Law Society and Irish Human Rights Commission

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Economic, Social and Cultural Rights

Making States Accountable

National Mechanisms for the Protection of Social Welfare Rights

The Social Welfare Appeals Office

Article 11 of the International Covenant on Economic, Social and Cultural Rights asserts "the right of everyone to an adequate standard of living for himself and his family including adequate food, clothing and housing, and to the continuous improvement of living conditions". *This right is protected here largely through the social welfare system.*

We have been reminded constantly in recent months that social welfare payments account for 34% of current Government spending and clearly the social welfare system affects a very substantial section of the population, inevitably including the poorest and most vulnerable. And it is never very far away from any of us.

There are very many different social welfare benefits with different criteria for qualifying for each of them, and the decisions about who qualifies for what, although for puny amounts compared with the vast salaries that bankers award themselves, are vitally important to the people who depend on these payments.

Dozens of decisions are taken every day about people's entitlement to the various types of benefit and those decisions can often literally determine what is put on the table for families in the evening or what goes into the children's lunch boxes in the morning when they leave for school.

That is how important social welfare is and even if we had the best system in the world – which we don't – some of the decisions that are made are going to be wrong and will cause serious hardship to people. Some decisions will be influenced by cultural misunderstandings, stereotyping and unintentional prejudice and that situation is not helped during the present recession by tabloid radio phone-in programmes spreading urban myths about immigrants being given large grants to buy taxis and single girls deliberately getting pregnant so they can claim One Parent Family Payment and Child Benefit.

And underlying all this there is still a lingering attitude, dating from the 19th century poor law system, that social welfare is a form of charity for which the poor should be duly grateful, rather than something which is a basic right in a modern democratic society.

But if it is a right – and it has been held by the European Court of Human Rights to be a right protected by the European Convention on Human Rights in the case of ***Stec & Others v. the United Kingdom (Admissibility Decision 6th July 2005)***[1] – there has to be a way of vindicating that right when things go wrong and bad decisions are made. That way is the Social Welfare Appeals system, which is a quasi-judicial mechanism for reviewing decisions as to who is entitled to benefits, similar to the Employment Appeals Tribunal or the Equality Tribunal.

This is a whole area of legally enforceable rights that most lawyers and most of the general public know very little about, yet almost 18,000 people lodged appeals with the Social Welfare Appeals Office last year and the figure is set to reach 25-26,000 this year because of the recession.

This may not appear to be high level or cutting-edge law, but Eleanor Roosevelt famously said that human rights have their origin in small and obscure places and the rights involved here are crucially important to people's daily lives.

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[1] ***Stec & Others v. United Kingdom (2005) 41 EHRR 22***

I want to look today at the Social Welfare Appeals system, how it works and whether it does vindicate peoples rights, the role lawyers and NGOs can and could play in it, and some fairly obvious improvements that could be made to the system. And I should stress that this is not a substitute for a broader discussion about reforming the whole method of providing social protection in our society, but that experience of how the system works in practice can make a valuable contribution to any wider discussion.

And even if we did establish a better social welfare system, decisions about eligibility and amounts of benefits would still have to be made and there would still have to be a mechanism to correct the mistakes that would inevitably occur, and to clarify the law so that it can be applied fairly to all.

I don't want to talk about the very wide range of social welfare benefits and payments and the qualifications for receiving them as I do not have any particular expertise in that area, but I would like to say a little as well about a group of cases which we in Free Legal Advice Centres (FLAC) have been taking through the Appeals system and which may help to illustrate how the system works, as well as highlighting a serious problem facing asylum-seekers and immigrants seeking to access the social welfare system in this State.

I should first pay a tribute to Northside Community Law Centre, where our chairperson, Moya de Paor works, and which produced an excellent report in 2005 called: "*The Social Welfare Appeals System: Accessible and Fair?*"[2], much of which is still very relevant today. I should also note that funding for the research on which that report was based came from the Combat Poverty Agency, which unfortunately is no longer with us, though the problems it was set up to deal with are getting worse by the day. Some of what I aim to do today will be updating the situation from the date of that report.

