantage of having an oral hearing to be the opportunity for the client to explain him or herself with another advantage noted by many of the respondents being that the client could be represented at an oral hearing.

122 Two people did not record answers.

While the advantages of an oral hearing have been noted, advocates also acknowledged that there can be disadvantages to an oral hearing in certain cases such as that the client may feel intimidated by the proceedings or find them stressful. The prolonged length of time a person may have to wait for a decision when an oral hearing is held was also a consideration for more than half of the advocates. Only one person recorded that there were no disadvantages to an oral hearing.

However, one participant noted that there could be a number of disadvantages to an oral hearing if the appellant was not accompanied by a representative:

If client not represented, [she] may not make relevant points to assist her case, may be less chance of a successful appeal. Especially so if English is not first language.

“Language difficulties” was also noted by another participant as a “barrier in oral hearing situations” although it is important to be aware that the SWAO will provide an interpreter when it is informed of the need for one or an appellant may bring an interpreter along if they prefer (Gleeson, CAO, 16 March 2012).

The survey also posed questions about the advantages and disadvantages of decisions based only on the written evidence and with no oral hearing. As already explained, there has been a greater tendency towards summary decisions recently due to the backlog and higher volume of appeals received by the Appeals Office (sections 1.3.4 and 2.4.2.2). Inevitably some of the issues identified as disadvantages to an oral hearing were seen as advantages in the context of a summary decision, the main one being the shorter waiting time for a decision based solely on the written evidence.

The perceived advantages and disadvantages of summary decisions are listed in Table 3.2 with the number of advocates who agreed with each statement recorded in brackets after it. As with the oral hearings, advocates felt there was more than one advantage or disadvantage so most of them marked more than one option.

Table 3.1: Advantages and disadvantages of oral hearings

Advantages	Disadvantages
Opportunity to explain him/herself (26/32)	Client may feel intimidated by the proceedings (21/32)
Opportunity to be represented (23/32)	Client may find the proceedings stressful (21/32)
Opportunity to rectify mistakes in original application (21/32)	Client has to wait longer for a decision (19/32)
Better chance of a successful appeal (19/32)	Client may not understand the proceedings (7/32)
Appellant better understands the system (17/32)	Language difficulties (2/32)
Appellant will be more likely to accept the Appeals Officer’s decision (9/32)	There is less chance of a successful appeal (1/32)
No Advantages (0/32)	No Disadvantages (1/32)

One person also highlighted another advantage of oral hearings:

Systematic difficulties can be highlighted to the Appeals Office and hopefully such issues are addressed through the SWAO annual report.

Table 3.2: Advantages and disadvantages of summary decisions

Advantages	Disadvantages
The waiting time for a decision is much shorter (21/32)	The process appears less transparent (20/32)
The appeals experience is less stressful for the client (13/32)	Client is not given an opportunity to present his or her case (20/32)
The client does not have to appear before an Appeals Officer and answer questions (11/32)	The reasons and grounds for appeal cannot easily be summed up in a written submission (12/32)
The reasons for the appeal can easily be summed up in a written submission (3/32)	There is less chance of a successful appeal (10/32)
There is more chance of a successful appeal (0/32)	Some clients have literacy difficulties (1/32)
No Advantages (4/32)	No Disadvantages (0/32)

Four people answered that there no advantages to having an appeal decided in a summary fashion.

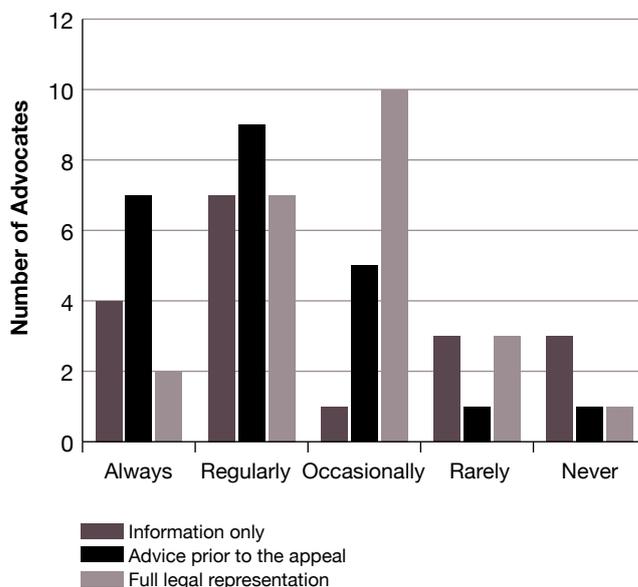
3.4 ADVOCATES' VIEWS ON REPRESENTATION

As demonstrated by the responses of the advocates and given that there are different levels and types of representation, whether at oral hearing or making written submissions, the need for representation was also examined in the survey. Firstly, advocates were asked to specify in what circumstances and in what proportion of cases they felt representation was necessary at oral hearings. Out of the 32 respondents, seven people (22 per cent) felt that representation at oral hearing was always necessary, 16 respondents felt that it depended on the circumstances of the case. However, four others felt it depended on the Appeals Officer hearing the case while 11 felt it depended on the client. Only one person felt it was rarely necessary and one other thought it was never necessary.

FLAC asked the Chief Appeals Officer whether the Appeals Officers had felt that there was an increased need for representation but she replied that there had been “no particular increase noticed” and did not comment on whether there was a need for more representation (Gleeson, CAO, 16 March 2012). When asked for statistics about the number of appellants who had been represented at oral hearings over the last three or four years she said no statistics had been kept “due to pressure of work” (Gleeson, CAO, 16 March 2012).

The advocates were then asked whether they thought that legal aid should be made available for social welfare appeals and of the 28 people who responded, 24 (75 per cent) felt it should be made available while 4 people (12.5 per cent) thought it should not be provided. Those who thought legal aid should be provided were then asked when they thought it should be provided, and the following chart represents their responses. As seen in Figure 3.8, legal aid is divided into three distinct categories: legal information only, legal advice prior to the appeal, or full legal representation:

Figure 3.8: Stage when advocates think legal aid should be made available for social welfare appeals



N = 24 advocates who think legal aid should be available for social welfare appeals.

It is clear that most of the 24 advocates who answered this question believe that legal aid should be provided in the form of legal information and advice prior to the appeal. In terms of providing full legal representation, nine advocates believed that it should be made available regularly or always, while 10 thought it should be made available occasionally. Three advocates felt it should only rarely be made available and one thought it should never be provided.

FLAC asked the Chief Appeals Officer if she felt that legal aid should be provided in certain cases, but she considered this to be “a policy matter for the Minister and Government” (Gleeson, CAO, 16 March 2012).

3.5 ADVOCATES’ EXPERIENCE OF FREEDOM OF INFORMATION REQUESTS

The survey sought to gauge how often advocates used freedom of information requests and how useful they found this mechanism. Twenty-four out of 32 respondents to the survey stated that they had advised clients to request their social welfare files under Freedom of Information but at different stages of making a social welfare appeal depending on the individual case. Half of the respondents who replied positively, stated that they asked their clients to seek their social welfare file before the appeal was lodged, while 14 people stated that the request was made after the appeal was lodged while some people asked either before or sometimes after submitting the grounds of appeal. Of the advocates who used the Freedom of Information legislation in this way, nine always advised clients to make a request and ten regularly did. Four other people stated that they occasionally got clients to request their social welfare file and another person rarely asked clients to make a request.

When asked about the value of making a Freedom of Information request, 50 per cent of those who asked clients to use the mechanism found all of the information useful. Reasons included the “[t]ransparency of information” and that it gave “a better insight to the facts of the case”.

People found it helped to “frame your review/appeal” and was “very useful for formulating grounds of appeal”. One other person commented that it was helpful as:

At least you know what went on the original application and if the client didn't give sufficient information.

The advocates who found most of the requests useful but not all, explained that in some instances this was due to a lack of “transparent reasons”, “sometimes there is no report, just a ‘checklist sheet’ that doesn’t provide much more information” or “the language used does not always clearly state the reason for refusal”. One respondent also referred to “inconsistencies in decisions made or failure to take account of certain medical evidence”. However, the fact remains that without requesting the file, these discrepancies would not be discovered. The same group of respondents also recognised that the files could be valuable:

Often times it was easier to rebut the grounds on which the decision was made once it became clear what factors were taken into consideration in coming to that decision. This is particularly important as the refusal letters from the deciding officer are often very sparse and do not give reasons behind the decision.... The file makes it much clearer that in some cases irrelevant information was taken into consideration and relevant factors were not considered.

However, some advocates were sceptical about the usefulness of Freedom of Information requests. One person stated that “[s]ome files did not contain the requested documents” and another advocate was “[u]nsure if all info disclosed”. One respondent stated that most of the requests were not useful as the file did not “really identify/expand true reason for refusal plus some of the notes are not legible”.

Advocates were asked specifically if they were aware of the Appeals Officer’s report written after he or she decides an appeal, and if so, if they asked clients to request this report. Twenty-six out of

32 advocates were aware of the report but of these, only 11 had asked clients to request it following a decision by an Appeals Officer. Seven of these advocates found all of these requests useful, three others found most of the requests useful and only one person found a few useful but most not. Advocates asked for the report in some cases for the purposes of asking an Appeals Officer to review his or her decision or in other cases to ask for a review by the Chief Appeals Officer. Two advocates indicated that they requested the report for their organisation's records.

3.6 ADVOCATES' EXPERIENCE OF FURTHER RIGHTS OF REVIEW OR APPEAL

In order to get a sense of how frequently Appeals Officers or the Chief Appeals Officer are asked to review their decisions, we asked the respondents in the survey if they were aware of these review mechanisms and if so, how often they had used them.

Some 24 of the 32 respondents (75 per cent) were aware of the possibility of these types of review under the legislation but in relation to the Appeals Officer's review only 15 advocates (62.5 per cent) said they had actually sought a review by an Appeals Officer. Of that 15, some 11 stated that they had made between one and ten requests while only one person had made between 20 and 30 and another person had made between 31 and 40 requests. Of the requests that were made, only one person stated that all of the reviews they had requested resulted in a successful outcome for the client while four of the 15 respondents found that none had been successful. Four others had success in more than half of the requests that they made and the same number had successes in less than half of the reviews they requested. Two others were awaiting a decision on a review at the time of the survey.

Advocates used the Chief Appeals Officer's review procedure somewhat less frequently with only 14 out of 24 respondents to this question (58 per cent)

reporting that they had used it. However, six (43 per cent) of those who had used the mechanism reported that it had been successful in all of the cases they had submitted while three (21 per cent) said it had not been successful in any of the cases submitted for review. There was limited success in other cases.

