



PERSON OR NUMBER?

Issues Faced by Immigrants Accessing Social Protection

A **'snapshot'** of a sample
of 54 cases presenting
to NGOs across Ireland



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FOREWORD

I am very pleased to be given the opportunity to contribute in a small way to this important publication. In light of my own experience as Ombudsman of complaints which cross my desk the cases set out in this report resonate with me. Each one tells a very human story and are a stark reminder of the very real challenges faced by immigrants and other marginalised people who rely on the State to provide them with basic supports and entitlements. A particular strength of the report is the series of practical recommendations it contains which, if implemented, would no doubt improve the quality of service provided to claimants.

The bedrock of discretionary decisions are impartiality, objectivity and a willingness on the part of the decision maker to take all relevant facts and evidence into consideration. I am disappointed to find that many of the cases outlined in this report suggest that those fundamental standards were not met.

There is a vast range of schemes and entitlements which have to be administered by our public servants. Many of them are complex and require a thorough knowledge of eligibility criteria and the rationale and legislation underpinning each of them. The report makes the very valid point that every effort should be made internally by the Department of Social Protection to monitor its own decisions to ensure they are consistent and of the highest standard. This necessitates giving constant feedback and guidance to individual decision makers at all levels. It strikes me that a more structured interaction between the Department and NGOs working at the coal face would also help. This would provide a forum to address issues of concern and to highlight inconsistencies of approach or unfair decisions which may in turn stem from systemic weaknesses within the Department's decision making processes. Any such developments can only be of benefit to all concerned.

This is an informative and challenging publication and one which merits the attention of all public servants who interact with the poor and the vulnerable in their daily work.

Emily O'Reilly
Ombudsman
November 2011



INTRODUCTION

Person or Number? had its genesis in the shared experiences of Non-Governmental Organisations (NGOs) in assisting migrants to access their rights to social protection. As worrying evidence mounted as to how migrants were treated, three agencies, Crosscare, Doras Luimní and Nasc, came together with other national and regional NGOs, to compile a snapshot of the barriers facing migrants trying to access social protection.

To state the obvious, Ireland's recent economic boom is over. What is less obvious and risks being forgotten is the key role played by immigrants in creating and sustaining economic growth and how they were adversely affected by the subsequent economic crash. While financial collapse and unemployment affected people in all parts of society, the *Annual Monitoring Report on Integration 2010* details how immigrants were particularly affected. The authors concluded that 'this recession has been particularly damaging for the employment prospects of immigrants' (McGinnity et al, 2011:15).

In many societies with market economies and welfare systems, those on the margins tend to get further excluded, marginalised and even 'scapegoated', particularly during times of scarce economic resources. *Person or Number?* attempts to identify what is happening at the coalface when the State makes the decision to include or exclude migrants, by making social protection available - or not. This report identifies the multiple barriers facing immigrants when they try to access their right to social protection. *Person or Number?* was motivated by the following values:

- The belief that particularly during a time of scarce resources Ireland should prioritise those most in need and should protect all vulnerable members of society.
- The belief that through our relevant State institutions we should endeavour to provide social protection and a level of service of the highest standards.
- The need to respond to the increasing number of immigrants across the country presenting to NGOs who are having difficulty accessing social protection when it was apparent that they have a right to such protection.

Person or Number? has two key aims, firstly to offer stakeholders an opportunity to pause and see some of the issues vulnerable immigrants face when trying to access social protection. Secondly, it aims to offer some practical suggestions that we believe would contribute to making a better system of social protection. This report is not a thorough analysis of all of the issues faced by immigrants in accessing social protection in Ireland, nor is it a thorough analysis of the Irish social protection system. *Person or Number?* is a 'snapshot' of some of the clearly identifiable issues at this point in time. These are issues that immigrants are bringing to NGOs across Ireland when they are in poverty or at risk of poverty and are having difficulties accessing basic financial support from the State.

