2009
SWAO Decision

SOCIAL WELFARE
APPEALS OFFICE

Review of Appeals Officer's decision in accordance with section 318 of the Social Welfare Consolidation Act 2005

1. I have been asked by the Child Benefit Section of the Department of Social and Family Affairs to review the decision of an Appeals Officer allowing an appeal in the case of (the appellant) whose child benefit claim had been disallowed on the grounds that she had failed to satisfy the habitual residence condition. The relevant file reference is AP 07/07606.

2. Section 318 of the Social Welfare Consolidation Act 2005 empowers the Chief Appeals Officer to revise, at any time, any decision of an Appeals Officer where it appears to him that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.

3. In preparation for my review, I have read through the file papers and familiarised myself with the details of the case. I have studied the submission received from the Department setting out the grounds on which it sought the review. I have also studied a number of submissions received from Free Legal Aid Centres (FLAC) which represents the appellant. In that regard, I have studied the following - (i) FLAC submission of 22 July 2008 in response to the Department's submission which I had invited FLAC to make following their request for information on the procedure to be followed in my review and how the appellant might respond to the Department's request for a review; (ii) FLAC letter of 2 January 2009 providing information on three similar appeals on which it had represented appellants; (iii) FLAC letter of 30 January 2009 providing additional information on request in relation to the three other appeals referred to; (iv) FLAC submission of 31 March 2009 providing an update on the

OIFIG ACHOMHAIRC LEASA SHÓISALAIGH
SOCIAL WELFARE APPEALS OFFICE,
D'OLIER HOUSE, D'OLIER STREET, DUBLIN 2. TELEPHONE: LOCALL 1890 74 74 34 FAX: (01) 671 8391

appellant's asylum / protection status; and (v) FLAC submission of 12 May 2009 seeking a similar level of flexibility on the Department's part in this case as had been applied to a case where, following High Court action, the Department had consented to the quashing of the decisions of a Deciding Officer and an Appeals Officer that an applicant for disability allowance who had been living outside of the state and common travel area for around five years did not satisfy the habitual residence condition and agreed to pay disability allowance to the applicant.

4. The Appeals Officer held an oral hearing of the appeal on 7 February 2008 at which the appellant attended accompanied by a friend and a representative of OPEN (One Parent Exchange Network). The decision being appealed was that she did not fulfil one of the statutory conditions for receipt of child benefit which required her to be habitually resident in the state. She failed to satisfy that condition on the grounds that she had not been granted permanent residency status in the state and, therefore, could not be deemed to be habitually resident in the state, her future intentions to remain in the state were uncertain, and on the basis of the evidence available to the deciding officer there was nothing to substantiate that she was habitually resident in the state.

5. The facts of the appellant's circumstances were detailed at the oral hearing and were not disputed. She had arrived in Ireland from in December 2004 Accordingly, all of her children were with her in Ireland. Her husband is still in . She had undertaken a number of education courses in and would be interested in pursuing further studies should she be allowed to remain in Ireland. Her children were attending a local national school. She applied for refugee status on arrival in Ireland but her application was refused. At the time of the oral hearing, she was awaiting a hearing of her case in the High Court by way of judicial review.

6. Having considered all the available evidence, including that adduced at the oral hearing, the Appeals Officer determined that the appellant could at that time be considered to be habitually resident in the state. Consequently, he allowed her appeal against the decision disallowing her claim for child benefit.

7. The Department of Social and Family Affairs, in seeking a review of the Appeals Officer's decision, submitted that the

Appeals Officer had not placed proper weighting on previous court rulings relating to the residency status of persons in the asylum process. Specifically, the Department referred to the judgement by the Chief Justice of 30 July 2003 in the case of Goncescu and Others v. the Minister for Justice, Equality and Law Reform and submitted a synopsis of legal advice on the issue received from the Office of the Attorney General. That legal advice summarised legal arguments on the issue of whether a person may be deemed to be resident in the state while in the asylum process.