I would also like to thank my colleague, Saoirse Brady, the Campaigns and Policy Officer of FLAC, who has worked closely with me on the cases I want to discuss and

[2] Northside Community Law Centre: "The Social Welfare Appeals System: Accessible and Fair?", a Report by Ciarin de Buis, 2005

who will shortly be producing a major report on the direct provision system for asylum-seekers.

The group of cases that I want to look at dealt initially with Child Benefit claims for people in the asylum/leave to remain process and then broadened out to deal with the Habitual Residence Condition, which applies to all social welfare benefits and applicants for such benefits, but particularly affects asylum-seekers, persons who have been refused asylum but are seeking subsidiary protection or leave to remain, and immigrants generally.

The Social Welfare Appeals Office

Firstly, let us look briefly at the mechanics of the Appeals system. Applications for social welfare benefits are normally dealt with by Deciding Officers of the Department of Social and Family Affairs. This is usually done on paper with no interviews of the applicants, though people applying for Disability or Illness benefits will be examined by a medical assessor, and for some benefits Social Welfare Inspectors may visit the applicants at home to check on their circumstances, e.g. whether they are co-habiting or not.

Filling in the forms to apply for benefits can be difficult, particularly for foreign nationals, but also for people with low literacy skills and for people who are just overwhelmed with the problems of day to day living. That is presumably one contributory factor among the reasons why there has been a steady figure of around 14-15,000 social welfare appeals per year over the last 10 years, with a sudden jump to 17,833 last year and a further massive jump to 25-26,000 this year as a result of the recession. Some of the mistakes in form filling just result in clerical errors that are easily resolved, but others have the result that serious needs are misunderstood or dismissed by officials.

The gender breakdown of appeal applications has been very steady over the years at about 52% female to 48% male.

Appeals are made in writing to the Social Welfare Appeals Office in D'Olier Street, Dublin, or can be made to local Social Welfare offices which will forward them to the Appeals Office. The Appeals Office itself was described by the Minister for Social and Family Affairs, Mary Hanafin, last year as "an independent and separately managed office of my Department"[3]. The Office is headed by a Chief Appeals Officer with around 18 full-time Appeals Officers who are civil servants who hold their positions "during the pleasure of the Minister"[4].

Once lodged, appeals are notified to the relevant section of the Department of Social and Family Affairs and a fairly steady figure of about 25% each year are then revised by a Deciding Officer[5], who awards the applicant the benefit sought or some of it. Presumably this quick resolution is because the applicant has got some assistance with the paperwork so as to present the claim more clearly, or the Deciding Officer has looked at the application a bit more thoroughly this time round.

Some benefits, and in particular Supplementary Welfare Allowance, are administered by the Health Service Executive instead of the Department of Social and Family Affairs and in that case there is an initial appeal to a HSE Appeals Officer; but there is then a further appeal, if required, to the Appeals Office.

If the decision is not revised, the Appeals Officer holds an oral hearing or deals with the issue summarily, i.e. just by reading the papers. Appeals Officers usually hold oral hearings if the applicant requests it and the results are strikingly different from the outcome of summary considerations. In 2008, 45% of oral hearings had an outcome favourable to the applicant, whereas only 20% of summary decisions were favourable to

[3] Dail Reports, Vol. 654, No. 2, Written Answers: Social Welfare Appeals, 14 May 2008
[4] Social Welfare Consolidation Act, 2005, Section 304
[5] These and other figures cited are taken from the 2008 Annual Report of the Social Welfare Appeals Office or earlier Reports

the applicant; and this pattern has been fairly constant over the years. The lesson seems pretty clear, that where the applicant gets an opportunity to explain his/her position directly or through an advocate or legal representative, s/he is far more likely to succeed.

There could of course be other factors as well, such as that the applicants with the stronger or more serious cases tend to opt for oral hearings, but the moral must be to advise applicants to always go for oral hearings.