Person or Number? found that the Irish social protection system is failing some immigrants. The most basic duty of accurate information provision on the crucial right to social protection is not being carried out consistently. Adversarial approaches; reliance on speculation; and inappropriate, aggressive and racist language by departmental staff were identified. Seven years after its introduction, the Habitual Residence Condition continues to be misapplied. Women with children and people who have experienced domestic violence have



met a poor response from the social protection system. At a policy level, a number of State policies have been identified as unfair barriers to social protection. Some people found themselves in situations of homelessness due to failures in the social protection system. It is important at this point to acknowledge that both at a structural level and individual level in local offices across the country, officials of the Department of Social Protection have experienced unprecedented demands for services in recent years. But this does not excuse the experiences and accounts that we recorded.

The report is laid out in the following way. It begins with the introduction, which is followed by the *Key contexts* section outlining the background to the report. Following a brief methodology section which outlines how data was collected and processed, the bulk of the report is presented in the *Findings and Recommendations* section. Fifteen case studies out of the full sample of 54 cases are used to highlight particular issues. The report closes with a brief conclusion.



1 KEY CONTEXTS

1.1 HISTORY

Systems of social protection in Ireland evolved slowly and unevenly. The Commission on Social Welfare established the principle that the State should set social protection systems on some objective basis of 'adequacy', with guiding principles of adequacy, redistribution, comprehensiveness, consistency and simplicity (Cousins 2002: 16).

The arrival of significant numbers of people to Ireland during the Celtic Tiger period prompted two important changes that reversed the progress made to date. The introduction of the direct provision system for asylum seekers in 2000 was one of the first key decisions by the State on how it provided social protection for people new to the country, as it removed asylum seekers from the standard social protection system. This was followed in 2004 with the introduction of the Habitual Residence Condition (HRC). This coincided with the accession of ten new member States to the European Union. While Ireland allowed the new States unrestricted access to its labour market, the HRC made it very difficult for anyone new to the country (regardless of nationality) to access means-tested social protection.

1.2 THE DEPARTMENT OF SOCIAL PROTECTION

The principal department relevant to this report is the Department of Social Protection. Following the economic collapse from 2008, the social protection system came under unprecedented stress, with unemployment rising to 14% when the research sample was made. Each week about 1.4m people receive a social welfare payment, delivered through 125 local and branch offices. The Department has 5,175 staff (Department of Social Protection, 2011: 6). In September 2011, the Community Welfare Service was transferred to the Department.

Services for non-Irish nationals are governed by the internal *'Non-national Customers: Guidelines for Staff'* (2002). It has a particular focus on asylum seekers, a chapter on the asylum process, an appendix including definitions of direct and indirect discrimination, racism and institutional racism. Other chapter titles are:

- Social welfare and other entitlements
- Interviewing the customer: best practice
- Policy developments

The chapter *Interviewing the Customer: Best Practice* states:

It is worth noting that the circumstances in which some asylum seekers/refugees left their country or the conditions from which they may have fled may make them especially vulnerable. It is therefore important that they are treated with empathy and understanding. It is essential that staff do not display, by action or words, prejudice against the individual or their status. Such customers may be suspicious of State organisations based on their experience of government bodies in their own countries of origin (2002: no page number).

Although the document is dated in many respects, its language recognises the particular difficulties that some migrants experience in their lives and includes an implicit commitment to combating racism and discrimination which is less evident in subsequent publications.



1.3 REPORTS AND DOCUMENTS

To date, there have been few reports on the experiences of immigrants trying to access the social protection system. The Free Legal Advice Centre (FLAC) reports on the direct provision system (FLAC, 2003 and FLAC, 2010) are instructive on how the Irish State has become increasingly restrictive in permitting access to the social protection system for asylum seekers and covered the issues in the direct provision system in some detail. The MRCI report *Social Protection Denied. The Impact of the HRC on Migrant Workers* indicated the harsh effect the HRC was having on migrant workers only one year after its introduction. Inadequate training of departmental staff, poor information provision and processing backlogs were identified in 2005, along with difficulties faced by women experiencing domestic violence and immigrant homelessness.

At the end of 2008 Grant Thornton consultants (2008) published *Strategic Review of the Customer Facing Services* as part of the Department of Social and Family Affairs Modernisation Action Plan under *Towards 2016*.

