

Decisions Advisory Office

Review of Habitual Residence Condition In Appeal Submissions

November 2013

This report reflects the position at the end of the project in November 2013.

Legislative changes to the habitual residence condition were introduced in 2014 and the associated guidelines for deciding officers have been amended accordingly.

Table of Contents

- 1. Introduction..... 2
- 2. Project Findings..... 3
 - 2.1 Facts not fully established on file..... 3
 - 2.2 New evidence at appeal stage 3
 - 2.3 Issues around Right to Reside (RtR) 3
- 3. Profile of the Files Examined..... 5
 - 3.1 Number of files examined..... 5
 - 3.2 Type of scheme files examined 5
 - 3.3 Cases where the appeal was disallowed..... 6
 - 3.4 Cases where the appeal was allowed or partially allowed 7
 - 3.5 Cases referred back to the LOs/ HQ by Project Team 10
- 4. Next Steps 10

1. Introduction

In order to qualify for certain social welfare payments, applicants must satisfy the Habitual Residence Condition (HRC). The term “habitually resident” is not defined in Irish law, but it generally conveys a degree of permanence – meaning that a person has been here for some time, from a date in the past, and is intending to stay 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.

Section 246 of the Social Welfare Consolidation Act 2005, as amended by Section 30 of the Social Welfare and Pensions Act 2007 and Section 15 of the Social Welfare and Pensions (No. 2) Act 2009 - sets out the legislation with regard to determining whether or not the habitual residence condition is satisfied.

HRC decisions are made by Deciding Officers (DOs) and Designated Persons (DPs) appointed by the Minister. Decisions must be made in accordance with National and EU legislation and with reference to the Department’s HRC guidelines.

This project is a quality assurance project under the auspices of the Decisions Advisory Office (DAO) in conjunction with the Social Welfare Appeals Office and with the assistance of experienced ex-LOSU staff (the project team). For the purposes of this project it was decided to examine HRC appeal cases as they were presented to the Appeals office. These files were examined by the project team and case details recorded. On return of files from the Appeals Officers, their findings were also noted.

The main focus of the project was Jobseekers Allowance claims (106), with some case reviews of other schemes i.e. Child benefit (8), Disability Allowance (4), One Parent Family (2), and SWA (1). The cases for this project were randomly selected.

This report does not purport to be representative of all HRC decisions; it was designed to establish the reasons for appeals and related issues and therefore focussed on cases which were appealed.

At no point did the project interfere with or delay the Appeals process.

2. Project Findings

Overall the majority of DO decisions were upheld. A number of issues arose, including in relation to the importance of fully establishing the facts on file and the interpretation of both the HRC guideline and Department of Justice and Equality (DJE) legislation on right to reside (RtR).

2.1 Facts not fully established on file

The following issues arose with some of the files examined:

- Absences in work/welfare record not explored.
- Copies of GNIB card or Department of Justice Minister's letter not kept on file
- Evidence not sought on what basis Stamp 4 is awarded - this information could inform immediately if client is habitually resident, i.e., Programme refugees.
- Lack of evidence of communication between Deciding Officers (DOs) and the then Community Welfare Officers (CWOs) regarding the basis of HRC decisions, i.e., was the client considered to be HRC exempt for the purposes of BASI (i.e., as a migrant worker), or was he/she tested for HRC and found to be habitually resident? This has implications for subsequent consideration of 'once and done'.
- Family relationships not explored adequately, i.e., there was a lack of evidence on file regarding long term partners, their RtR status, work records and the influence that this information may have on a 5 factor assessment and the right to reside.

2.2 New evidence at appeal stage

If new evidence comes to light when the appellant completes an appeal form, the DO should make sure that they read the appeal thoroughly. In one case the appellant mentioned on his appeal form that he had an Irish Born Child (IBC), this evidence had not come to light before. The issue was not pursued by the DO but the AO made enquiries and the appeal was subsequently allowed. The relevant facts should be fully established and considered by the DO.

When there are two appeals on-going at the same time (for example re means and HRC) they should be submitted together by the LO, if this is feasible. Equally, good practice suggests the SWAO should look at both appeal grounds together.