The hearings themselves are quite informal and most Appeals Officers make genuine efforts to make the process as user-friendly as possible[6] but it is still quite intimidating for most applicants and there is a real need for advocacy services that can accompany inexperienced and vulnerable applicants to these hearings.

Overall, 48% of all appeals in 2008 resulted in some advantage to the applicants and that percentage has been fairly constant for the last five years or more. That does not reflect very well on the standard of the initial decisions, though it also probably reflects in some cases the difficulty the applicants had in filling in the forms in the first place. Some applicants will probably have received assistance from CICs, NGOs or even just from friends by the time of the appeal and will have been able to present their case more clearly. However, it is still unsatisfactory that almost half of all the decisions appealed are found to have been wrong in some way. It also raises a question about how many people were too frightened or too uninformed about the system to lodge an appeal when their application was refused.

If an appeal is unsuccessful, the applicant can seek to judicially review the Appeals Officer's decision or appeal it to the High Court on a point of law, both of which options would realistically require legal representation – and legal aid is not generally available for such applications. And neither type of application can deal with the facts of the case if the applicant believes the Appeals Officer got the facts wrong. Judicial review is

[6] We are also aware however, of a couple of occasions where applicants were subjected to unnecessarily intrusive and upsetting questioning.

generally confined to procedural considerations and appeals to the High Court, which are provided for in the legislation, are restricted to points of law. Perhaps because of these considerations, there have been relatively few social welfare cases in the High Court over the years.

An applicant can also ask the Chief Appeals Officer to review the decision of the Appeals Officer under Section 318 of the Social Welfare Consolidation Act, 2005. The Chief Appeals Officer can revise the Appeals Officer's decision if he thinks the decision was wrong "*by reason of some mistake having been made in relation to the law or the facts*". This procedure is not well known and there have not been very many applications under it, though FLAC has been involved in a number of such applications recently and I will deal with them shortly.

Using the Appeals Mechanism

The Habitual Residence Condition (HRC), which applicants for social welfare benefits are required to satisfy, was introduced in May 2004, ostensibly to prevent a feared influx of "welfare tourists" from the East European EU Accession states. The influx did not happen but one of the effects of the introduction of the HRC was to stop asylum-seekers and people seeking humanitarian leave to remain from getting Child Benefit, which had hitherto been a universal benefit paid to all, rich or poor, citizen or non-citizen, without distinction.

In 2005, FLAC launched a campaign, regrettably not successful, to restore Child Benefit to all children, and in connection with that campaign we took on a number of cases of people in the asylum/leave to remain process who had been refused child Benefit on the basis that they did not fulfil the HRC.

In some cases over enthusiastic Deciding Officers had turned down applications from people who had been granted leave to remain in this country and clearly satisfied the

HRC and in those cases we found that well-prepared renewed applications, or appeals, led to revised decisions fairly swiftly and the benefit was granted.

In other cases the criteria for satisfying the HRC began to be teased out. Section 246 of the Social Welfare Consolidation Act, 2005, which is the main Act governing social welfare benefits at the moment, had introduced a presumption that no-one could be regarded as habitually resident unless they had been living in Ireland or the UK for two years. This was a rebuttable presumption but in any event it was quickly discovered that laying down a specific time period like this was in breach of a decision of the European Court of Justice (the EU Court)[7] and a set of criteria drawn from the European Court of Justice decision in 1999 in ***Swaddling v The [UK] Adjudication Officer[8],*** was substituted for the two-year time limit.

