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Comments in red by Phil Melville on response by JELR 28 June 07 following circulation on 22nd June of revised HRC guidelines.

Just coming back to you on the HRC Guidelines. A few of us have looked at this and what follows represents our consolidated comments.

We think some further elaboration would be helpful of the relationship between the 2 years referred to in Section 4 and the various factors set out in that Section and expanded later on. It is not clear the extent to which these factors can overcome the need to be present in the state for 2 years and if so to what extent. For example a person who is here for 6 months in a good job with prospects would appear under the guidelines to qualify for HRC notwithstanding their short time in the State. This is probably not the intention but it is capable of being read that way.

Need for further clarification to JELR of the implications of ECJ case law and that the 2 years is only a rebuttable presumption clause.

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2. We have concerns that the legislation and the guidelines in this area have the potential to do two things. (i) They could make social welfare payments an attractive and real option for persons who do not have the right to reside in the State. (ii) They could create a situation whereby a person in the State without permission could claim closer ties with the State through an arm of the State recognising him/her as being habitually resident and providing financial support to the person.

Section 246 of the 2005 Act requires only that the person be present in the State. That Act was amended in 2007 to provide that the deciding officer must take into account certain factors. However, that amendment to my mind now ties "presence" together with "residence" as if they were one and the same thing, which they are not. "Residence" implies lawful presence in the State. It would be preferable if there was a precise definition of "residence" either in immigration law or in social welfare law.

In any event, the law is as it is but we wonder could the guidelines at the bottom of page 3 be amended, even in the context of the legislation as it stands, to make it clear that for a non-EEA national "presence in the State or any other part of the CTA" means presence under the terms of a valid permission of the immigration authorities of the country concerned as evidenced by the appropriate endorsement in the person's passport, a permit or a certificate of registration.

Suggestion: Introduce the word "lawful" into the first paragraph of Part 5 together with a definition in the above terms as follows:

"The term "habitually resident" is not defined in either Irish or EC law, but it is intended to convey a degree of permanence evidenced by a ~~regular~~ lawful physical presence enduring for some time, beginning at a date usually in the past and intended to continue for a period into the foreseeable future. It implies a close association between the

applicant and the country from which payment is claimed and relies heavily on fact. "Lawful presence" in this context means presence under the terms of a valid permission of the immigration authorities of the country concerned as evidenced by the appropriate endorsement in the person's passport, a permit or a certificate of registration.

Some clarity would assist to fully understand what paragraph 5.1 of both attachments mean. In particular:

Issue of habitual residence can only count/period only applies when an asylum seeker comes out of the asylum process with some form of right to remain in the State - we are happy with this but it cannot include a situation where JR is being taken against a decision of RAC, RAT or the Repat area as the individuals concerned are still asylum seekers and should continue in direct provision only.
Current wording is explicit in referring to where refugee status is granted. Above cases clearly do not fall into this category.

We are concerned about the reference to the fact that other factors can be assessed for asylum seekers indicating habitual residence. What is this intended to mean? As far as we are concerned, asylum seekers as long as they are asylum seekers and are still in the asylum/repatriation process (including JRs) should not qualify for anything except direct provision and exceptional needs payments – in the SFA area.
Again revised wording has clarified this by reference to Romanian and Bulgarian cases.

When they get some form of leave to remain in the State or refugee status they can be deemed to meet the habitual residence requirement.

The circular hints at this but perhaps a more explicit statement would assist. Para 6.3 is also helpful

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Page 6 of the guidelines refers to the position of asylum seekers. It states that those persons cannot be considered to be resident in Ireland. However, there are other non-EEA nationals who also should not be considered as resident in Ireland. Those persons could be covered by amended material on page 13. On that page we are not sure why visa-holders are included as a visa does not give the holder permission to enter or remain in the State. Perhaps that sub-paragraph could be amended as follows:-

Non-EEA nationals in the State without permission:- Any non-EEA national who is in Ireland and does not hold a current permission to be in the State as evidenced by the appropriate endorsement in his/her passport and who does not hold a current Certificate of Registration issued by the Garda National Immigration Bureau cannot be regarded as meeting the habitual residence conditions. Any non-EEA national in Ireland who is the subject of a deportation order or transfer order cannot be regarded as meeting the habitual residence conditions.

This paragraph is addressing a different point and I believe it could be included as is. The original para referred to addresses the problem experienced when DOs assumed that a time limited visa or work permit of itself undermined a person's contention that they were habitually resident.

On page 13 it would be preferable to replace the term "exceptional leave to remain" with "temporary leave to remain"

Earlier documents referred to this phrase as an alternative where refugee status was not appropriate. I gather from research that the language has been changed, but I cannot trace explicit reference to this. The paragraph as amended would read:

Temporary Leave to Remain
The Minister for Justice, Equality and Law Reform may grant temporary leave to remain in Ireland to a person outside the immigration requirements. Temporary leave may be granted on humanitarian grounds and is normally given for a period subject to review every year. A claimant who is given temporary leave to remain in these circumstances should be treated as habitually resident. The position should be reviewed if there is any change in the person's circumstances.

Regards
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