Its main findings (Grant Thornton 2008: 12) were:

- Staff did not engage with customers in a meaningful, constructive way and the most experienced staff did not deal with customers directly;
- The provision of information was inadequate, only a quarter of claimants believing that they had been told what they should have been or the range of claims to which they were entitled (for example about urgent need assistance from Community Welfare Officers). Many local offices did not have an information officer.
- Particular issues logged were customers not being advised about the most appropriate scheme for them; lack of up-to-date information about the status of their claim; and lack of advice about particular schemes such as Back To Work and Family Income Supplement.
- Staff appeared to have been trained inconsistently and inadequately. There was a lack of a dedicated training officer in local offices. Some training officers did not receive adequate training themselves. They were not informed or equipped to deal with the volume and interpretation of circulars issued to them. There was scope for cooperation and information sharing between regional staff and external bodies (for full details, see annexe 2).

The consultants found low levels of satisfaction with the helpfulness of staff (22%), public service area facilities (15%) and staff knowledge (11%). The proportion treating customers with respect was rated at 9% and customer confidence at 8%. In two discussion forums held in April 2008, 'many of the representative bodies expressed their discontent with the requesting of the same information over and over. Staff training is required and should be made compulsory for all front-line managers particularly in the areas of racism and discrimination' (Grant Thornton, 2008:124).

Although the British system of social protection is different to ours, there are sufficient similarities to warrant reference to the 2010 Ipsos MORI report commissioned by the Department of Work and Pensions (UK) *Ethnic Minority Customers' Experiences of Claiming Disability Benefits*. This came to the following conclusions:



-
- Ethnic minority customers were less aware and knowledgeable of benefits available and took longer to find out about them. They faced additional barriers. A personalized approach was especially appreciated in helping them.
 - There should be specific efforts by the authorities to improve their understanding of eligibility criteria. Decisions must be transparent. Language capacity should be improved. Application forms should be simplified. There would be benefits from training in diversity and culture (Jones and Tracy, 2010:53-55).

Person or Number? builds on the findings and recommendations of these reports.



2 METHODOLOGY

In order to carry out the research for *Person or Number?* various NGOs were approached in order to collect a sample that was nationally representative of the issues faced by immigrants trying to access the social protection system. Six organisations agreed to contribute: Crosscare Housing and Welfare Information, Migrant Rights Centre Ireland (both based in Dublin), the Integration Centre (cases were submitted from its Galway and Dublin operations), Doras Luimni (based in Limerick), Longford Women's Link and Nasc – The Irish Immigrant Support Centre (based in Cork). This sample is representative of those who have presented to NGOs with a question or issue concerning social protection. It does not cover the totality of the immigrant experience in attempting to access social protection, but it is a snapshot of barriers faced by immigrants.

In order to be absolutely rigorous, a blind non-selective case collection process was decided upon. From a set date before Christmas 2010, the six organisations were asked to record the next ten queries from immigrants who presented where the query related to social protection (i.e. a payment from the Department of Social Protection or the Community Welfare Service previously administered by the Health Service Executive (HSE).

The six NGOs wrote up detailed case studies accordingly. The following paragraph was given to the NGOs as guidance in writing up the case studies:

Please outline the details of the case and the circumstances of the individual that presented to your service. Details such as nationality, immigration status and personal situation leading to the need to access the social protection system are important. Please also include the date the person came to your service. If the person interacted with the social protection system then details of this interaction are also important to include.

All people in the sample presented to one of these organisations in either December 2010 or January 2011. All organisations provided a written summary of each case by the end of March. Follow up questions on the cases were completed by April. This marked the time when the last developments on the cases were considered for the purposes of analysis. To give an idea of the scale of their operations, in 2010 approximately 1,500 immigrants sought assistance from the six NGOs on issues relating to social protection.

Six of the cases provided were not used: three were largely related to the healthcare system and three others were not used as client consent had not been received by the cut-off date.

Fifty-four cases were analysed for issues where clients experienced difficulty accessing social protection. In the event, most of these cases involved more than one issue. Issues were only identified from the written case summary provided. At this stage, over 80 issues were identified from the various case studies. This was condensed down to 33 as many issues were repeated in the various case studies and some were similar enough to be categorised under the same heading. Four direct interviews were held with people whose case studies had been submitted to the report. These were chosen randomly to supplement the written case studies which allowed only limited probing for more information via the NGO.



Following on from this, meetings were held with five of the six contributing organisations. Initial findings were presented to the various organisations. Further input was received from contributing organisations and this supplemented the initial findings which were drawn from the written case summaries provided. Comments from staff of the various organisations were recorded in order to get a better sense of which issues were most common in their service. These comments are referenced in the findings section.