8. In the judgement delivered in the Goncescu case, the Chief Justice indicated that an application from an asylum seeker entitled the applicant to enter the state solely for the purpose of having their application for asylum examined and that the permission granted to enter and remain in the state was limited to that purpose. In the course of his judgement, the Chief Justice referred to another Supreme Court judgement in which persons whose applications for asylum had been rejected were described as being without title to remain in the state. He also referred to United Kingdom provisions which were considered in a specified court case in which two persons were allowed to physically enter the United Kingdom for the purpose of having their asylum applications examined. However, following the rejection of those applications, the persons concerned were deemed by the United Kingdom authorities not to have entered the United Kingdom. The legal advice concluded that time spent in the state while an asylum application was being processed cannot be considered as constituting residence. On that basis, as the length and continuity of residence in the state is one of the factors to be considered for the purpose of satisfying the habitual residence condition, time spent in the state while an asylum application is being processed cannot be treated as constituting residence in the state for that purpose.

9. In addition, the Department submitted that in coming to his determination the Appeals Officer appeared to have relied on a precedent from previous similar appeals in circumstances where the Department's position was that appeals determinations do not set precedents and each appeal must be considered on its individual merits.

10. In conducting this review, I have chosen to confine my comments to the two issues put forward by the Department as constituting the grounds on which it has sought the review. I have studied the large amount of additional material which has been submitted by FLAC on behalf of the appellant (as detailed above) but I do not propose to comment specifically on it other than to the extent that it responds to the

Department's grounds of review. Accordingly, I propose to deal in turn with each of the grounds put forward by the Department.

11. The submission received from FLAC raised a number of issues relating to the legal advice obtained by the Department and referred to above. It contended that the Goncescu case, if applied to all social welfare benefit applicants, effectively meant that nobody who was in the asylum or subsidiary protection process could satisfy the requirements of the habitual residence condition. If that was the case and all asylum and protection seekers were automatically deemed not to satisfy that condition, then deciding officers in considering that condition were precluded from taking any account of the specific criteria or factors governing the habitual residence condition set out in the 2007 legislative amendment to that condition. It contended that the Goncescu case had no relevance to social welfare entitlements as it concerned access to EU agreements allowing foreign nationals establish themselves as self-employed persons in EU member states.

12. The FLAC submission adverted to the fact that the Goncescu case was delivered almost one year before the introduction of the habitual residence condition into social welfare legislation in Ireland and, consequently, the Supreme Court could not have had the interpretation of that condition in mind when it delivered its judgement. Furthermore, FLAC argued that when the legislation governing the habitual residence condition was amended in 2007 to include specific criteria or factors for complying with it those amendments would have superseded the judgement of the Supreme Court. It could also be argued that an overriding criterion that would have the effect of excluding from benefit a particular category of claimants (such as asylum/protection seekers) cannot be read into the amending legislation when that legislation provided for the taking into account of specific criteria or factors by deciding officers. The submission made the point that a feature of the Goncescu case was that the persons in question had exhausted the asylum and protection process thus leaving the relevant authorities no option but to order their deportation. That situation contrasts with the appellant who is still in the asylum and protection process in this country and cannot be considered for deportation until all aspects of the process have been completed and an unfavourable outcome delivered.

13. Finally, the FLAC submission drew attention to the fact that the Department had used a later version of its legal advice in a different appeal hearing with which FLAC was involved. While reiterating the earlier view that time spent in the

asylum process cannot be reckoned as residence in the state for the purpose of fulfilling the habitual residence condition, the later legal advice went on to clarify that the time spent issue was only one of the five factors which are required to be taken into account and the circumstances in respect of the other four factors may be sufficient to warrant treating the applicant as habitually resident. It then went further to indicate that events that occurred during the period of seeking asylum may in themselves be indicative of habitual residence while maintaining the position that the time itself could not be taken into account.

14. In relation to the issue of the use of appeal determinations as precedents, the FLAC submission suggested that the Department's submission in that regard showed a misunderstanding of the role and functions of references to previous appeal decisions. It made the point that, while an examination of previous decisions may be useful in identifying general principles, they cannot determine new cases which must be determined on the basis of their own merits and circumstances. It concluded that failure to take account of previous appeal decisions on similar issues could lead to inconsistency in decision making which would be unfair to appellants and in breach of their right to a fair hearing and of the principle that like applications should be treated alike.