FLAC sought statistics from the Appeals Office of the number of reviews received and decided by the Chief Appeals Officer. She explained that in cases where a review is requested, she will examine the case but "particularly where it appears there is additional information" she will send the case to the Appeals Officer who decided it for "views and any appropriate action" (Gleeson, CAO, 17 January 2012). In some cases the Appeals Officer will revise the decision but no statistics are kept on cases resolved in this way (Gleeson, CAO, 17 January 2012). Alternatively the Chief Appeals Officer may decide "to set up an oral hearing, particularly if the decision was made on a summary basis" (Gleeson, CAO, 17 January 2012). It is not known how many reviews by the Chief Appeals Officer were requested in total. However, in 2010 and 2011 (since the current Chief Appeals Officer took up her position), she has decided 33 cases, 18 of which were not revised while 15 of them were overturned (Gleeson, CAO, 17 January 2012). Six reviews were outstanding as of March 2012 (Gleeson, CAO, 16 March 2012). These figures are consistent with the responses from the advocates.

Advocates were asked if they were aware of the statutory right of appeal of an Appeals Officer's decision to the High Court on a point of law. While 20 people stated that they were aware of it, none of them had ever used it. In 2011, only one statutory appeal was taken against the Minister for Social Protection and the Appeals Office,¹²³ although a decision was handed down in an appeal which had been lodged in 2008.¹²⁴ The same year two Judicial Reviews were decided.¹²⁵

Only three respondents reported making a complaint to the Ombudsman; one had made complaints in five cases and another on three separate occasions. The final respondent did not record the number of complaints made. Two of these respondents

¹²³ *Brightwater Selection (Ireland) Ltd v. Minister for Social and Family Affairs* [2011] IEHC 510.

¹²⁴ *Neenan Travel Ltd. v. Minister for Social and Family Affairs* [2011] IEHC 458.

¹²⁵ *Solovastru v. Minister for Social Protection* [2011] IEHC 532 and *Jama v Minister for Social Protection* [2011] IEHC 379.

indicated that the complaints made were only in relation to the first instance decision-making process while the third stated that the complaints related to both the first-instance decision-making and the appeal stage. More than half of these complaints were upheld in favour of the client.

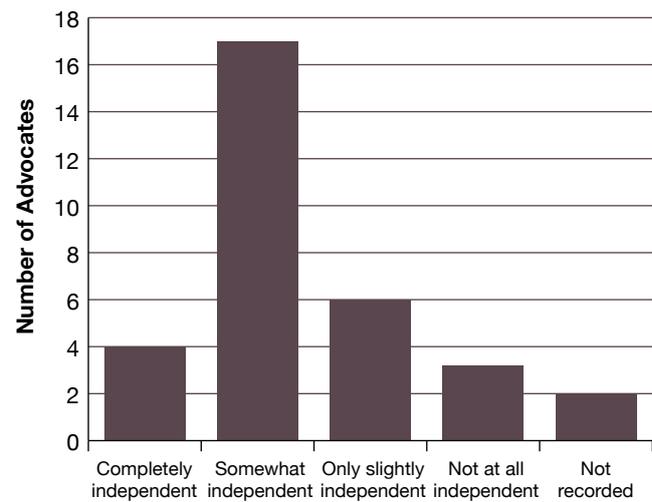
3.7 ADVOCATES' PERCEPTION OF THE INDEPENDENCE OF THE APPEALS OFFICE

Participants in the survey were asked whether they believed the Appeals Office was an independent statutory body, part of the courts service, part of a government department or none of these. While six of the 32 advocates (19 per cent) thought it was a statutorily independent body, 23 participants (72 per cent) correctly identified it as, or thought it was, part of a government department. One person who thought it was an independent statutory body commented, "I know legally that it is, but not sure in practice" while another person believed it was an independent body "[b]ased on the legislative basis of its status and by and large by my experiences of it". Another participant who stated that the Appeals Office is part of a government department went on to state that it "may be independent but still feels part of Government department".

One person thought it was part of the courts service and another participant thought it was none of the above commenting that its "[i]ndependence is compromised by appointment process". These results indicate that most of the advocates regard the Appeals Office as a part of a government department rather than an independent standalone entity.

In relation to its operation, the majority of respondents felt that the Appeals Office could be considered to be somewhat independent but as one person noted "[t]here is still the perception that it is part of the Department of Social Protection". Another advocate felt that "independence is aspired to but a certain level of career bias holds back the true independence of the organisation" while someone else said they had "not experienced personally instances of bias but there is a lack of transparency".

Figure 3.9: Advocates' views of the independence of the Appeals Office



N=32

One respondent who felt that the Appeals Office was only slightly independent commented on the lack of "information on the backgrounds of the staff" or "how they were trained". Other advocates felt that the Appeals Office was not at all independent because it was a division of the department and was "paid from the Department of Social Protection budget".

The Chief Appeals Officer, quoting from Northside Community Law Centre's report published in 2005, points out that the organisations involved in that research did not consider independence as an issue but "felt that there was a certain lack of independence inherent in the current structures" (NCLC 2005 cited by Gleeson, CAO, 17 January 2012). In response to FLAC's questions about the need for statutory independence for the Appeals Office, Ms Gleeson replied:

The SWAO currently operates as a separate executive and the service is generally regarded as independent, accessible, fair and relatively informal... In 2010, 43% of appeals were successful, a statistic which underpins the independence of the SWAO. (Gleeson, CAO, 17 January 2012)

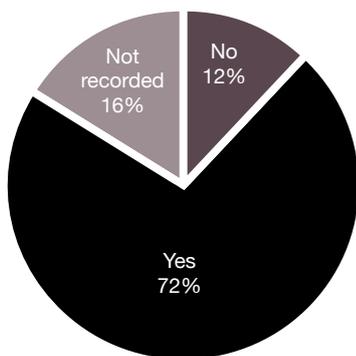
The Chief Appeals Officer indicated that she did not consider it necessary to place the office on a statutory footing, saying:

Therefore to achieve a set up where the SWAO would be seen to be completely independent would involve very significant structural and legislative reform. However, it seems to me that any significant reform of the current system would need to be benchmarked on a much broader range of criteria. (Gleeson, CAO, 17 January 2012)

She also referred to the “very significant cost implications of a major structural reform which would need to be justified by an evidenced cost benefit analysis” (Gleeson, CAO, 17 January 2012).

On the whole there is a sense on the part of advocates that the appeals process is independent to some extent but the majority of them thought that the appeals process would improve if it was more independent as can be seen in Figure 3.10.

Figure 3.10: Advocates’ views on whether the social welfare appeals process would improve if the Appeals Office was more independent



N=32

Advocates were asked to explain how they thought independence might improve the process and some of the reasons given included greater transparency and impartiality with one person referring to how it would “appear more independent by being removed completely from the department”.

Others referred to independently recruited staff being free from the “adopted mindset and approach of their DSP colleagues”; or a departmental “way of thinking”. It seems from these limited results that while advocates acknowledge the attempts made to create an independent process, they do not consider it to be fully independent.

3.8 ADVOCATES’ VIEWS ON THE FAIRNESS OF THE SOCIAL WELFARE APPEALS SYSTEM

When asked how fair they perceived the social welfare appeals system to be, nine per cent of advocates felt it was completely fair while a further 66 per cent of advocates thought it was somewhat fair. Of the remaining advocates, 12 per cent felt it was slightly fair, six per cent thought it was not at all fair, while the views of the remaining six per cent were not recorded.

The respondents were asked to give reasons for their answers and one respondent who considered the process to be completely fair said that the decision-makers “are all very objective – no personal connection to clients and nothing to be gained by making particular decisions”. Another person thought the system was completely fair as the appeals taken by that person were all successful as the appeals were all well prepared.

Several respondents commented that the length of time it takes to process an appeal is unfair and one person distinguished between the fairness of the actual decisions made and the system itself stating:

I think it is important to have an appeals system and my experience to date is that decisions made have been fair. However, the appeals system is unfair in that it takes so long to get a decision and also many people never get any assistance with appeals and are not aware of the legislative basis for refusals/decisions. I feel it is also unfair that so many appeals are necessary when a more rigorous approach to the application form/process should be standard.

Another respondent who found the process only slightly fair criticised the system for being “long and cumbersome” and pointed out some of the practical problems associated with the process:

The appellant is not advised that they should seek advice prior to submitting their appeal. The appeal form itself does not lend itself to encouraging appellants to make in depth submissions on their appeal. The form contains only a brief space for the appellant to outline their reason for appealing the refusal. This leads the appellant to mistakenly believe that longer submissions are not necessary. This is also promulgated by Deciding Officers. It has been reported to our office that appellants have been discouraged by Deciding Officers from seeking help from an external organisation (including Citizens Information Centre) in order to appeal the decision.

The ‘equality of arms’ issue, discussed in Chapter 2 above, was also raised in the context of fairness; advocates who found the system somewhat fair criticised it as “weighted” because members of the public have to face “professionals”. This could be balanced by advocates “but only if training is given”. Another person summed up some of the problems with the appeals process as:

The time taken for each appeal makes the process an unattractive one for potential appellants. The ‘onus of proof’ has also been raised significantly for certain entitlements. Without adequate knowledge, preparation and/or representation, appellants are at a disadvantage compared to the resources which can be called upon by the social welfare system.

The hardship resulting from the long waiting times seems to have contributed to the advocates’ perception of the lack of fairness of the system as it was pointed out several times that people may be left “in poverty, homeless with huge debts” or left “destitute while waiting for up to 18 months and longer for a payment”.

3.9 ADVOCATES’ SUGGESTIONS ON IMPROVING THE SOCIAL WELFARE APPEALS SYSTEM

The responses to the survey indicate that advocates feel that there are ways in which the appeals process could be reformed. Better first instance decision-making, access to information, shorter waiting times for appeals and greater independence of the Appeals Office have all been highlighted as steps which could be taken to ensure fairness, transparency and equality in the system. The suggestions put forward by the advocates have also informed FLAC’s recommendations on reforming and improving the Appeals Office to ensure it is an accessible, fair and efficient system which operates in line with both domestic and international human rights law as outlined in the second chapter of this report.

CONCLUSIONS AND RECOMMENDATIONS



The social welfare appeals process, as it currently operates, does not comply with all of the State's domestic and human rights obligations as it does not afford a fair, efficient and effective procedure or remedy. As long as the Social Welfare Appeals Office remains part of the Department of Social Protection, it will not achieve perceived and actual independence or transparency, both of which are essential for public confidence in the system.

The current pressure on the appeals system has resulted in a number of appellants being unable to access and assert their fundamental rights due to delays and over-reliance on summary decision-making. In some cases these problems have created potential hardship for some appellants awaiting a decision on their appeal. The social welfare system needs to be overhauled both at first instance when a person makes an application as well as at appeal stage. Putting more resources into making correct initial decisions would prove more efficient and cost-effective for the State by reducing the number of appeals against incorrect refusals, while also resulting in a fairer outcome for appellants as they would be able to assert their rights at the outset rather than face unnecessary delays.

