

Not Fair Enough

Making the case for reform of the social welfare appeals system

Presentation by Saoirse Brady, FLAC Policy and Advocacy Officer, 24 October 2012

The Programme for Government agreed by Labour and Fine Gael in 2011 recognised the huge strain on the social welfare appeals system and promised “to clear the social welfare appeals backlog” by diverting staff from other departments. While FLAC welcomes the commitment to address the pressing problem of social welfare appeals we would argue that there is a more fundamental issue to be considered, namely the way in which the system is administered as a whole.

The title *Not Fair Enough* reflects FLAC’s position that having an Appeals Office is certainly a step in the right direction but it still falls short of the standard of fairness required under human rights principles. It is undoubtedly better than the situation which existed before its creation 20 years ago where an appellant had to appeal directly to the Minister. Nonetheless, despite the fact that there is a dedicated office to determine appeals, FLAC questions whether it is sufficiently independent from the Department of Social Protection, as well as whether it actually does afford a fair and effective remedy in real and practical terms.

The annual workload of the Appeals Office has more than doubled in recent years; last year there was a record high of 51,515 appeals so the social welfare appeals system has taken on even greater significance. FLAC acknowledges that the Appeals Office is working harder to put in place more efficient processes to cope with the deluge of appeals but we must also stress that this must not be to the detriment of fair procedures.

The report itself examines the current operation of the social welfare appeals machinery and aims to explain the relevant legislation and regulations in a clear and accessible way. To this end we have also produced a number of information guides which look at various aspects of the social welfare system including making a social welfare application, making an appeal and another complex legal issue, the Habitual Residence Condition which has been the subject of many social welfare appeals.

The social welfare system can prove to be a labyrinth of various processes, rules and regulations which applicants do not always fully understand. This is demonstrated by the number of refusals which are overturned by the initial decision-maker when he or she is contacted by the Appeals Office to review the original decision. In 2011, 18 per cent of finalised decisions or more than 6000 appeals were overturned before they were even assigned to an Appeals Officer. The Minister for Social Protection has stated that often people give more detail at this stage than they did in the original application therefore questions must be asked about why this continues to be the case and what could be done at first-instance decision level to alleviate the pressure on the Appeals Office. FLAC is calling for the system to be frontloaded through a simpler application process where the necessary information is obtained at the beginning of the process through support and assistance which would help both applicants and administrators alike.

Not Fair Enough also analyses the system from a human rights perspective by reference to both domestic and international human rights law. Finally we consulted with advocates working on social welfare appeals and asked how they viewed the system and what improvements they felt were necessary to ensure even-handedness and faith in the system as they felt that the system itself was unfair and delays much too long.

Both the Irish Constitution and international human rights instruments enshrine the right to fair procedures. The Social Welfare Appeals Office is a quasi-judicial body which issues legally binding decisions which can have a huge impact on the life of the appellant and more often than not their families. Social welfare is becoming increasingly important in the lives of many across Irish society. This is why it is so important that it functions effectively and efficiently.

To ensure the right to fair procedures is respected, the tribunal must be, and must appear to be, independent from the Executive. However, this is not the case given that the Appeals Office is a section of the Department of Social Protection and Appeals Officers are serving civil servants appointed by the Minister of Social Protection. There is no public appointment process and after spending time in the Appeals Office an Appeals Officer can transfer back to another part of the Department. FLAC is not saying that civil servants should be excluded from consideration for this role entirely; instead we are calling for the necessary safeguards to be put in place to ensure that there is a separation between the different roles as one of the parties to the appeal is effectively a colleague of the Appeals Officer.

The right to fair procedures also encompasses the concept of equality of arms or a fair balance between both sides of a dispute. This can be achieved in a number of ways; through equal access to information, through the holding of an oral hearing where there is any difference of opinion on the facts of the case and through the provision of adequate advice and representation where one side is in need of assistance to put them on a more equal footing with the other side.

Currently appellants have to request a copy of their social welfare file and are not given it automatically when they appeal a refusal by a Deciding Officer. While they may be aware of a lot of the content of their file, they may not have seen certain information from the Department. For example, the appellant is not given a copy of the further submission made by the Deciding Officer to the Appeals Office after an appeal is lodged. The appellant does not even receive a copy of the full Appeals Officer's report when the appeal is decided. Instead the appellant receives a letter with a line or two about the decision which is not even signed by the Appeals Officer who made the decision. Furthermore, and this is a fundamental issue, the Appeals Office does not allow access to previous decisions which may be relevant to a person's appeal where a point of law has been established or a policy has been clarified. Without access to previous decisions an appellant is not only at a disadvantage, it may also lead to inconsistency in decision-making. However, this lack of transparency does not comply with the notion of a fair balance where one side has access to information that the other doesn't.

FLAC is also concerned at the emphasis on summary decision-making given that there is a consistently higher success rate when an oral hearing is held than when a decision is made on the written evidence only. In 2011, 48 per cent of appeals decided after an oral hearing were positive in favour of the appellant whereas less than 25 per cent were successful when a summary decision was made. While a

summary decision may be quicker than an oral hearing it is essential that ensuring that a person has a fair opportunity to present his or her case and that this is not sacrificed in the name of efficiency. Many appellants may not know that they can request an oral hearing as it is not specified on the appeal form so this is one small step that could be taken to improve access to justice.

The lack of representation is also a hurdle for some appellants who may find themselves trying to navigate technical legal questions without any assistance. Civil legal aid is not available to represent appellants before the Appeals Office whether through written submissions or at hearings. In an ideal world appellants would be able to represent themselves but it must be remembered that this is a quasi-judicial body which examines issues and questions of law which may not be familiar to appellants.

I have already referred to the idea that any appeals mechanism should afford an effective remedy. While the appeals mechanism affords a remedy of sorts, with the huge delays ranging from an average of 25 weeks for a summary decision to over a year on average for a decision following an oral hearing, FLAC deems it ineffective. Appellants may indeed receive payment of arrears for the time during which they were denied their entitlements but often this will not make up for the detrimental effect of having to live without the necessary payment and make ends meet in the meantime.

FLAC may be critical of the social welfare appeals system and that is not to take away from the work that the Appeals Office is doing on a day-to-day basis. Our concerns relate to the overall structure of the system and how it could be improved to the benefit of all who interact with it. As you will see in the report we have made quite a number of suggestions for improvement including the following five 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.
- 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.
- 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.
- 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.

- 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.

Social welfare is an important safety-net for people in need who cannot provide for themselves and in times of recession it becomes even more crucial to ensure that people can live in dignity. Fundamental human rights must be put at the heart of the social welfare system so that it can function in a meaningful way. As Magdalena Sepúlveda, the UN Special Rapporteur on Extreme Poverty and Human Rights reminds States social protection is not “a policy option, but rather... a legal obligation under international human rights law”.