2.3 Issues around Right to Reside (RtR)

2.3.1 Criminal Activity

In some cases where criminality was established there was no correspondence from DJE to confirm whether or not the person retained his/her right to reside in Ireland. If a person does not retain his/her RtR, this is a significant change in circumstances and grounds for reviewing HRC.

The HRC guideline states: "In any case where a person has been charged with an offence or spent a period of time in prison, the Deciding Officer/Designated Person should verify with the Dept. of Justice and Equality (DJE) that the claimant has a right to reside in Ireland, as this may have been revoked by DJE."

2.3.2 Burden on the State:

With regard to residence in the State EU Directives and DJE SI 656 of 2006 - Article 6 state that:

6. (1) Subject to Regulation 20, a person to whom these Regulations apply may reside in the State for up to 3 months on condition that he or she -

(a) (i) where the person is a Union citizen, holds a valid national identity card or passport,
(ii) where the person is not a Union citizen, holds a valid passport, and

(b) does not become an unreasonable burden on the social welfare system of the State.

It is clear from the files examined that this is a particularly difficult issue.

2.3.3 Different approaches by DOs vs AOs Training RtR and EU Nationals:

It appears that different approaches exist in dealing with RtR for EU Nationals.

It is important that DOs are clear in relation to the provisions which determine whether or not an EU national has the right to reside here. This issue will be addressed in the HRC bulletin which the DAO is developing as a result of this project in order to assist DOs in making these decisions.

The following points arise in relation to right of residence:

(i) First 90 days of residence:

EEA/EU nationals should not be claiming Social Assistance payments within the first 90 days of their arrival. If they are not working, self-employed, studying, or a dependent of someone in these categories, after the 90 days, the right to reside expires.

(ii) Dependants of EU nationals:

Where a claimant is an EU citizen she/he has free movement and can reside here as a dependent of a family member etc. By applying for a social assistance in his/her own right she/he is subject to HRC and SI 656 of 2006 is applied.

The RtR is not always clear in such cases. Those who have lived here for five years are entitled to permanent residency and should be regarded as legally resident.

Difficulties also arise with elderly relatives residing here as dependent family members, who then apply for State Pension Non Contributory.

(iii) Child of the migrant worker:

Having a child in school can give the parent (main carer) certain residence rights.

3. Profile of the Files Examined

3.1 Number of files examined

Summary of cases which have been reviewed by the Project team/ returned to the Project following the AO's decision:

- ✓ 126 cases reviewed
- ✓ 5 cases withdrawn/not examined by project (cases requested by AO staff, PQs etc.)
- ✓ 121 cases were submitted to Project Team/ Appeals Officers

Table 1: Number of cases examined		
Result of Appeal	No. of cases	Cases as % of total
Appeals Disallowed*	66	54.5%
Appeals Allowed	26	21.5%
Appeals allowed-New evidence presented at Appeal hearing	3	2.5%
Partially allowed	11	9.1%
Referred back for review	13	10.7%
Await AO decisions	2	1.7%
Total	121	100%

* Included 4 cases where the person did not attend for oral hearing

3.2 Type of scheme files examined

Table 2 shows a breakdown of the 121 cases were examined.

Table 2: Breakdown by scheme		
Scheme	No. of cases	Outcome
Jobseeker's Allowance	106	59 disallowed 24 allowed 11 Partially allowed 3 new evidence produced at oral hearing 7 referred back to LO for review * 2 Awaiting AO decision
Child Benefit	8	6 Disallowed 2 Allowed
Disability Allowance	4	1 disallowed 3 allowed
OFP	2	2 referred to LO for review*
SWA	1	1 referred to CWO for review
Total	121	

* referred to LO/CWO for review- Please see paragraph 3.5

3.3 Cases where the appeal was disallowed

66 of the 121 appeal cases examined were disallowed and a further 11 were only partially allowed (allowed from a current date due to the passage of time). So, DO decisions were upheld in the majority (77/121) of the decisions/appeals examined.

Table 3 presents a breakdown of the disallowed appeals by nationality of the appellant.