In this light, FLAC makes the following overarching recommendations to improve the social welfare appeals process to ensure it complies with domestic and international human rights standards. We also make specific recommendations on both procedural and structural changes which could enhance the system as it currently operates. Some of the recommendations are directed to the State, primarily to the Department of Social Protection. Other recommendations are directed to the Appeals Office itself.

4.1 OVERARCHING RECOMMENDATIONS

- A. The Social Welfare Appeals Office should be placed on a statutorily independent footing to ensure perceived and actual independence from the Department of Social Protection. The Government should examine different models for independent quasi-judicial tribunals and should consider various options to increase the perception of independence including making the Appeals Office directly accountable to the Oireachtas or ensuring separation of powers by making it part of the courts service. (Sections 1.2, 2.4.1 and 3.7)
- B. All actions and decisions taken by staff members of the Department of Social Protection, including those of the Appeals Office, should comply with national and international human rights standards. In particular, employees should be made aware of their obligations and positive duty to act in a manner compatible with the European Convention on Human Rights Act 2003. (Sections 2.1, 2.2, 2.3 and 2.4)
- C. The social welfare appeals process should be transparent, fair and efficient to make certain that people can assert their rights and entitlements in a fair and timely fashion. (Sections 1.6.3, 2.4.1, 2.4.2 and 3.8)
- D. The rights of people applying for social protection should not be dismissed or reduced because of the economic recession. The government should seek to respect, protect and promote the rights of the most vulnerable and ensure that the rule of law is observed. It must maximise its limited resources to ensure that people can live in dignity. (Sections 1.1.1, 1.1.2 and 2.2.1)
- E. The Appeals Office should carry out an audit of its procedures to ensure the optimum use of available resources and the outcomes of the audit should be made public. (Sections 1.1.1, 1.6 and 2.2.1)

4.2

RECOMMENDATIONS RELATING TO PROCEDURAL CHANGE

4.2.1

Decision-making at first instance

1. First instance decision-making should be improved to ensure the best use of limited resources, reduce waiting times for appeals and make certain that people are able to access their social welfare entitlements without undue hardship. (Sections 1.3.1, 1.3.2, 1.3.4.2, 1.6.3, 1.7, 2.4.4 and 3.8)
2. Social welfare application forms should be simplified and made more readily accessible and easier to use. The forms should be set out so as to make it as clear as possible to applicants what information is required to process their claims, and to obtain all necessary information at the outset. (Sections 1.3.1, 1.3.2 and 3.8)
3. Department of Social Protection staff should advise potential applicants on their possible entitlements based on their individual circumstances. Where necessary, the staff should direct applicants to organisations such as the Citizens Information Centres or relevant NGOs for assistance with making an application. Where there are English language difficulties, the applicant should be provided with the information in his or her own language or provided with an interpreter where necessary. In the case of literacy difficulties, applicants should be given appropriate assistance with understanding the information and completing the forms. (Section 3.8)
4. Department of Social Protection decision-makers should ensure that claimants are able to make an application for social welfare payments, or are assisted to do so where necessary; that their applications are considered in full; and that in the case of a negative decision, a written refusal is issued with reasons for the refusal. (Sections 1.3.1 and 3.2)
5. A quality control audit of Deciding Officers' decisions should be carried out to identify any trends or patterns of poor quality decision-making or inconsistencies arising from different interpretations of policy or law. Any discrepancies should be addressed by the Department through guidelines and training. (Introduction, sections 1.3.1 and 1.3.2)
6. Adequate training should be provided for Department staff in relation to any changes in social welfare legislation or policy, European social security law and case-law, fair hearing procedures as well as human rights obligations and standards in general. (Sections 2.4.1 and 3.3.2)

4.2.2

Access to information

7. Appellants should be automatically given a copy of their social welfare file when they are informed of their right of appeal against a refusal of their social welfare applications. (Sections 1.3, 1.4, 2.4.2.1 and 3.5)
8. A clear instruction should be given that an appellant's file and the Deciding Officer's submission or comments on the grounds of appeal should be sent promptly to the Appeals Office and in any event within four weeks of receipt of notice of the appeal. (Sections 1.3.2, 1.6.3, 2.4.4 and 3.8)
9. A copy of the appellant's file and the Deciding Officer's submission, which is sent to the Appeals Office when an appeal is lodged, should be automatically sent to the appellant and the appellant should be given the opportunity to reply before the appeal is heard or decided summarily. (Sections 1.3.3, 1.4 and 2.4.2.1)
10. The Appeals Officer's report should be automatically sent to the appellant with the decision letter from the Social Welfare Appeals Office along with information on the appellant's right to a review by the Appeals Officer or the Chief Appeals Officer on a point of fact or law. Information on the statutory appeals process on a point of law should also be included. (Sections 1.3.5, 1.3.6 and 1.3.7)

4.2.3

Consistency in decision-making

11. Appellants and their representatives should be given access to any previous decisions which may be relevant to their case. An anonymised searchable database should be established and made available to the public by the Social Welfare Appeals Office as recommended by the UN Special Rapporteur on Extreme Poverty and Human Rights following her visit to Ireland in January 2011. (Sections 2.4.2.1 and 2.4.3)

4.2.4

Fair procedures

12. The social welfare appeals process should comply with fair procedures as set out in the Irish Constitution and Article 6 of the European Convention on Human Rights and incorporate the elements therein. (Section 2.4)

4.2.5

Oral hearings

13. The appellant should be informed that he or she can request an oral hearing. A specific option should be prominently displayed on the social welfare appeal form to indicate this possibility and the significance of an oral hearing should be explained. (Sections 1.3.4, 2.4.2.2 and 3.3.3)
14. Oral hearings should be granted when requested unless there is good reason for not doing so, and should always be granted when there is a conflict of evidence or matters which could benefit from discussion and clarification. The appellant should be afforded an opportunity to explain his or her case, rectify any mistakes or misinterpretations on the part of the initial decision-maker and answer any questions raised by the Appeals Officer. (Sections 1.3.4 and 2.4.2.2)
15. The length of time to process an oral hearing should be reduced so it does not become a disincentive to appellants' requesting an oral hearing. (Sections 1.6.3, 2.4.4, 3.3.3 and 3.9)

4.2.6

Reasonable processing times

16. All appeals, whether decided following an oral hearing or based on written evidence only, should be finalised within a reasonable period of time. Steps must be taken to reduce the current delays in the appeals process while at the same time ensuring that all appeals are properly considered and decided. (Sections 1.3.4, 1.6.3 and 2.4.4)
17. A set time-frame should be established for each step of the social welfare appeals process. As suggested above, the Department of Social Protection should forward a social welfare file to the Appeals Office within a short time frame so that the appeal can be processed without lengthy delays. (Sections 1.6.3 and 2.4.4)
18. There should be a system for prioritising urgent cases, for example, appeals from people who cannot access another payment while awaiting a decision of the Appeals Office on a primary payment, possibly due to the application of the Habitual Residence Condition, should be prioritised as they cannot access Supplementary Welfare Allowance, the so-called safety net payment, in the interim. Alternatively, in cases of hardship a system should be established for urgent interim payments while awaiting an appeal decision. (Sections 1.7 and 2.5)
19. If an appeal is not processed within the set period, an interim payment should be paid to the appellant to prevent him or her incurring debts or facing destitution while awaiting a decision on a social welfare appeal. (Sections 1.6.3, 1.7, 2.4.4 and 2.5)

4.2.7

Right to assistance and legal representation at appeal stage

20. Appellants should be informed of their right to obtain legal information and advice from the Legal Aid Board prior to making an appeal. (Sections 2.4.2.3 and 3.4)
21. Appellants should be encouraged to seek assistance at the earliest possible opportunity so they can get appropriate advice and make complete written submissions in support of their appeal. (Sections 2.4.2.3 and 3.4)
22. Civil legal aid should be made available for social welfare appeals where representation is necessary either for oral hearings or making written submissions or both. (Sections 2.4.2.3 and 3.4)
23. Providing more resources to advocates – whether through the Legal Aid Board, the Citizens Information Service or not-for-profit organisations working on social welfare appeals – may improve the quality of submissions to the Appeals Office, therefore making it easier to decide a case on the written evidence only. However, this will be dependent on the quality of representation and where there is any conflicting evidence a person should still be granted an oral hearing. (Sections 1.3.4.2, 2.4.2.3, 3.4 and 3.9)
24. The Appeals Office should maintain statistics on the number of people represented at social welfare appeals including those represented by lawyers. This would help to identify whether there is an increased need for representation at appeal stage. (Sections 2.4.2.3 and 3.4)
25. The Appeals Office should hold similar meetings to those held regularly with the Decisions Advisory Office, with appellants' representatives or advocates, to identify any issues arising on the part of the appellants and their representatives and to maintain a balanced approach to both sides. (Introduction and section 1.3.2)

4.2.8

Access to an effective remedy

26. The current social welfare appeals process should be examined to determine whether it provides an adequate and effective remedy. The recommendations outlined above in relation to reasonable processing times, equality of arms, access to information and legal representation should all be implemented to ensure that the appeals process affords a genuine remedy for people trying to access social welfare payments. (Section 2.5)

4.2.9

Chief Appeal Officer's mechanism

27. There should be greater transparency in the way in which the Chief Appeals Officer's review mechanism works. More information should be provided about how she conducts these reviews and statistics kept on the number of reviews requested. (Sections 1.3.6.3, 2.4.3 and 3.6)

4.3

RECOMMENDATIONS RELATING TO STRUCTURAL CHANGES

4.3.1

Appeals Officers

28. The Minister for Social Protection should not appoint Appeals Officers from other parts of the Department of Social Protection. Instead a public appointment procedure should be put in place to ensure that people are appointed on specific criteria. (Sections 1.2.1, 2.4.1, 3.3.2 and 3.7)
29. Terms of reference for Appeals Officers should be drawn up to include job requirements, relevant expertise and experience and a fixed term of office with potential for renewal. Selection criteria should be made public which would ensure a fairer appointment process and greater transparency and accountability. (Sections 1.2, 2.4.1 and 3.3.2)

30. Appeals Officers should be employed from a variety of different backgrounds to allow for diversity and a greater range of expertise. The position should not be limited to civil servants. All Appeals Officers should become employees of the Appeals Office. (Sections 2.4.1 and 3.3.2)
31. Regular training should be provided to Appeals Officers in relation to the different areas of law upon which they are expected to make a decision. These include but are not limited to social welfare law, immigration law, EU law and human rights law. There should also be training in cultural awareness and sensitivity in relation to ethnic minorities, including Travellers, sexual orientation and transgender issues and persons with disabilities. (Sections 2.4, 2.4.1 and 3.3.2)
32. The current situation whereby Appeals Officers may automatically transfer back into another part of the Department of Social Protection should be ended so as to enhance confidence in the independence of the Appeals Officers. (Section 2.4.1)

BIBLIOGRAPHY

Department of Social Protection (DSP):

- DSP (2012) *Statistical Information on Social Welfare Services 2011*. Dublin: DSP.
- DSP (2011a) *Statistical Information on Social Welfare Services 2010*. Dublin: DSP.
- DSP (2011b) *Strategy statement 2011-2014*. Dublin: DSP.
- DSP (2010a) *Appeal Submission Guidelines – Guidelines for submitting appeals to the SWAO*. Dublin: DSP.
- DSP (2010b) *Operational Guidelines for Social Welfare Inspectors and Appeal Hearings*. Dublin: DSP.
- DAO (2009) Bulletin: “Appeal” from the Social Welfare Appeals Office’. Carrick-on-Shannon: Decisions Advisory Office.
- DSP (2008) *Guidelines for Deciding Officers on the Habitual Residence Condition*. Dublin: DSP.