A further condensing process followed where the findings were consolidated under the headings that are now in the findings section.

The names and nationalities of the people whose case studies were provided in this report have been changed to help protect their identity.

A significant challenge of the main data collection method was to adequately reflect language barriers that people faced in trying to access the social protection system. This was not always apparent in the case studies which were written by the NGOs. An important finding from the four direct interviews which did not show up in the written case studies was the issue of language barriers. Three of the four direct interviewees had significant difficulties communicating in English and all had experienced difficulty in communicating with representatives of the social protection system.



3 FINDINGS AND RECOMMENDATIONS

One of the most striking findings of the report is the breadth and variety of issues that immigrants face when they are trying to access the State social protection system in Ireland. The following twelve subsections cover the majority of the issues that presented in the 54 case studies that were analysed. The 54 cases consisted of 17 EU nationals and 37 non-EU nationals. Eleven cases relate to contribution-based payments and the remaining 43 relate to means-tested payments. Twenty of the cases related to women who were the sole or primary carer of their child/children. The following are the twelve main issues arising.

3.1. POOR INFORMATION PROVISION AND ADVERSARIAL APPROACHES

The Department of Social Protection *Customer Charter* sets out the standards its service users are to expect. Among other commitments it states that:

We will

- Provide you with full and clear information
- Inform you of your rights and entitlements (Department of Social and Family Affairs, 2009:7)

The Customer Action Plan 2009-11 lists twelve *Customer Services Principles*. The second principle is entitled 'Information' which states that department officials will:

Take a proactive approach in providing information that is clear, timely and accurate, is available at all points of contact and meets the requirements of people with specific needs. (Department of Social and Family Affairs, 2009:21)

These are accepted standards and principles yet our research found that they were not implemented at frontline level on a consistent basis. There were six examples of people in the sample being provided with incorrect information by staff in a local Social Welfare Office or by a CWO. In three cases this related to a person's eligibility for a payment where a full assessment process was required. Instead of being directed towards making an application they were simply told verbally that they would not be entitled to the payment.

Verbal refusals were highlighted by NGOs as a particular problem that appeared in conjunction with misinformation. Many applicants believe that a verbal refusal is an official and recorded refusal, yet such unofficial actions are often not recorded by the officials in question.

Staff from the various NGOs flagged the issue of misinformation as a problem regularly presenting to their service. In three cases people had been told by their local Social Welfare Office that going to visit family abroad for up to three weeks would not jeopardise their payment. This was misleading information as in all three cases people were informed on their return that they no longer satisfied the Habitual Residence Condition (HRC) and they were without an income for extended periods of time pending the outcome of the appeal of the decision.



Aduke

Aduke came to Ireland in 2003. She was granted Stamp 4 based on the Irish Born Child Scheme (IBC). As a lone parent, she was in receipt of the One Parent Family payment. In November 2010 she went to Nigeria for three weeks to see her family. She informed her local Social Welfare Office and her CWO before the trip. She was told there would be no problem. When she came back, she received a letter from the Department of Social Protection stating that she was not habitually resident. She appealed that decision in January 2011 and is still waiting for the decision. She has two small children, she has not been able to pay her rent since November 2010 and she is afraid that she will be evicted. At the time of writing she was being supported by friends hoping that her payments will be restored.

From the case studies provided it was clear in three cases that people were not told relevant pieces of information about their rights that could have ensured they had some income. Staff from the NGOs involved said that this issue was a particularly common presenting issue. The following are comments from staff of the various NGOs on this issue:

‘the burden of knowledge of a complex system is dropped on the applicant’

‘sometimes crucial pieces of information are not given to people’

‘full information is not always given’

‘proper information is just not given, you need to know the right questions to ask’

Mary

Mary is an American citizen who started a relationship with an Irish man after they met while she was on holiday in Ireland. They had a daughter together and on returning to Ireland from a visit to the US she applied for permission to remain in Ireland – she was granted a Stamp 3 immigration permission for a year. After a year Mary applied to the Irish Naturalisation and Immigration Service (INIS) for Stamp 4 permission, which would have granted her the right to work. After submitting this application, the relationship with her partner deteriorated and became abusive. INIS responded to the application for Stamp 4 looking for additional supporting documentation which Mary was not able to provide as her partner was uncooperative. He forced her to leave her home with their daughter. Mary presented to her local Social Welfare Office but she was told they could not help her. She was not told that she could go to her local CWO for help. ‘I felt like I had no rights. What is worse is that I was trying to look after my baby. I asked the officer if I could at least have the application form for the One Parent Payment but she said “You can’t take it, you can’t take anything”. She was very rude.’