15. I have considered very carefully the points made by FLAC in regard to the habitual residence legislation. It would not be unreasonable to come to the view, having regard to the date of the Goncescu judgement, that the Supreme Court would not have been aware of any intention on the part of the Oireachtas to introduce legislation which would have the effect of limiting access to certain social welfare benefits on the grounds of satisfying a habitual residence test. Furthermore, it would not be unreasonable to come to the view that the Goncescu judgement might have offered some comments or insights into the interpretation of the habitual residence condition if the case itself had a social welfare relevance and the judgement had issued subsequent to the introduction of the relevant legislation. The facts of the matter are that the Goncescu case did not have a social welfare relevance and that the judgement predated the introduction of the habitual residence condition legislation. In the circumstances, I would have doubts about the relevance of the Goncescu judgement to the circumstances of the appellant's case.

16. I have noted that the thrust of the legal advice relied upon by the Department in this case has been amended for use in

other appeal cases. The effect of that amendment is to emphasise that the time spent in the asylum process was only one of the five factors required to be taken into account and that the other four factors, when applied to the circumstances of the case, may be sufficient to warrant treating the applicant as habitually resident. In addition, events that occurred during the asylum seeking period may in themselves be indicative of habitual residence while maintaining the line that the time itself could not be taken into account. I also note that the benefit of that additional clarification in the legal advice was not made available to the appellant in the circumstances of this case.

17. In its letter of 31 March 2009, FLAC provided me with an update in relation to the appellant's asylum status for the purpose of my review. That update indicated that, following her unsuccessful application for asylum and leave to remain in the state and the issue of a deportation order against her which has not been enforced, she is awaiting a judicial review hearing of her application for subsidiary protection. That hearing is unlikely to be heard for some time according to FLAC. Having regard to the nature of the amended legal advice now available to the Department and the appellant's current status in the asylum / protection process, it would seem to me to be difficult to mount a credible argument that the application of the five factors, as specified in the legislation, to the appellant's circumstances, as already detailed, would not satisfy the habitual residence condition.

18. A final point I wish to make on the habitual residence issue concerns the will of the Oireachtas in terms of its enactment of the habitual residence condition in 2004 and its subsequent amendment in 2007. I do not believe there was any intention in framing the 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. Moreover, if there is any such intention proposed for the future, the remedy of legislative change is available to implement it.

19. As regards the precedent value of appeal determinations, I have to say at the outset that the long standing view within the Social Welfare Appeals Office is that appeal determinations are not regarded as precedents and that each appeal is decided in the light of its own particular facts and circumstances. Consequently, I do not believe that it is appropriate for Appeals Officers to refer to details of

previous appeal cases in their oral hearing reports or in their formal written decisions. Having said that, however, I acknowledge 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 assistant to appellants in the context of their own appeals. One of my functions as Chief Appeals Officer is to seek to ensure as great a consistency in decision making among Appeals Officers as is possible having regard to their statutory status as quasi judicial administrative tribunals. To that end, my annual report each year includes a selection of appeal case studies, suitably anonymised, which serves not only to clarify the process by which appeals are determined but also to provide an outline of the issues arising for consideration by the Appeals Officer and the basis on which the decision is made. In addition to the annual report, a much larger selection of case studies is accessible on www.socialwelfareappeals.ie.

20. Having considered the matter carefully, I do not believe that the reference by the Appeals Officer in his oral hearing report to similar cases having been allowed by Appeals Officers is sufficient to warrant a revision of his decision.

21. In undertaking reviews under section 318, I must be satisfied that Appeals Officers in coming to their determinations interpret the law correctly and also act reasonably in interpreting the law having regard to the circumstances of the cases coming before them. I believe that in allowing this appeal the Appeals officer acted in a reasonable manner having regard to the circumstances of the case. Accordingly, I find no reason to revise the decision of the Appeals Officer as provided for under section 318 of the Social Welfare Consolidation Act 2005.

Brian Flynn
Chief Appeals Officer

12 June 2009