Correspondence from Decisions Advisory Office (DAO):

Woods, DAO, 14 May 2012

Social Welfare Appeals Office (SWAO):

- SWAO (2012) *Annual Report 2011*. Dublin: SWAO.
- SWAO (2011a) *Annual Report 2010*. Dublin: SWAO.
- SWAO (2011b) *Guide to the Functions, Records and Procedures of the Social Welfare Appeals Office 2011*. Dublin: SWAO.
- SWAO (2010a) *Annual Report 2009*. Dublin: SWAO.
- SWAO (2010b) *Social Welfare Appeals Office – An Introduction (SW 56)*. Dublin: SWAO.
- SWAO (2010c) *Appeals Hearings (SW 53)*. Dublin: SWAO.
- SWAO (2008) *Annual Report 2007*. Dublin: SWAO.
- SWAO (2007) *Annual Report 2006*. Dublin: SWAO.
- SWAO (2006) *Annual Report 2005*. Dublin: SWAO.
- SWAO (2005) *Annual Report 2004*. Dublin: SWAO.
- SWAO (2004) *Annual Report 2003*. Dublin: SWAO.
- SWAO (2003) *Annual Report 2002*. Dublin: SWAO.
- SWAO (2002) *Annual Report 2001*. Dublin: SWAO.

Correspondence from SWAO:

- Gleeson, CAO, 16 March 2012.
- Gleeson, CAO, 17 January 2012.

Department of Finance

- DOF (2001) *Book of Estimates for Public Expenditure*.
- DOF (2002) *Book of Estimates for Public Expenditure*.
- DOF (2003) *Book of Estimates for Public Expenditure*.
- DOF (2004) *Book of Estimates for Public Expenditure*.
- DOF (2005) *Book of Estimates for Public Expenditure*.
- DOF (2006) *Book of Estimates for Public Expenditure*.
- DOF (2007) *Book of Estimates for Public Expenditure*.
- DOF (2008) *Book of Estimates for Public Expenditure*.
- DOF (2009) *Book of Estimates for Public Expenditure*.
- DOF (2010) *Book of Estimates for Public Expenditure*.
- DOF (2011) *Book of Estimates for Public Expenditure*.
- DOF (2012) *Book of Estimates for Public Expenditure*.

Department of Jobs, Enterprise and Innovation

Department of Jobs, Enterprise and Innovation (DJEI) (2012) *Blueprint to Deliver a World-Class Workplace Relations Service*. Dublin: DJEI.

Parliamentary Questions and Oireachtas Debates:

(retrieved at www.oireachtas.ie)

- Burton, Joan, TD, Minister for Social Protection, 11 October 2011.
- Burton, Joan, TD, Minister for Social Protection, 30 March 2011.
- Burton, Joan, TD, Minister for Social Protection, 20 July 2011.
- Burton, Joan, TD, Minister for Social Protection, 6 March 2012.
- Burton, Joan, TD, Minister for Social Protection, 28 March 2012.
- Burton, Joan, TD, Minister for Social Protection, 24 April 2012.
- Ó Cuiv, Eamon, TD, Minister for Social Protection, 18 January 2011.

Joint Oireachtas Committee Hearings

Gleeson, Geraldine, Chief Appeals Officer (SWAO), Joint Oireachtas Committee on Social Protection, 21 March 2012.

Kavanagh, Dan, Deputy Chief Appeals Officer (SWAO), Joint Oireachtas Committee on Social Protection, 27 October 2010.

Kyne, Seán, TD, Joint Oireachtas Committee on Social Protection, 21 March 2012.

UN Human Rights Documents:

UN CESCR (1998) *General Comment No. 9*,
The domestic application of the Covenant.

UN CESCR (2008) *General Comment No. 19*,
The right to social security (Article 9).

OHCHR (2011) *Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Mission to Ireland*, 17 May 2011.

Other publications:

Central Statistics Office (CSO) (2012) *This is Ireland: Highlights from Census 2011*, Part 1. Dublin: Stationery Office.

Citizens Information Board (CIB) (2011) *Pre-Budget 2012 Submission*. Dublin: CIB.

Clark, R. (1995) *Annotated Guide to Social Welfare Law*. London: Sweet & Maxwell.

Commission on Social Welfare (CSW) (1986) *The Irish Social Welfare System: Law and Social Policy*. Dublin: Stationery Office.

Cousins, M. (2010) *Social Security Law in Ireland* (2ndedn). Dublin: Thomson Round Hall.

Cousins, M. (2012) *Access to quasi-judicial decisions – Jama v Minister for Social Protection*, available online at http://works.bepress.com/mel_cousins/20/.

Council of Europe (2007) *Social Security as a Human Right: The protection afforded by the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing.

De Blacam, M. (2009) *Judicial Review* (2ndedn), Dublin: Tottel Publishing.

Department for Social Development Northern Ireland (DSD) (2010) *Appeals Service Information Leaflet*. Belfast: DSD.

Farrell, M. (2012) *Using International Standards Beyond the ECHR: UN and Council of Europe Human Rights Instruments*. Paper delivered at PILA/PILS annual conference, available online at www.pila.ie.

FLAC, (2009) *Briefing Note on the Habitual Residence Condition*. Dublin: FLAC.

Genn, H. (1993) *The Modern Law Review* Vol. 56, No. 3, Dispute Resolution. Civil Justice and its Alternatives (May, 1993), pp. 393-411. London: Blackwell Publishing, available online at <http://www.jstor.org/stable/1096675>.

Hammarberg, T. (2011) *Human Rights in Europe: No Time for Complacency. Viewpoints by Thomas Hammerberg the Council of Europe Commissioner for Human Rights*. France: Council of Europe Publishing.

Hogan, G. & Gwynn Morgan, D. (2010) *Administrative Law in Ireland* (4thedn). Dublin: Round Hall.

Justice Gap (2011) *Unequal before the law? The future of civil aid*. London: Wilmington Publishing and Information Limited, a Wilmington Group company.

Kelly, J.M., Hogan, G., Whyte, G. (2003) *J.M. Kelly: The Irish Constitution*. Dublin: Tottel Publishing.

Law Centre (NI) (2010) *Redressing Users' Disadvantage Proposals for Tribunal Reform in Northern Ireland*. Belfast: Law Centre NI.

Law Society of England and Wales (2011) *Missing Millions: Government plans for civil legal aid offer unproven savings and will incur unaccounted-for costs*. London: The Law Society.

Legal Aid Board (2009) *Annual Report 2008*. Cahirciveen: LAB.

Legal Aid Board (2010) *Annual Report 2009*. Cahirciveen: LAB.

Legal Aid Board (2011) *Annual Report 2010*. Cahirciveen: LAB.

Legal Voice (2012) *@FightBach's verdict on LASPO: 'wicked, mean and unconstitutional'*. Leicester: Legal Voice.

Legatt, Sir A. (2001) *Tribunals for Users: One System, One Service*. London: TSO.

- Liberty (2011) *Liberty's response to the Ministry of Justice Proposals for the Reform of Legal Aid*. London: Liberty.
- Northside Community Law Centre (2005) *The Social Welfare Appeals System: Accessible & Fair?* Dublin: Northside Community Law Centre.
- Ombudsman (2012) *Annual Report 2011*. Dublin: Office of the Ombudsman.
- Ovey, C. & White, R. (2006) *Jacobs & White: The European Convention on Human Rights* (4thedn). Oxford: OUP.
- Whyte, G. (2001) *Social Inclusion and the Legal System, Public Interest Law in Ireland*. Dublin: Institute of Public Administration.

APPENDICES

APPENDIX 1: LEGISLATION AND REGULATIONS

SOCIAL WELFARE (CONSOLIDATION) ACT 2005 (AS AMENDED)

PART 10: Decisions, Appeals and Social Welfare Tribunal

Chapter 1 *Deciding Officers and Decisions by Deciding Officers*

Appointment of deciding officers.
[1993 s246]

Decisions by deciding officers.
[1993 s247(1); 1997 s29(1) (a)]

[1993 s247(2); 2005 (SW&P) s7(1)(d) & 10(e)]

299.— The Minister may appoint such and so many of his or her officers as the Minister thinks proper to be deciding officers for the purposes of this Act, and every person so appointed shall hold office as a deciding officer during the pleasure of the Minister.

300.— (1) Subject to this Act, every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer.

(2) Subject to *subsection (3)*, this section applies to every question arising under—

(a) *Part 2* (social insurance) being a question—

- (i) in relation to a claim for benefit,
- (ii) as to whether a person is or was disqualified for benefit,
- (iii) as to the period of any disqualification for benefit,
- (iv) as to whether an employment is or was insurable employment or insurable (occupational injuries) employment,
- (v) as to whether a person is or was employed in an insurable employment or insurable (occupational injuries) employment,
- (vi) as to the rate of employment contribution which is or was payable by an employer in respect of an employed contributor,
- (vii) as to who is or was the employer of an employed contributor,
- (viii) as to whether a person is or was entitled to become a voluntary contributor,
- (ix) on any other matter relating to *Part 2* that may be prescribed,
- (x) as to whether an employment is or was an insurable self-employment,
- (xi) as to whether a person is or was in insurable self-employment, or
- (xii) as to the rate of self-employment contribution which is or was payable by a self-employed contributor,

	<p>(b) <i>Part 3</i> (social assistance) other than Chapter 9 (supplementary welfare allowance),</p> <p>(c) <i>Part 4</i> (child benefit),</p> <p>(d) <i>Part 5</i> (respite care grant),</p> <p>(e) <i>Part 6</i> (family income supplement),</p> <p>(f) <i>Part 7</i> (continued payment for qualified children),</p> <p>(g) <i>Part 8</i> (EU payments),</p> <p>(h) <i>Part 9</i> (general provisions relating to social insurance, social assistance and insurability), and</p> <p>(i) <i>Part 12</i> (liability to maintain family).</p>
[1999 s30(1)(b)]	(3) In the case of a deciding officer who is a bureau officer this section also applies to every question arising under <i>Chapter 9 of Part 3</i> .
[1993 s247(3)]	(4) A reference in <i>subsection (2)(a)</i> to a question arising in relation to a claim for benefit includes a reference to a question whether benefit is or is not or was or was not payable.
[2003 (MP) s11]	(5) Notwithstanding <i>subsections (1) to (4)</i> and subject to <i>subsection (7)</i> , where a person is in receipt of child benefit, the Minister may provide for the award of child benefit to that person in respect of a second or subsequent child on receipt of the information that may be prescribed, verified in the manner that may be prescribed, where the Minister is satisfied that the information is adequate to ensure that the award is made in accordance with this Act.
[2005 (SW&P) s16(a)]	(6) Notwithstanding <i>subsections (1) to (4)</i> and subject to <i>subsection (8)</i> , the Minister may provide for the award of a bereavement grant or a payment under <i>section 248</i> , in the circumstances and subject to the conditions that may be prescribed, on receipt of information that may be prescribed, verified in the manner that may be prescribed, where the Minister is satisfied that the information is adequate to ensure that the award is made in accordance with this Act.
[2003(MP) S11]	(7) In the case of an award made under <i>subsection (5)</i> , any question which arises subsequently in relation to whether child benefit is or is not payable, or in relation to who is entitled to receive child benefit, shall be referred to a deciding officer for decision.
[2005 (SW&P) s16(a)]	(8) In the case of an award made under <i>subsection (6)</i> , any question which arises subsequently in relation to whether a bereavement grant or a payment under <i>section 248</i> is or is not payable, or in relation to who is entitled to receive a bereavement grant or a payment under <i>section 248</i> , shall be referred to a deciding officer for decision.