Nationality	Category	No. of appeals cases examined	No. disallowed	Appeals disallowed as % of cases of that nationality in project	This nationality as a % of appeals in the project which were disallowed
Irish	EU	12	5	41.6%	7.6%
UK national	EU	27	18	67%	27.4%
Lithuanian	EU	15	10	66.6%	15.2%
Polish	EU	23	8	34.8%	12.2%
Latvian	EU	6	5	83%	7.6%
Italian	EU	2	2	100%	3.0%
N. Irish	EU	4	2	50%	3.0%
Slovakian	EU	2	2	100%	3.0%
Hungarian	EU	3	2	67%	3.0%
Czech	EU	3	2	67%	3.0%
Romanian	EU	4	2	50%	3.0%
French	EU	1	1	100%	1.5%
Nigerian	Non-EU	4	3	75%	4.5%
Congolese	Non-EU	4	2	50%	3.0%
Indian	Non-EU	1	1	100%	1.5%
American	Non-EU	1	1	100%	1.5%
	Total		66		100%
Appeals disallowed as % of the project.				54.5%	

- In all cases, the AO mentioned the 5 factors (or a combination) when disallowing claims. However, in a certain number of cases they singled out certain issues which they found to be of particular importance.
 - (i) Length and continuity was mentioned in 14 cases. In 11 of these cases, the client had applied for JA within 3 months of arrival in the state.
 - (ii) No work record - 13 cases
 - (iii) No family links or ties to Ireland - 8 cases

- (iv) Lived outside State for most of their lives - 4 cases
 - (v) Centre of interest not established in Ireland - 10 cases
- 6 Child benefit appeals were disallowed. 4 were disallowed quoting the 5 factors. One was disallowed because the appellant was still in the asylum process and one was disallowed as the appellant was appealing her disallowance for a period when she had been in the asylum process.
 - One DA claim was disallowed "no right to reside" - this was a non-EU national who did not have the required GNIB stamp.

3.4 Cases where the appeal was allowed or partially allowed

3.4.1 Appeals allowed

Of the cases examined (including 3 cases where additional information was provided to the AOs) 29 cases had their appeals allowed. Those of Polish Nationality account for the biggest proportion of appeals allowed. See Table 4 for a breakdown of the appeals allowed categorised by the nationality of the appellant.

Nationality	Category	No. of appeals examined	No. allowed	Appeals allowed as % of cases of that nationality in project	This nationality as a % of appeals in the project which were allowed
Irish	EU	12	3	27%	10.3%
UK national	EU	27	3	11%	10.3%
Northern Irish	EU	4	1	25%	3.4%
Polish	EU	23	12	52%	41.3%
Romanian	EU	2	2	50%	6.9%
Lithuanian	EU	14	2	14%	6.9%
German	EU	1	1	100%	3.4%
Portuguese	EU	1	1	100%	3.4%
Congolese	Non-EU	3	1	33.3%	3.4%
South African	Non-EU	1	1	100%	3.4%
Nigerian	Non-EU	4	1	25%	3.4%
Pakistani	Non-EU	1	1	100%	3.4%
	Total		29		100%
Appeals allowed as % of project				24%	

The reasons given by AOs for allowing these appeals were:

- For EU nationals length of residence in Ireland despite spouse and children resident in other EU country.
- AO considered that the client met the conditions of the five factor assessment.
- An appreciable period of time had elapsed from the original date of decision and the date of the oral hearing, which could be further considered in addition to the DO's submission.
- "Once and Done" was applied incorrectly.
- Consideration of family relationships.
- DOs had misinterpreted that the reasons why certain immigration stamps were issued.
- New evidence produced at oral hearing.

3.4.2 Appeals partially allowed

Of the cases examined, 11 were partially allowed, i.e., allowed from the date of appeal decision. See Table 5 for a breakdown of the appeals partially allowed categorised by the nationality of the appellant.