S. 246 of the 2005 Act was subsequently amended to include the new criteria:

> *"(4) Notwithstanding the presumption in Subsection (1), a deciding officer or the [Health Service] Executive, when determining whether a person is habitually resident in the state, shall take into consideration all the circumstances of the case including, in particular, the following:*
>
> *(a) the length and continuity of residence in the State or in any other particular country;*
>
> *(b) the length and purpose of any absence from the State;*
>
> *(c) the nature and pattern of the person's employment;*
>
> *(d) the person's main centre of interest;*
>
> (e) *the future intentions of the person concerned as they appear from all the circumstances*"[9]

[7] Despite this, we still periodically see decisions where people have been refused benefits on the basis that they do not satisfy the HRC because they have not been in Ireland or the UK for two years.
[8] ***Case C-90/97 Swaddling [1999] ECR I-1075***
[9] Inserted by S. 30 of the Social Welfare and Pensions Act, 2007

It soon became clear that the key criteria were 'main centre of interest' and 'future intentions', i.e. if the person concerned intended to stay in Ireland, if permitted.

In a small number of cases taken by FLAC and by other NGOs helping asylum-seekers and immigrants, Appeals Officers began to hold that non-Irish nationals, including asylum-seekers, who could show that they had substantial family ties in Ireland, or who could clearly not return to their countries of origin, or go anywhere else, could qualify under the HRC. As a result a small number of asylum-seekers were awarded Child Benefit. - The Appeals Office had actually expressed concern about the application of the HRC to Child Benefit when it was first introduced in 2004[10]

In February 2008, when a woman in the leave to remain process won her Child Benefit appeal, the Department of Social and Family Affairs requested the Chief Appeals Officer to review the decision under S. 318 of the 2005 Act. The woman had been represented at her appeal by One Parent Exchange Network (OPEN) who were running an outreach programme in the Mosney asylum-seekers' Accommodation Centre. The Department relied on a Supreme Court decision given in 2003[11], before the HRC was introduced, which held that a number of East European nationals, whose asylum applications had been rejected, were not to be regarded as resident in Ireland for the purposes of an EU Establishment Directive.

Quoting an opinion from the Attorney General's office, the Department claimed that this decision established that no-one in the asylum or leave to remain process could be regarded as "resident" in the State for the purposes of the HRC. They made similar review applications in another three cases of women who had successfully appealed decisions that they did not satisfy the HRC.

FLAC represented all four applicants in connection with the Department's review application in what turned out to be a very long drawn-out process of submissions,

[10] Social Welfare Appeals Office: Annual Report 2004, page 10
[11] ***Goncescu & Others v. Minister for Justice, Equality and Law Reform [2003] IESC***

including submissions about a different version of the Attorney General's advice, which we had received in a separate case. In the second version, the Attorney General's office said that while they did not believe that time spent in the asylum process could count towards satisfying the HRC, time spent in the State was only one of the criteria involved and events that occurred while people were in the asylum process could help towards establishing habitual residence. This appeared to include forming relationships here, having children here and putting down roots in the local community etc. This version did not support a blanket ban on asylum-seekers qualifying for benefits.

Eventually in June 2009, the Chief Appeals Officer gave his decision in the first of these cases, noting that "*the Goncescu case did not have a social welfare relevance and … the judgment pre-dated the introduction of the Habitual Residence Condition*". He added: "*I do not believe there was any intention in framing the [HRC] 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*"[12]. He upheld the Appeals Officers' decision in that and the other three cases and the applicants were awarded Child Benefit with substantial arrears in some cases.

In the meantime, FLAC had also asked the Chief Appeals Officer to revise four decisions by an Appeals Officer who had relied on the Department's *Goncescu* argument to reject appeals from a group of applicants who were in the asylum process. We are still awaiting decisions in those cases.

As of now, however, the Chief Appeals Officer has held that there cannot be a blanket ban preventing any person in the asylum/leave to remain process from qualifying for social welfare benefits – apart of course from the accommodation and food they receive in direct provision in Mosney or other accommodation centres. This is clearly at odds with Guidelines on the Habitual Residence Condition issued by the Department in July

[12] Case of Ms 'B'; "Review of Appeals Officer's decision in accordance with section 318 of the Social Welfare Consolidation Act, 2005", 12 June 2009

2008, which state that asylum-seekers cannot qualify under the HRC. The Minister for Social and Family Affairs has recently acknowledged that there is a "discrepancy" in relation to this issue[13] but the Department appears to be awaiting the second set of decisions from the Chief Appeals Officer before deciding what to do about it.