<p>Revision of decisions by deciding officers.</p> <p>[1993 s248(1)]</p> <p>[1999 s30(1)(c); 2005 (SW&P) s23 & Sch 1]</p> <p>[1993 s248(2)]</p> <p>[1999 s30(1)(d)]</p>	<p>301.— (1) A deciding officer may, at any time—</p> <p>(a) revise any decision of a deciding officer, where it appears to him or her that the decision was erroneous in the light of new evidence or of new facts which have been brought to the notice of the deciding officer since the date on which it was given or by reason of some mistake having been made in relation to the law or the facts, or where it appears to the deciding officer that there has been any relevant change of circumstances since the decision was given, or</p> <p>(b) revise any decision of an appeals officer where it appears to him or her that there has been any relevant change of circumstances which has come to notice since the decision was given, and the provisions of this Part as to appeals apply to the revised decision in the same manner as they apply to an original decision of a deciding officer.</p> <p>(2) A deciding officer who is a bureau officer may at any time make a decision revising a determination of an employee of the Executive, including an employee of the Executive designated under <i>section 323</i>, to entitlement to supplementary welfare allowance where it appears to the deciding officer that the determination ought to be revised having regard to the facts as they are established to the satisfaction of the deciding officer and the application of this Act to those facts and the provisions of this Part as to appeals shall apply to the revised decision in the same manner as they apply to an original decision of a deciding officer.</p> <p>(3) <i>Subsection (1)(a)</i> shall not apply to a decision relating to a matter which is on appeal or reference under <i>section 303</i> or <i>311</i> unless the revised decision would be in favour of a claimant.</p> <p>(4) <i>Subsection (2)</i> shall not apply to a determination relating to a matter which is on appeal under <i>section 312</i> or <i>323</i>, as the case may require, unless the revised decision would be in favour of the claimant.</p>
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<p>Effect of revised decisions by deciding officers.</p> <p>[1993 s249; 1999 s30(2) & Sch F]</p>	<p>302.— A revised decision given by a deciding officer shall take effect as follows:</p> <p>(a) where any benefit, assistance, child benefit, family income supplement or continued payment for qualified children will, by virtue of the revised decision be disallowed or reduced and the revised decision is given owing to the original decision or determination having been given, or having continued in effect, by reason of any statement or representation (whether written or verbal) which was to the knowledge of the person making it false or misleading in a material respect or by reason of the wilful concealment of any material fact, it shall take effect from the date on which the original decision or determination took effect, but the original decision or determination may, in the discretion of the deciding officer, continue to apply to any period covered by the original decision or determination to which the false or misleading statement or representation or the wilful concealment of any material fact does not relate;</p> <p>(b) where any benefit, assistance, child benefit, family income supplement or continued payment for qualified children will, by virtue of the revised decision be disallowed or reduced and the revised decision is given in the light of new evidence or new facts (relating to periods before and after the commencement of this Act) which have been brought to the notice of the deciding officer since the original decision or determination was given, it shall take effect from the date that the deciding officer shall determine having regard to the new facts or new evidence and the circumstances of the case;</p> <p>(c) in any other case, it shall take effect as from the date considered appropriate by the deciding officer having regard to the circumstances of the case.</p>
<p>Reference by deciding officer to appeals officer.</p> <p>[1993 s250]</p>	<p>303.— A deciding officer may, where he or she thinks proper, instead of deciding it himself or herself, refer in the prescribed manner any question to be decided by the deciding officer to an appeals officer.</p>

Chapter 2 Appeals Officers, Chief Appeals Officer and Decisions by Appeals Officers

<p>Appointment of appeals officers [2010 MP s22] [1993 s251; 1996 s30(1)(a)]</p>	<p>304.— The Minister may appoint such and so many persons as he or she thinks proper to be appeals officers for the purposes of any provision or provisions of this Act, and every person so appointed shall be an appeals officer during the pleasure of the Minister.</p>
<p>Chief Appeals Officer [2010 MP s23] [1993 s252]</p>	<p>305.— One of the appeals officers who is an officer of the Minister shall be designated by the Minister to be the Chief Appeals Officer and another of them who is an officer of the Minister shall be designated by the Minister to act as the deputy for the Chief Appeals Officer when that Officer is not available.</p>
<p>Reference to High Court. [1993 s253]</p>	<p>306.— The Chief Appeals Officer may, where he or she considers it appropriate, refer any question which has been referred to an appeals officer, other than a question to which <i>section 320</i> applies, for the decision of the High Court.</p>
<p>Appeals to Circuit Court. [1997 s34; 1999 s29(1)]</p>	<p>307.— (1) Whenever a person has appealed a decision of a deciding officer then, where the Chief Appeals Officer certifies that the ordinary appeals procedures set out in this Chapter are inadequate to secure the effective processing of that appeal, the Chief Appeals Officer shall cause a direction to be issued to the person who has submitted the appeal directing the person to submit the appeal not later than 21 days from receipt of the direction to the Circuit Court and the Circuit Court may, on hearing the appeal as it thinks proper, affirm the decision or substitute the decision of the deciding officer in accordance with this Act and on the same evidence as would otherwise be available to the Appeals Officer.</p>
<p>[1997 s34]</p>	<p>(2) The appellant shall give notice of the appeal as submitted to the Circuit Court to the deciding officer.</p>
<p>[1997 s34]</p>	<p>(3) No appeal shall lie from a decision of the Circuit Court on an appeal under this section.</p>
<p>Annual report. [1993 s254(1)]</p>	<p>308.— (1) As soon as may be after the end of each year, but not later than 6 months thereafter, the Chief Appeals Officer shall make a report to the Minister of his or her activities and the activities of the appeals officers under this Part during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas.</p>
<p>[1993 s254(2)]</p>	<p>(2) A report under <i>subsection (1)</i> shall be in such form and shall include information in regard to such matters (if any) other than those referred to in that subsection as the Minister may direct.</p>
<p>[1993 s254(3); 2005 (SW&P) s26 & Sch 4]</p>	<p>(3) The Chief Appeals Officer shall, whenever so requested by the Minister, give to the Minister information in relation to the matters that the Minister may specify concerning his or her activities or the activities of appeals officers under this Part.</p>

<p>Appointment of assessors. [1993 s255]</p>	<p>309.— (1) The Chief Appeals Officer may appoint any person whom he or she considers suitable to sit as an assessor with an appeals officer when any question, which appears to the Chief Appeals Officer to require the assistance of assessors, is heard.</p> <p>(2) The Chief Appeals Officer may constitute, on the basis of districts or otherwise as he or she considers appropriate, panels of persons to sit as assessors with appeals officers and members may be selected in the manner that he or she may determine from those panels to so sit when any question, which in the opinion of the Chief Appeals Officer is appropriate for the assistance of assessors, is heard.</p>
<p>Other functions of Chief Appeals Officer. [1993 s256(1)]</p>	<p>310.— (1) The Chief Appeals Officer shall have any other functions in relation to appeals under this Part that may be prescribed.</p>
<p>[1993 s256(2)]</p>	<p>(2) In this section “functions” includes powers, duties and obligations.</p>
<p>Appeals and references to appeals officers. [1993 s257(1)]</p>	<p>311.— (1) Where any person is dissatisfied with the decision given by a deciding officer, the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer.</p>
<p>[1993 s257(2)]</p>	<p>(2) Regulations may provide for the procedure to be followed on appeals and references under this Part.</p>
<p>[1993 s257(3); 2005 (SW&P) s23 & Sch 1]</p>	<p>(3) An appeals officer, when deciding a question referred under subsection (1) or section 312 , shall not be confined to the grounds on which the decision of the deciding officer, or the determination of the employee of the Executive, as the case may require, was based, but may decide the question as if it were being decided for the first time.</p>
<p>Supplementary welfare allowance — appeals. [1996 s30(1)(b); 2005 (SW&P) s23 & Sch 1]</p>	<p>312.— Where a person is dissatisfied with the determination of an appeal by the person under section 323 in relation to a claim for supplementary welfare allowance, the question shall, on notice of appeal being given to the Executive within the prescribed time, be forwarded by it to the Chief Appeals Officer for referral to an appeals officer.</p>
<p>Power to take evidence on oath. [1993 s258]</p>	<p>313.— An appeals officer shall, on the hearing of any matter referred to him or her under this Part have power to take evidence on oath and for that purpose may administer oaths to persons attending as witnesses at that hearing.</p>
<p>Notification to persons to attend and give evidence or produce documents at appeal hearing. [1993 s259(1)]</p>	<p>314.— (1) An appeals officer may, by giving written notice in that behalf to any person, require the person to attend at the time and place specified in the notice to give evidence in relation to any matter referred to the appeals officer under this Part or to produce any documents in the person’s possession, custody or control which relate to any such matter.</p>