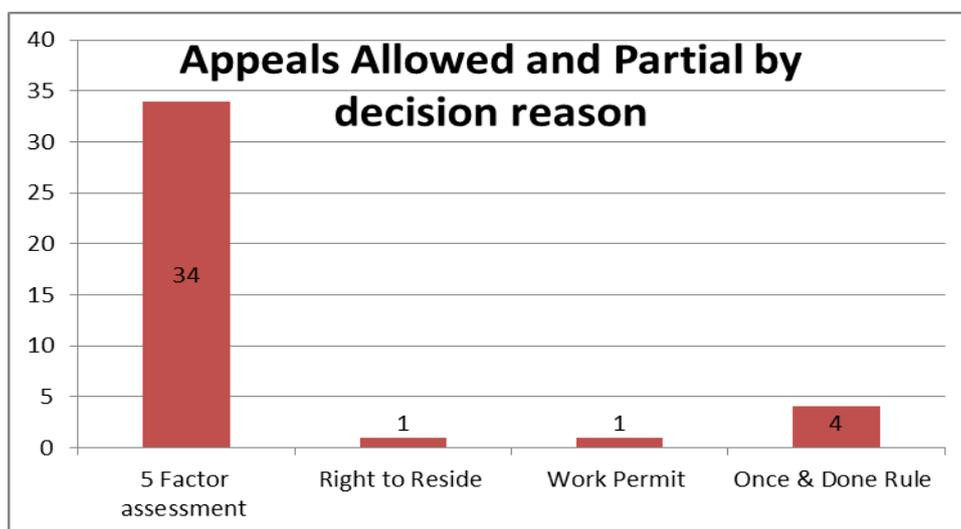
Nationalities	Category	No of appeals	No. disallowed	% of nationality examined	as a % of appeals partially allowed
Irish	EU	12	3	25%	27.5%
UK national	EU	27	3	11%	27.5%
Lithuanian	EU	15	2	13%	18%
Hungarian	EU	3	1	33.3%	9%
Latvian	EU	3	1	33.3%	9%
Congolese	Non-EU	3	1	33.3%	9%
	Total		11		100%
Appeals disallowed as % of the project				9.2%	

55% of partially allowed appeals cases examined were either of Irish or UK nationality.

3.4.3 Reasons why appeals were allowed or partially allowed

Figure 1 shows a breakdown of the decision reasons in the cases where the appeals were allowed or partially allowed. 34 of the appeals allowed were allowed on the basis of the 5 factor assessment.

Figure 1: Appeals Allowed and Partially Allowed, by decision reason



* The work permit case involved a Romanian national's application for Child Benefit. The person had no work permit prior to January 2012 but the appeal was allowed from January 2012 following changes to work permit legislation.

27 of the people whose appeals were allowed or partially allowed had a work record of less than 52 PRSI contributions and some of these had paid no contributions.

Of the 11 appeal cases which were partially allowed, AOs found that due to the lapse of time from the JA application to date of Appeal Hearing 5 could be allowed on the grounds that a period of time had elapsed since arrival in Ireland. In all cases, the AOs agreed that the appellants were not habitually resident at date of application but that the claims could be allowed from a current date. These 5 cases are summarised here [using total contributions paid (TCP) as an indication of the length and nature of employment in Ireland]:

- Case 1: UK National: Arrived in Ireland Jan 11, JA claim from 16/03/12. Appeal allowed from 14/02/13 *TCP=Nil (13 months in Ireland)
- Case 2 UK National: Arrived in Ireland 13/06/12, JA claim from 28/06/12. Appeal allowed from 20/03/13 TCP=Nil (9 months in Ireland)
- Case 3 UK National: Arrived in Ireland June 11, JA claim from 22/06/12. Appeal allowed from 05/01/13 TCP=8 (19 months in Ireland)
- Case 4 Irish National: Arrived in Ireland March 11, JA claim from 11/01/12. Appeal allowed from 01/03/13 TCP=Nil
- Case 5 Lithuanian /EU National: Arrived in Ireland Nov 11, JA claim from 02/07/12. Appeal allowed from 01/07/13 TCP=129 Based on cons from previous residence.

3.5 Cases referred back to the LOs/ HQ by Project Team

Thirteen files were referred back to the respective LOs/CWO to review the 5 factor assessment. All of the clients involved in these appeals had resided here for a continuous and considerable period of time and had significant work records. Therefore, it was considered that they were likely to satisfy HRC.

These cases did not proceed to appeal (at least not within the time frame of the project).

4. Next Steps

The issues arising and lessons from this project will be the subject of a forthcoming DAO bulletin on HRC.

ENDS