To date, our use of the Social Welfare Appeals mechanism has been reasonably successful in vindicating the rights of the particular group of social welfare claimants whom we have been representing. Along the way, our focus has broadened out from just Child Benefit applicants to the wider Habitual Residence Condition and we have represented people seeking a variety of different benefits affected by that condition.

We hope that our experience may be relevant and helpful to other social welfare claimants who believe that their rights have been infringed by the refusal of benefits and we feel that this is an important arena for the defence of the rights of vulnerable and disadvantaged people.

Suggestions for Improvements

We also feel that while our experience of the appeals process has so far been generally fairly positive, we may also be able to make some comments which may supplement those made in the Northside Community Law Centre report in 2005.

Independence: Firstly, there is the question of independence. We have found that the Social Welfare Appeals Office and the Chief Appeals Officer have acted in a thoroughly independent and impartial way in the cases in which we have been involved. And in the case of ***McLoughlin v Minister for Social Welfare***[14] as far back as 1958, the Supreme Court declared that an Appeals Officer had a duty imposed upon him by the Oireachtas and was "*required to perform it as between the parties to that appeal before him freely*

[13] Dail Debates; Other Questions: Social Welfare Code, 11 November 2009
[14] ***McLoughlin v. Minister for Social Welfare [1958] I. R. 1***

and fairly as becomes anyone who is called upon to decide upon matters of right or obligation".

However, the fact that the Social Welfare Appeals Office can be described by the Minister as an "office of my Department" and that its personnel hold their positions "during the pleasure of the Minister" is not conducive to creating confidence in persons who are frustrated and angry at what they believe is unfair treatment by the same Department. There is also the possibility that appeals to the Appeals Office could be challenged for lack of independence under Article 6 of the European Convention on Human Rights.

In his 2007 Annual Report, the Chief Appeals Officer called for his office to be given statutory independence, saying:

> *"[T]hose seeking to avail of our appeals service 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*"[15].

What he had in mind was presumably a position similar to that of the Ombudsman or the Equality Tribunal. Such a development would create greater confidence in the Appeals Office and help to make the public more aware of its role and powers.

Publication of Decisions: The Northside Community Law Centre Report called for the publication of all decisions of the Appeals Office. Since then the Office has regularly published a number of decisions in its Annual Report and has put a substantial collection of decisions on its website. While this is very welcome, it is still only a selection, however, and applicants have no way of knowing how representative it is of the decisions being taken by the 18 or so Appeals Officers in relation to various issues.

[15] Social Welfare Appeals Office: Annual Report 2007, p.15

We certainly felt frustrated at times not knowing whether arguments we were making had already been considered and decided upon by Appeals Officers, whereas the Department officials, as Respondents in almost all appeals, would have been aware and have had a databank of other decisions which were not accessible to us or our clients.

In their application for a review of the HRC decisions described above, the Department rather bizarrely objected that the Appeals Officers who had given favourable decisions to applicants had referred to earlier decisions by other Appeals Officers or the Chief Appeals Officer. The Department argued that such decisions should not be treated as precedents. In fact it did not appear that the Appeals Officers in question were treating previous decisions as binding precedents, rather that they were using them for guidance.

And to set the matter to rest, the Supreme Court in a case where it required the Refugee Appeals Tribunal to make its decisions available, said*:"[F]air procedures require some reasonable mechanisms for achieving consistency in both the interpretation and the application of the law in cases like this or of a similar category. Yet, if relevant previous decisions are not available to an appellant, he or she has no way of knowing whether there is such consistency. 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*"[16].

The regular publication of Appeals decision, except perhaps very routine or repetitive ones, would greatly assist applicants and people advising them to know what their rights and entitlements are and how to assert them.