[1993 s259(2)]	(2) A notice under <i>subsection (1)</i> may be given either by delivering it to the person to whom it relates or by sending it by post in a prepaid registered letter addressed to that person at the address at which he or she ordinarily resides or at his or her place of business.
[1993 s259(3); 2005 (SW&P) s26 & Sch 4]	(3) A person to whom a notice under <i>subsection (1)</i> has been given and who refuses or wilfully neglects to attend in accordance with the notice or who, having so attended, refuses to give evidence or refuses or wilfully fails to produce any document to which the notice relates is guilty of an offence and is liable on summary conviction to a fine not exceeding €1,500.
[1993 s259(4)]	(4) Where a person required to attend to give evidence or to produce documents under <i>subsection (1)</i> fails to attend or to produce those documents, an appeals officer may, on serving notice on that person, apply to the District Court for an order directing that person to attend or to produce those documents as required.
Procedure where assessor appointed. [1993 s260]	315. — Any matter referred to an appeals officer under this Part and to be heard by the appeals officer sitting with an assessor appointed under <i>section 309</i> may, with the consent of the parties appearing at the hearing, but not otherwise, be proceeded with in the absence of the assessor.
Award of expenses. [1993 s261(1); 1996 s34]	316. — (1) In relation to any matter referred to an appeals officer under this Part the following apply: (a) subject to <i>paragraph (b)</i> , an award shall not be made in respect of any costs (whether in respect of the representation of the appellant or otherwise in relation to the matter) incurred by a person; (b) an appeals officer may make an award to a person appearing before the officer towards the person’s expenses, which shall be payable by the Minister.
[1996 s34]	(2) In <i>subsection (1)(b)</i> , “expenses” means— (a) expenses necessarily incurred by the appellant or a witness in respect of his or her travel and subsistence or loss of remuneration, and (b) in the case of a person appearing before an appeals officer in a representative capacity, an amount only in respect of that person’s actual attendance.
[1993 s261(2)]	(3) The Minister may pay to assessors referred to in <i>section 309</i> the amounts in respect of expenses (including expenses representing loss of remunerative time) as the Minister, with the sanction of the Minister for Finance, determines.
Revision by appeals officer of decision of appeals officer. [1993 s262]	317. — An appeals officer may, at any time revise any decision of an appeals officer, where it appears to the appeals officer that the decision was erroneous in the light of new evidence or of new facts brought to his or her notice since the date on which it was given, or where it appears to the appeals officer that there has been any relevant change of circumstances since the decision was given.

<p>Revision by Chief Appeals Officer of decision of appeals officer. [1993 s263]</p>	<p>318.— The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.</p>
<p>Effect of revised decision by appeals officer. [1993 s264; 1996 s32 & Sch H]</p>	<p>319.— A revised decision given by an appeals officer shall take effect as follows:</p> <ul style="list-style-type: none"> (a) where any benefit, assistance, child benefit, family income supplement or continued payment for qualified children will, by virtue of the revised decision be disallowed or reduced and the revised decision is given owing to the original decision having been given, or having continued in effect, by reason of any statement or representation (whether written or verbal) which was to the knowledge of the person making it false or misleading in a material respect or by reason of the wilful concealment of any material fact, it shall take effect from the date on which the original decision took effect, but the original decision may, in the discretion of the appeals officer, continue to apply to any period covered by the original decision to which the false or misleading statement or representation or the wilful concealment of any material fact does not relate; (b) where any benefit, assistance, child benefit, family income supplement or continued payment for qualified children will, by virtue of the revised decision, be disallowed or reduced and the revised decision is given in the light of new evidence or new facts (relating to periods before and after the commencement of this Act) which have been brought to the notice of the appeals officer since the original decision was given, it shall take effect from the date the appeals officer shall determine having regard to the new facts or new evidence and the circumstances of the case; (c) in any other case, it shall take effect from the date considered appropriate by the appeals officer having regard to the circumstances of the case.
<p>Decision of appeals officer to be final and conclusive. [1993 s265; 2005 (SW&P) s7(1)(c) & 10(c)]</p>	<p>320.— The decision of an appeals officer on any question—</p> <ul style="list-style-type: none"> (a) specified in section 300 (2)(a)(i), (ii) or (iii), other than a question arising under Chapter 13 of Part 2 as to whether an accident arose out of and in the course of employment, and (b) arising under Part 3 , 4 , 5 , 6 , 7 , 8 , 9 or 11 or this Part, shall, subject to sections 301 (1)(b), 317 , 318 , 324 (1)(c) and 327 , be final and conclusive.
<p>Supplementary welfare allowance. [1996 s30(1)(h)]</p>	<p>321.— For the purposes of supplementary welfare allowance, every reference in this Part to a decision shall be read as a reference to a determination.</p>

Chapter 3 *Supplementary Welfare Allowance — Determinations and Appeals*

Determination of entitlement to supplementary welfare allowance.

[1993 s266; 2005 (SW&P) s23 & Sch 1]

Appeals.

[1993 s267(1); 2005 (SW&P) s23 & Sch 1]

Revision of determination of entitlement to supplementary welfare allowance.

[1993 s268; 2005 (SW&P) s23 & Sch 1]

[1996 s30(1)(g)]

322.— Any function in relation to the determination of the entitlement of any person to supplementary welfare allowance and the amount of any such allowance shall, subject to section 300 , 312 or 323, be a function of the chief executive officer of the Executive.

323.— Where a person is dissatisfied with the determination by an employee of the Executive of a claim by him or her for supplementary welfare allowance, an appeal shall lie against the determination to another employee of the Executive appointed or designated by the Minister.

324.— (1) An employee of the Executive (in this subsection referred to as the “first-named employee”) who is duly authorised to determine entitlement to a supplementary welfare allowance may, at any time—

- (a) revise a determination of another employee of the Executive, other than an employee appointed or designated under section 323 , of entitlement to such allowance if it appears to the first-named employee that the determination was erroneous in the light of new evidence or of new facts which have been brought to the notice of the first-named employee since the date on which the determination was given or by reason of some mistake having been made in relation to the law or the facts, or if it appears to the first-named employee that there has been any relevant change of circumstances since the determination was given,
- (b) revise the determination of another employee of the Executive appointed or designated under section 323 , if it appears to the first-named employee that there has been any relevant change of circumstances which has come to notice since the determination was given, or
- (c) revise the decision of an appeals officer, if it appears to the first-named employee that there has been any relevant change of circumstances which has come to notice since the decision was given, and the provisions of this Part as to appeals shall apply to the revised determination in the same manner as they apply to an original determination of an employee of the Executive.

(2) Subsection (1)(a) and (b) shall not apply to a determination relating to a matter which is on appeal under section 312 or 323, as the case may require, unless the revised determination would be in favour of a claimant.

<p>Effect of revised determination by employee of Health Service Executive. [1993 s269; 2005 (SW&P) s23 & Sch 1]</p>	<p>325.— A revised determination of entitlement to a supplementary welfare allowance given by an employee of the Executive shall take effect as follows:</p> <ul style="list-style-type: none">(a) where any supplementary welfare allowance will, by virtue of the revised determination be disallowed or reduced and the revised determination is given owing to the original determination having been given, or having continued in effect, by reason of any statement or representation (whether written or verbal) which was to the knowledge of the person making it false or misleading in a material respect or by reason of the wilful concealment of any material fact, it shall take effect from the date on which the original determination took effect, but the original determination may, in the discretion of the employee of the Executive, continue to apply to any period covered by the original determination to which the false or misleading statement or representation or the wilful concealment of any material fact does not relate;(b) where any supplementary welfare allowance will, by virtue of the revised determination, be disallowed or reduced and the revised determination is given in the light of new evidence or new facts (relating to periods before and after the commencement of this Act) which have been brought to the notice of the employee of the Executive since the original determination was given, it shall take effect from the date that the employee of the Executive shall determine having regard to the new facts or new evidence and the circumstances of the case;(c) in any other case, it shall take effect from the date considered appropriate by the employee of the Executive having regard to the circumstances of the case.
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Chapter 4 General Provisions Relating to Decisions and Appeals

<p>Appeals — oral hearings. [1993 s270]</p>	<p>326.— Notwithstanding section 311 (2), where the Minister or a person designated by the Minister considers that the circumstances of a particular case warrant an oral hearing of the appeal, the Minister or any person so designated by him or her may direct the Chief Appeals Officer that the appeal be determined by way of an oral hearing.</p>
<p>Appeals to High Court. [1993 s271]</p>	<p>327.— Any person who is dissatisfied with— (a) the decision of an appeals officer, or (b) the revised decision of the Chief Appeals Officer, may appeal that decision or revised decision, as the case may be, to the High Court on any question of law.</p> <p>327A.— (1) Where pursuant to section 318 the Chief Appeals Officer— (a) revises a decision of an appeals officer, the Minister may appeal that revised decision to the High Court on any question of law, or (b) does not revise a decision of an appeals officer, the Minister may appeal the decision of the Chief Appeals Officer not to revise the first-mentioned decision to the High Court on any question of law.</p>
<p>Appeal to High Court by Minister. [SW (MP) Act 2010 s16]</p>	<p>(2) An appeal by the Minister under subsection (1) shall not operate as a stay on the payment of benefit or assistance to a person pursuant to a decision of an appeals officer or, as the case may be, the Chief Appeals Officer, until that appeal is determined.”</p>
<p>Certificate by deciding officer or appeals officer. [1993 s272]</p>	<p>328.— A document purporting to be a certificate of a decision made under this Act by a deciding officer or an appeals officer and to be signed by him or her shall be prima facie evidence of the making of the decision and of the terms of that decision, without proof of the signature of the officer or of his or her official capacity.</p>
<p>Revision to include revision consisting of reversal. [1993 s273; 2005 (SW&P) s23 & Sch 1]</p>	<p>329.— A reference in this Part to a revised decision given by a deciding officer or an appeals officer or a revised determination given by an employee of the Executive includes a reference to a revised decision or determination which reverses the original decision or determination.</p>
<p>Regulations. [1996 s31; 2005 (SW&P) s23 & Sch 1]</p>	<p>330.— The Minister may make regulations specifying the procedures to be followed by— (a) a deciding officer, when deciding questions under sections 300 and 301 , (b) an appeals officer, when deciding questions under sections 303 , 311 and 312 , and (c) an employee of the Executive in making determinations in relation to supplementary welfare allowance including determinations under section 323 .</p>

SOCIAL WELFARE (APPEALS) REGULATIONS, 1998

S.I. No. 108 of 1998

The Minister for Social, Community and Family Affairs, in exercise of the powers conferred on him by section 298, as applied and modified by the Social Welfare (Rent Allowance) (Amendment) (No. 2) Regulations, 1990 (S.I. No. 302 of 1990), of the Social Welfare (Consolidation) Act, 1981 (No. 1 of 1981), and by section 4 , 188 , 250 , 256 , 257 ,257A (inserted by section 30 of the Social Welfare Act, 1996 (No. 7 of 1996) and 273A (inserted by section 31 of the Social Welfare Act, 1996) of the Social Welfare (Consolidation) Act, 1993 , (No. 27 of 1993), hereby makes the following Regulations:

PART I General

Citation

1. These Regulations may be cited as the Social Welfare (Appeals) Regulations, 1998.

Commencement

2. These Regulations shall come into operation on the 6th day of April, 1998.

Definitions

3. In these Regulations—“designated officer” means an officer of the health board appointed or designated under section 267 of the Principal Act for the purposes of determining an appeal against a determination by an officer of the health board of a claim for supplementary welfare allowance;

“hearing” means oral hearing;

“the Principal Act” means the Social Welfare (Consolidation) Act, 1993 .