Mary said she was forced to work in the informal economy to support herself and her child. Such examples and others provided from staff from the NGOs would indicate that some officers on the ground were making efforts to prevent people from making formal applications.



There were a further two instances in the sample of officers repeatedly refusing to give a person an application form for a payment – when there was more than a reasonable case to argue that the person would be entitled to a payment. Such adversarial approaches are not in keeping with the department’s commitments in its *Customer Charter* and *Customer Action Plan*. Adversarial approaches are also evident in a number of cases of clear and extreme hardship when short term exceptional or urgent needs payments could have been provided by Community Welfare Officers but they were not granted - see the case of Radhi later in the report.

The next case study highlights one of the most common barriers that arose in the case studies and in discussion with NGOs, that is, local Social Welfare Offices not telling people of the possibility of going to a local CWO to apply for short term financial assistance.

Emilia

Emilia came to Ireland from Poland four years ago to join her husband who was working in Ireland. She had her first baby here and was a full-time mother. She wanted to find work and learn English but her husband did not like that idea and tried to stop her from doing that. Her husband was violent towards her and assaulted Emilia on many occasions. She had to call the Gardaí many times and she made a statement to the Gardaí on one occasion. Emilia eventually decided to leave her husband. Firstly she wanted to know if she would get help if she was on her own. She went to her local Social Welfare Office to see if she would get any support if she left her husband. She was told that she would not get any help because she had no work record in Ireland and so she went to a local NGO. Emilia believed that she and her daughter would become homeless if she left her husband so she has stayed living with him.

One staff member of a NGO stated that:

‘The local Social Welfare Office telling a person in need about the CWO service has not happened in our experience unless the person specifically asks. It usually presents when a migrant comes in and says ‘it has been so long since I heard from the Department of Social Protection’ and it transpires they were never even told about the CWO service.’

Other NGOs agreed that the issue came to their attention when a client told them he/she had been waiting many months for their formal payment to be processed and presented to their service in crisis and extremely vulnerable situations.

The findings under this subsection are strongly supported by the Grant Thornton review referenced in detail in annexe 2, particularly under the subheadings of ‘Support and ‘Information Provision’.

Recommendations

An audit of the knowledge level of frontline staff of the Department of Social Protection would accurately identify areas where more training is needed. The findings indicate that there are some significant knowledge deficits among frontline staff in the area of qualifying criteria for various payments.



All Department of Social Protection frontline staff should receive formal clarification as to their roles in particular in the context of the *Customer Charter* which commits to the provision of ‘full and clear information’ and more particular the undertaking in the *Customer Action Plan* which commits to taking a :

‘[...] proactive approach in providing information that is clear, timely and accurate, is available at all points of contact, and meets the requirements of people with specific needs’ (Department of Social and Family Affairs, 2009:21).

All Department of Social Protection frontline staff should be provided with adequately detailed training to meet the department’s commitments.

Now that the Community Welfare Service is fully within the remit of the Department of Social Protection there is a significant opportunity to ensure that all people know of their option to apply for payments such as Supplementary Welfare Allowance.

3.2. DECISIONS BASED ON SPECULATION

The Department’s own guidelines on *Decision Making and Natural Justice*¹ under a section titled *Weighing the Evidence* state that:

‘A deciding officer should approach the determination of claims and questions by first considering the evidence. From that evidence the facts of the case should be established. The deciding officer then should apply the law to the established facts. This approach should be applied irrespective of the benefit or assistance concerned.’

While acknowledging a place for circumstantial or indirect evidence in the decision making process, the findings of this research indicate that in three cases officers made decisions to refuse people payments where speculation on the actual facts rather than the facts themselves was a very influential element. The weight given to such evidence can also be influenced by prejudices and racism as indicated in the case study below.