The Northside report also urged that applicants should be informed that they can require copies of their file from the Department under the Freedom of Information Acts, 1997-2003 before preparing an appeal. This should be made very clear and applicants

[16] ***Atanasov & Others v Refugee Appeals Tribunal & Others [2006] IESC***

encouraged to apply for their files as it is in the interests of the Appeals Officer as well as the applicant that appeals are well presented and properly documented.

At the conclusion of their appeals, applicants are sent a usually fairly cryptic one or two-paragraph summary of the reasons for the Appeals Officer's decision. The Appeals Officer normally does a more detailed report on the case which is placed upon the file. Applicants are entitled to get copies of this as well, but are not informed about it. They should be sent the full report as a matter of course.

Delays: The average time taken to deal with an appeal in 2008 was 22 weeks. The Annual Report states that if the 25% of most "protracted" cases are excluded from this calculation the average delay was only 14 weeks. It does not say what is the average time taken to deal with the 'protracted' cases.

An average delay of almost six months to get a decision on an appeal is not acceptable where people may be suffering deprivation while they wait. A delay of up to two years from the initial decision in cases where the matter has been referred to the Chief Appeals Officer is even more unacceptable. In the case of Child Benefit applications, children grow up. They cannot retrospectively be bought the clothes, toys or treats they missed while their parents waited for a decision on their application.

The delays are not the fault of the Appeals Office or the Chief Appeals Officer. For a start, about half the delay occurs in the Department before it furnishes the applicant's file and the Deciding Officer's submission on the appeal. And the Appeals Officers have an exceptionally heavy workload. On a rough calculation, each Appeals Office must deal with about 500 cases per year. It is a case of lack of resources being put into this important body, which is not seen as a priority probably because by definition it deals with poorer people.

S. 318 Reviews: Finally, there is the question of reviews by the Chief Appeals Officer under S. 318 of the 2005 Act. Figures for these reviews are not given in the annual

reports and I am grateful to the Appeals Office for furnishing details at short notice. There were 20 requests for S. 318 reviews in 2008 and 11 reviews were completed in that year. There have been 15 requests for reviews so far this year and 15 reviews have been completed, including some which were carried over from last year.

There are no figures for how many applications result in a revision of the Appeals Officer's decision but in the majority of cases there is no change. A lot of the applications come from the Department and, not surprisingly, a number of these have recently dealt with issues concerning Jobseekers Allowance. Other requests come from applicants and a few have come from the Ombudsman's office. No special resources appear to have been allocated to deal with these applications which have to be dealt with in addition to the Chief Appeals Officer's other duties, thus causing significant delays.

The standing and nature of these reviews is also unclear. They were considered in the case of ***Castleisland Cattle Breeding Society Ltd. v Minister for Social and Family Affairs*** in the High Court in 2003 and in the Supreme Court in 2004.[17] The judge in the High Court appeared to regard a S. 318 review as almost equivalent to a court hearing with all the accompanying procedural requirements but the Supreme Court stated that "*essentially it is a revising matter rather than an appellate procedure".* On the other hand in the case of ***Maher v. Minister for Social Welfare***[18] in 2008, the Supreme Court appeared to take the view that a S. 318 review amounted to a further step in the appeal process which an applicant would be expected to exhaust prior to appealing to the High Court.

The position of S. 318 reviews needs to be clarified. Either this is essentially an exercise in correcting fairly elementary mistakes by Appeals Officers or it is a serious review of both law and facts – and this is important because the facts, of course, cannot be reviewed in the High Court. If it is the latter, then it would need proper rules and procedures to

[17] ***High Court [2003] IEHC 13, 7th November 2003; Supreme Court [2004] IESC 40 (15 July 2004)***
[18] [2008] IESC 15

comply with the requirement for fair procedures and appropriate resources would have to be allocated for the handling of such reviews.

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These suggestions are made with a view to making the Social Welfare Appeals system a stronger, better known and more effective instrument for protecting and vindicating the rights of vulnerable people. And this paper is also something of a plea for the legal profession and the NGO community to make more use of this mechanism in the interests of their clients and the communities they serve.

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