

FLAC Presentation to the Joint Oireachtas Committee on Social Protection

27 October 2010

FLAC would firstly like to thank the Committee for giving us the opportunity to present to you today as we have worked on issues arising around the application of the HRC for a number of years. In this context we have produced a *Guide to the Habitual Residence Condition* which has been distributed to the Committee in order to explain and clarify this condition in Irish social welfare law. However, this *Guide* will only work in practice if the law is understood by those applying it and the Condition is then administered in accordance with the law.

We have made a longer submission to the Committee which highlights our concerns so I will try to summarise the main points from this document now.

The Habitual Residence Condition has posed difficulties since its introduction in 2004 which is not surprising given the complex nature of such a residence test. Initially the EU Commission felt that the application of a two year residency requirement inhibited the free movement of workers and issued infringement proceedings. The State's response was to change the law in 2007 to include the five *Swaddling* factors taken from a European Court of Justice decision, outlined more fully in FLAC's *Guide to the HRC*.

However, despite this amendment in 2007, the 'rebuttable presumption', or in other words the reference to 'two years', still remains in the principal legislation and continues to cause confusion for both claimants and some decision-makers who continue to apply it. FLAC still receives calls from people applying for a payment who have been refused on the basis of the two-year rule. As the provision is now obsolete it is not clear why it has not been deleted from the legislation. While the Department's own guidelines state that a period of time spent living in the Common Travel Area should be considered as a period of time spent in the State, in practice this is not given due consideration and people are failing the HRC on this basis without any assessment of the other four factors.

Fair practice and procedure is also an issue for those applying for a payment subject to the HRC. The fact that people are deterred from applying for a payment to which he or she may be entitled, or do not receive written refusals which can be appealed, runs contrary to the Department of Social Protection's own guidance which clearly outlines the steps necessary to ensure fairness in decision-making. Furthermore, in cases where a decision is made and given in writing, there is a high rate of bad or inconsistent decision-making at first instance which has led to the Social Welfare Appeals Office being completely overwhelmed.

It is important that each government department, including both the Department of Social Protection and the Health Service Executive, acts in accordance with the European Convention on Human Rights, incorporated into domestic law in 2003. The Convention not only provides for fair procedures but it also places a duty of care on the organs of the State to ensure that a person is not subjected to inhuman or degrading treatment. This treatment includes a failure on the part of the State to prevent destitution as outlined in our submission. It is not clear that any consideration is given to the ECHR in any of the administrative decisions taken on HRC grounds and the experience of immigrant and homeless organisations suggests that people are being left homeless or without any means at all.

The final part of the submission refers to particularly vulnerable groups affected by the HRC. While this list is not exhaustive it includes Travellers, victims of domestic violence, EU migrant workers made redundant and asylum seekers as well as returning Irish emigrants as outlined by Crosscare. The range of people affected by the HRC shows just how far-reaching the implication of this policy so it is essential that it is applied correctly, and in instances where it does cause hardship or inequity then the application of it to certain groups should be reconsidered as many individuals are already at risk of poverty and social exclusion by the very nature of their social status. This is compounded by the misapplication of the Condition or a lack of consideration of the individual's circumstances.

Finally we have made a number of recommendations which we hope the Committee will use to inform any proposals it may put forward. FLAC calls on the Department of Social Protection to ensure that:

- the two-year rule is removed from the legislation
- comprehensive training is made available for Deciding Officers and Community Welfare Officers which adequately explains people's rights to payments subject to the HRC and
- a common sense approach is taken and each case decided on its individual circumstances especially in cases where a person is particularly at risk of poverty and destitution.