Interpretation

4. In these Regulations any reference to a section refers to a section of the Principal Act.

Revocation of Regulations

5. The Social Welfare (Appeals) Regulations, 1990 (S.I. No. 344 of 1990) are hereby revoked.

PART II Functions of Chief Appeals Officer

Distribution of references to appeals officers

6. The Chief Appeals Officer shall be responsible for the distribution amongst the appeals officers of the references to them under sections 257 and 257A and for the prompt consideration of such references.

Convening of meetings

7. The Chief Appeals Officer may convene meetings of appeals officers for the purpose of discussing matters relating to the discharge of the functions of appeals officers including in particular consistency in the application of the statutory provisions.

Reference by a deciding officer to appeals officer

8. (1) A reference to an appeals officer by a deciding officer under section 250 shall be in the form, for the time being, approved by the Chief Appeals Officer or in any other such manner as the Chief Appeals Officer may accept as sufficient in the circumstances.
- (2) Where a reference to an appeals officer is made by a deciding officer under section 250, the manner for dealing with it shall, with any necessary modifications, be the same as if the reference were an appeal made under section 257 of the said Act.

PART III Procedure on Appeal

Submission of appeal and information to be supplied by appellant

9. (1) Any person (in these Regulations referred to as the appellant) who is dissatisfied with the decision of a deciding officer or the determination of a designated officer and who wishes to appeal against such decision or determination, as the case may be, shall give notice in that behalf, in writing, to—
 - (a) in the case of an appeal against a decision of a deciding officer, the Chief Appeals Officer, or
 - (b) in the case of an appeal against a determination by a designated officer, the health board.
- (2) The time within which an appeal may be made shall be any time up to the expiration of 21 days from the date of the notification of the decision of a deciding officer or determination of a designated officer, as the case may be, to the appellant:

Provided that notice of appeal given after the end of that period may, with the approval of the Chief Appeals Officer or the health board, as the case may be, be accepted.
- (3) The notice of appeal shall contain a statement of the facts and contentions upon which the appellant intends to rely.
- (4) The appellant shall send to the Chief Appeals Officer or to the health board, as the case may be, along with the notice of appeal, such documentary evidence as the appellant wishes to submit in support of his or her appeal, and the notice shall contain a list of any such documents.
- (5) Any person wishing to withdraw an appeal may do so by sending a written notice to that effect to the Chief Appeals Officer or the health board, as the case may be.

Notification of appeal and information to be supplied

10. (1) In the case of an appeal against the decision of a deciding officer under section 257, the Chief Appeals Officer shall cause notice of the appeal to be sent to the Minister who shall, as soon as may be, furnish to the Chief Appeals Officer—
 - (a) a statement from the deciding officer or on his or her behalf showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed, and
 - (b) any information, document or item in the power or control of the deciding officer that is relevant to the appeal.
- (2) In the case of an appeal against a determination of a designated officer under section 257A, the health board shall furnish to the Chief Appeals Officer, in the form, for the time being, approved by him or her or in such other form as he or she may accept as sufficient in the circumstances—
 - (a) the notice of the appeal together with any documentary evidence submitted by the appellant in connection with such appeal,
 - (b) a statement from the designated officer or on his or her behalf showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed, and
 - (c) any information, document or item in the power or control of the designated officer that is relevant to the appeal.

Notice of appeal

11. The Chief Appeals Officer shall cause notice that an appeal has been submitted to be furnished to any other person appearing to be concerned.

Further information to be supplied and amendment of pleadings

12. The appeals officer to whom an appeal is referred may at any time—
- (a) require the appellant, the deciding officer or the designated officer, as the case may be, or any other person appearing to the appeals officer to be concerned, to furnish to him or her, in writing, further particulars regarding the appeal,
 - (b) allow the amendment of any notice of appeal, statement, or particulars at any stage of the proceedings, and
 - (c) fix the time for furnishing any such statement or particulars upon such terms as he or she may think fit.

Summary appeals

13. Save as provided in section 270, where the appeals officer is of the opinion that the case is of such a nature that it can properly be determined without a hearing, he or she may determine the appeal summarily.

Hearings

14. Where, in the opinion of the appeals officer, a hearing is required he or she shall, as soon as may be, fix a date and place for the hearing, and give reasonable notice of the said hearing to the appellant, the deciding officer or designated officer, as the case may be, and any other person appearing to the appeals officer to be concerned in the appeal.

Attendance at a hearing

15. (1) The appellant shall ordinarily appear at the hearing in person and he or she may be accompanied by any member of his or her family, or, with the consent of the appeals officer, by any other person.
- (2) The appellant may, with the consent of the appeals officer, be represented at the hearing by any member of his or her family or by any other person.
- (3) The deciding officer or designated officer, as the case may be, may appear at the hearing in person or he or she may be represented by another officer of the Minister or the health board, as the case may be.
- (4) Any other person appearing to the appeals officer to be concerned may also attend at the hearing.

Failure to attend hearing

16. Where, after notice of a hearing has been duly given, any of the parties fails to appear at the hearing, such order or decision may be made, and such steps may be taken with a view to the determination of, or in reference to, the appeal as the appeals officer may think appropriate.

Failure to comply with Regulations

17. The appeals officer may decide any question duly referred to him or her, notwithstanding the failure or neglect of any person to comply with any requirement of these Regulations.

Procedure at hearing

18. (1) The procedure at the hearing shall be such as the appeals officer may determine.
- (2) The appeals officer may postpone or adjourn the hearing as he or she may think fit.
- (3) The appeals officer may admit any duly authenticated written statement or other material as *prima facie* evidence of any fact or facts in any case in which he or she thinks it appropriate.

Decision of appeals officer

19. (1) The decision of the appeals officer shall be in writing signed by him or her and shall be sent, as soon as may be, to the Chief Appeals Officer.
- (2) In any case where the decision of the appeals officer is not in favour of the appellant, the appeals officer shall attach to his or her decision a note of the reasons for the said decision.
- (3) The Chief Appeals Officer shall, as soon as may be after the receipt of the decision of the appeals officer, cause a memorandum of—
- (a) the decision, and
 - (b) where in accordance with sub-article (2) of this article the decision is not in favour of the appellant, the reasons therefor, to be sent to—
 - (i) the appellant and to any other person concerned,
 - (ii) the Minister, in the case of an appeal against the decision of a deciding officer, and
 - (iii) the health board, in the case of an appeal against a determination by a designated officer.

Method of sending documents

20. Any notice or other document required or authorised to be sent to any person for the purpose of these Regulations shall be deemed to be duly sent if sent by post addressed to him or her at his or her ordinary address or at his or her place of business.

GIVEN under the Official Seal of the Minister for Social, Community and Family Affairs, this 3rd day of April, 1998.

DERMOT AHERN,
Minister for Social, Community and Family Affairs.

EXPLANATORY NOTE.

These Regulations, which come into effect on 6 April, 1998, prescribe the functions of the Chief Appeals Officer and set out the procedures to be followed in social welfare appeals.

SOCIAL WELFARE (CONSOLIDATED CLAIMS, PAYMENTS AND CONTROL) REGULATIONS 2007

S.I. 142 of 2007

Decision of deciding officer

191. (1) The decision of a deciding officer shall be in writing and signed by him or her.
- (2) Where the decision of the deciding officer is not in favour of the person, the deciding officer shall set out in writing the reasons for the said decision.
- (3) Subject to sub-article (4), the Minister shall, as soon as may be after the decision is made, cause a memorandum of—
- (a) the decision, and
 - (b) where it is not in favour of the person, the reasons for the said decision,
- to issue to the person.
- (4) In the case of a decision arising under section 300(2)(a), other than decisions arising under sub-paragraphs (i), (ii) and (iii) of that section, the Minister shall, as soon as may be after the decision is made, cause a memorandum of—
- (a) the decision, and
 - (b) the reasons for the said decision,
- to issue to the parties who are subject to the decision.

APPENDIX 2: FLAC SURVEY FOR ADVOCATES

FLAC survey for advocates/representatives on the social welfare appeals process

September 2011

FLAC would like to thank you for agreeing to take part in this survey which will we will use in our research about the current social welfare appeals process. FLAC plans to use the knowledge, expertise and experience of advocates who have represented clients at appeal stage to inform our report and to portray an up-to-date and coherent analysis of the operation of the system from the advocate's perspective.

1. Type of organisation you work for:

NGO

CIC

Other: _____

2. Location:

Dublin

Rest of Leinster

Munster

Connaught

Ulster

3. (a) Approximately how long have you been involved in helping people to make appeals?

(b) Do you assist clients to represent themselves or do you directly represent the client?

Clients always represent themselves in social welfare appeals

Clients represent themselves with my assistance in less than half of the appeals

Clients represent themselves with my assistance in more than half of the appeals

I always represent the clients in social welfare appeals

4. What are the types of payment involved in those appeals?

Child and family-related payments

Disability, illness or carer-related payments

Jobseeker-related payments

Supplementary Welfare Allowance and related supplements

Other (please specify): _____

5. At what stage do your clients usually come to you in relation to their case?

Looking for initial information/advice about entitlements

Making a social welfare application

Making a social welfare appeal

6. (a) How many social welfare appeals have you been involved in?

- 0 – 10
- 11 – 20
- 21 – 30
- 31 – 40
- 41 – 50
- 50+

(b) And of these how many involved:

- | Oral hearings | Written submissions only |
|----------------------------------|----------------------------------|
| <input type="checkbox"/> 0 – 10 | <input type="checkbox"/> 0 – 10 |
| <input type="checkbox"/> 11 – 20 | <input type="checkbox"/> 11 – 20 |
| <input type="checkbox"/> 21 – 30 | <input type="checkbox"/> 21 – 30 |
| <input type="checkbox"/> 31 – 40 | <input type="checkbox"/> 31 – 40 |
| <input type="checkbox"/> 41 – 50 | <input type="checkbox"/> 41 – 50 |
| <input type="checkbox"/> 50+ | <input type="checkbox"/> 50+ |

7. Approximately what percentage of the total number of appeals has been successful?

Oral hearings _____

Written submissions only _____

8. (a) Have you ever had to request a written refusal to a social welfare application for a client?

- Yes
- No

(b) If yes, how many times? _____

9. (a) How often have your clients asked for a review by the first instance decision-maker before lodging an appeal?

- Always
- Regularly
- Occasionally
- Rarely
- Never

(b) Where a review has been requested, in how many cases has the decision been revised?

- All
- More than half
- Less than half
- None

(c) In your experience how often do you feel that correct decisions are made at first instance?

- Always
- More than half of the cases
- Less than half of the cases
- Never

(d) How do you feel the first instance decision-making process could be improved?

10. (a) When making an appeal to the Social Welfare Appeals Office (SWAO) how often do you request an oral hearing?

- Always
- Regularly
- Occasionally
- Rarely
- Never

(b) When you request an oral hearing has been requested, how often has it been granted?

- Always
- More than half of the cases
- Less than half of the cases
- Never

11. What is the average length of time your client(s) has had to wait after lodging an appeal for:

	An acknowledgment	An oral hearing (if applicable)	A decision
0-3 months	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3-6 months	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6-9 months	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9 – 12 months	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12 -18 months	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Over 18 months	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

12. When making a written submission, do you mainly base your arguments on:

- The law
- The individual facts of the case
- Both

13. (a) How would you describe your knowledge of the legal aspects of the arguments you make?

- Excellent
- Good
- Adequate
- Less than adequate
- None

(b) How would you rate your own legal knowledge in relation to:

Social welfare legislation and regulations	Excellent <input type="checkbox"/>	Good <input type="checkbox"/>	Average <input type="checkbox"/>	Poor <input type="checkbox"/>	Don't know <input type="checkbox"/>
European Union law including relevant case-law	Excellent <input type="checkbox"/>	Good <input type="checkbox"/>	Average <input type="checkbox"/>	Poor <input type="checkbox"/>	Don't know <input type="checkbox"/>
Human rights standards and treaties including the European Convention on Human Rights	Excellent <input type="checkbox"/>	Good <input type="checkbox"/>	Average <input type="checkbox"/>	Poor <input type="checkbox"/>	Don't know <input type="checkbox"/>

(c) Where do you get legal assistance, information and/or advice?

- Private solicitor/barrister working *pro bono* (unpaid)
- Law centre
- Legal NGO
- In-house legal officer
- None
- Other, please specify:

(d) What further training or supports do you think would be useful in this regard?

Oral hearings

14. (a) Do you feel the venues for oral hearings are appropriate?

D'Olier House Yes No

Conference rooms in hotels Yes No

(b) How would you describe the oral hearing proceedings:

Formal

Informal

15. How many different Appeals Officers have you appeared before? _____

16. In general what was your impression of the Appeals Officer(s) knowledge, experience and understanding of the issue(s) under appeal?

Excellent

Good

Average

Poor

17. How would you rate the legal knowledge of the Appeals Officer(s) in relation to:

Social welfare legislation and regulations	Excellent	Good	Average	Poor	Don't know
	<input type="checkbox"/>				

European Union law including relevant case-law	Excellent	Good	Average	Poor	Don't know
	<input type="checkbox"/>				

Human rights standards and treaties including the European Convention on Human Rights	Excellent	Good	Average	Poor	Don't know
	<input type="checkbox"/>				

18. How impartial would you say the Appeals Officers you have dealt with were?

Completely impartial

Biased in favour of the appellant

Biased in favour of the Department of Social Protection

19. Do you feel that the system would operate better if the Appeals Officers were:

Civil servants from the Department of Social Protection

Civil/public servants from other government departments

Lawyers with a specific knowledge of social security law

People who are recruited from outside the civil/public service

Specially trained tribunal members from a variety of backgrounds

A combination of the above (please provide an explanation):

Representation

20. In your experience how often do you think representation is necessary at oral hearings?

- Always
- Depends on the circumstances of the case
- Depends on the Appeals Officer
- Depends on the client
- Rarely
- Never

21. (a) Do you think legal aid should be made available for social welfare appeals?

- Yes
- No

(b) If yes, when do you think it would be necessary?

For information only	Always	Regularly	Occasionally	Rarely	Never
	<input type="checkbox"/>				
For advice prior to appeal	Always	Regularly	Occasionally	Rarely	Never
	<input type="checkbox"/>				
Full legal representation	Always	Regularly	Occasionally	Rarely	Never
	<input type="checkbox"/>				

22. (a) What are the advantages of having an oral hearing? (Mark all that you feel are relevant)

- The client has the opportunity to be represented
- The client has the opportunity to explain him or herself
- There is an opportunity to rectify mistakes in the original application
- There is a better chance of a successful appeal
- The appellant understands the system better
- The appellant will be more likely to accept the decision of the Appeals Officer
- The hearing is more transparent than a decision made on the written evidence alone
- Other: _____
- There are no advantages

(b) What are the disadvantages to having an oral hearing? (Mark all that you feel are relevant)

- The client has to wait longer for a decision
- The client may not understand the proceedings
- The client may feel intimidated by the proceedings
- The client may find the proceedings stressful
- There is less chance of a successful appeal
- Other: _____
- There are no disadvantages

Summary Decisions

23. (a) What are the advantages of a summary decision/decision based only on the written evidence?

- The waiting time for a decision is much shorter
- The appeals experience is less stressful for the client
- The client does not have to appear before an Appeals Officer and answer questions
- There is more chance of a successful appeal
- The reasons for the appeal can easily be summed up in a written submission
- Other: _____
- There are no advantages

(b) What are the disadvantages of a summary decision/decision based only on the written evidence?

- The process appears less transparent
- The client is not given an opportunity to present his or her case
- The reasons and grounds for appeal cannot easily be summed up in a written submission
- There is less chance of a successful appeal
- Other: _____
- There are no disadvantages

Revision of Appeals Officer's Decision

24. (a) Have any appeals decisions in which you have been involved been revised subsequently?

- All
- More than half
- Less than half
- None

(b) If so, was it by (and if more than one then please indicate):

- | | | | | |
|---------------------------|------------------------------|-----------------------------------------|-----------------------------------------|-------------------------------|
| A Deciding Officer | <input type="checkbox"/> All | <input type="checkbox"/> More than half | <input type="checkbox"/> Less than half | <input type="checkbox"/> None |
| An Appeals Officer | <input type="checkbox"/> All | <input type="checkbox"/> More than half | <input type="checkbox"/> Less than half | <input type="checkbox"/> None |
| The Chief Appeals Officer | <input type="checkbox"/> All | <input type="checkbox"/> More than half | <input type="checkbox"/> Less than half | <input type="checkbox"/> None |
| The Ombudsman | <input type="checkbox"/> All | <input type="checkbox"/> More than half | <input type="checkbox"/> Less than half | <input type="checkbox"/> None |
| The courts | <input type="checkbox"/> All | <input type="checkbox"/> More than half | <input type="checkbox"/> Less than half | <input type="checkbox"/> None |

(c) How many were revised in favour of the appellant?

- All
- More than half
- Less than half
- None

Reviews

25. (a) Are you aware of the provision under s.317 of the Social Welfare (Consolidation) Act 2005 to request an appeals officer to revise a decision?

Yes

No

(b) If yes, have you made any request under s.317 of the 2005 Act on behalf of a client?

Yes

No

(c) If yes, how many requests have you made? _____

(d) How many of the reviews were successful?

All

More than half

Less than half

None

26. (a) Are you aware of the provision under s.318 of the Social Welfare (Consolidation) Act 2005 to request a review of an Appeals Officer's decision by the Chief Appeals Officer?

Yes

No

(b) Have you made any request under s.318 of the 2005 Act on behalf of a client?

Yes

No

(c) If yes, how many requests have you made? _____

(d) How many of these requests were made based on an error on:

A point of law All More than half Less than half None

The facts of the case All More than half Less than half None

Both All More than half Less than half None

(e) How many of the reviews were successful?

All

More than half

Less than half

None

27. (a) Are you aware of the provision under s.327 of the Social Welfare (Consolidation) Act 2005 to appeal the Appeals Officer's decision to the High Court?

Yes

No

(b) Have you lodged any appeals under s.327 of the 2005 Act on behalf of a client?

Yes

No

(c) If yes, how many appeals have you made? _____

(d) How many of the reviews were successful?

All

More than half

Less than half

None

28. (a) Have you made a complaint to the Ombudsman in relation to a social welfare appeal on behalf of a client?

Yes

No

(b) If yes, how many complaints have you made? _____

(c) Did the complaint relate to maladministration at

First instance level

Appeal stage

Both

(d) How many of the complaints were upheld in favour of the client?

All

More than half

Less than half

None

Independence

29. Do you consider the SWAO to be a(n)

- Independent statutory body
- Part of the courts service
- Part of a government department
- None of the above

Why? _____

30. How would you describe the level of independence of the Social Welfare Appeals Office?

- Completely independent
- Somewhat independent
- Only slightly independent
- Not at all independent

Why? _____

31. (a) Do you think the social welfare appeals process would improve if it was more independent?

- Yes
- No

(b) If so, in what way? _____

(c) What other improvements would you like to see made to the appeals process? _____

Freedom of Information

32. (a) Have you got clients to request their files under Freedom of Information legislation?

- Yes
- No

(b) If yes, at what stage was the request made?

- Before the appeal form was lodged
- After the appeal form was lodged
- Before submitting the grounds of appeal
- After submitting the grounds of appeal

(c) How often do you get clients to use Freedom of Information legislation to access their files when making a social welfare appeal?

- Always
- Regularly
- Occasionally
- Rarely
- Never

(d) If yes, did you find the requests useful?

- All useful
- Most useful, some not
- Few useful, most not
- Not at all useful

(e) Why did you find the requests useful/not useful? _____

33. (a) Are you aware that the Appeals Officer writes a report after reaching a decision on the appeal?

Yes

No

(b) Have you got clients to request, or on behalf of a client, requested an Appeals Officer's report under Freedom of Information legislation?

Yes

No

(c) If yes, how many times have you done so? _____

(d) If yes, how often do you use Freedom of Information legislation to access the report following a social welfare appeal?

Always

Regularly

Occasionally

Rarely

Never

(e) If yes, did you find the requests useful?

All useful

Most useful, some not

Few useful, most not

Not at all useful

(f) Why did you request the report(s)?

To ask for a review by the Appeals Officer under s.317

To ask for a review by the Chief Appeals Officer under s.318

For your organisation's records

To make a complaint to the Ombudsman

Fairness

34. Overall, do you find the social welfare appeals system to be a fair system?

Completely fair

Somewhat fair

Only slightly fair

Not at all fair

Please provide a reason for your answer: _____

Thank you for your co-operation in taking the time to answer all of these questions.

NOT FAIR ENOUGH sets out the operation of the Social Welfare Appeals Office and charts the increase in the workload of the office as well as looking at the challenges facing it in terms of limited resources and delays. The report also summarises some of the main difficulties facing appellants and their advocates when they come into contact with the appeals system. These include the perceived lack of independence of the Appeals Office as a section of the Department of Social Protection, as well as the need for greater transparency, consistency and even-handedness. FLAC examines the process in light of domestic and international human rights law to which the State is committed even in times of austerity. The report outlines various perspectives on the appeals system, from advocates representing clients at appeal stage to the views of the Chief Appeals Officer on behalf of the Appeals Office. FLAC makes the case for reform of this key institution which plays an ever more critical role as more and more people seek state support in a fair and timely manner.



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