Bibi

Bibi has lived in Ireland since 2002. She is a naturalised Irish citizen. Her rent allowance and One Parent Family Payment was cut after a Social Welfare Inspector called and saw a man holding her child in the back garden during a party at the house. After that she lost her accommodation and had to sleep on the floor of her sister’s house with her two year old daughter. With the help of an NGO she got the rent allowance reinstated but the local CWO still refused to pay. The CWO who refused said to a worker in the NGO “All these Nigerians, you know what they are at”. Later, with the help of the NGO the payment was finally paid. Bibi was homeless for four months with her two-year-old daughter while she herself was five-eight months pregnant. The CWO again refused to back pay the rent allowance but eventually with the intervention of the NGO again agreed to pay. However the CWO paid the money directly to Bibi’s landlord rather than to Bibi herself without her consent. Issues with this case are ongoing.

¹ Accessed from <http://www.dsfa.ie/EN/OperationalGuidelines/Pages/decnatj.aspx#natjust> on 23/08/2011)



In relation to the Social Welfare Inspector Bibi stated the following:

‘The inspector came into my house in [...] was not friendly, I find her very rude, not professional, racist.’

One of the other cases from the sample where speculation on the facts was a significant factor was the case of a man from Niger with refugee status whose payment was terminated because an inspector saw a disused, uninsured and untaxed car in the driveway and assumed that he had purchased it with undisclosed income. Similarly, a case referenced by an NGO staff member related to an officer refusing a payment due to undisclosed means because the applicant was wearing designer jeans (which she had purchased in a charity shop).

Recommendations

The use of circumstantial and indirect evidence must be done with great care and awareness of its legal weight. More detailed guidance is recommended for deciding officers in the use of circumstantial and indirect evidence.

Where the deciding officer comes to a conclusion, from circumstantial or indirect evidence that would be prejudicial to a person’s application, the applicant should always be informed of the conclusion and always given the opportunity to rebut it prior to a decision being made on the payment by the deciding officer.

Specific and explicit published guidance should be given to ensure that prejudice of any kind does not find a place in the decision making processes. This is particularly important where circumstantial and indirect evidence is used and where there is room for subjectivity and discretion.

3.3. PROCESSING DELAYS

For several years there have been significant delays in the processing of social protection payment applications. While there have been some improvements in 2011, waiting times are still extremely long. The national average processing time for One Parent Family Payment in April 2011 was fifteen weeks. On top of the processing times of initial applications, an additional hardship for those awaiting decisions on payment applications is the processing times of the Social Welfare Appeals Office. In terms of appeals brought to the Social Welfare Appeals Office as of January 2011, the average waiting time for an appeal to be dealt with by way of a summary decision was 27.4 weeks, while the average time to process an oral hearing was 45.6 weeks.

Delays in processing applications are an issue across the board for most people. However, processing delays can cause particular hardship for immigrants. As already mentioned, people are not always informed about their option to go to a CWO for short term financial assistance. For people new to the social protection system, they are more likely to be unaware of this option. Another barrier that affects immigrants is the fact that even if they do present to a CWO for short term assistance, they still have to satisfy the Habitual Residence Condition for a basic SWA payment.

² Joan Burton, *Dáil Éireann Debates* 732, Cols. 843-844, 19 May 2011.

³ Éamon Ó Cuív, *Dáil Éireann Debates* 726, Col. 678, 13 January 2011.



From further findings in this report it is clear that there are significant issues with how HRC assessments are carried out.

In addition a lack of familial and social networks has been an aggravating factor in cases identified for this study.

In the case study sample, processing delays were one of the most common issues and in twelve cases they were contributory to particular hardship.

Lydia

Lydia, a Latvian national, has one child and is a lone parent. After she was made redundant from her job her Child Benefit payment was stopped as she had no entitlement to Jobseekers Benefit. She made an application for One Parent Family Payment in 2009 and had not received an answer at the time of writing.

Recommendations

Initial application processing times must be reduced dramatically and at the same time people who have made initial applications for a payment should be allowed access to the Supplementary Welfare Allowance scheme independent of HRC status at least until a HRC decision is made on the initial application. Such an arrangement would ensure that nobody entitled to a payment would be left without means once they apply and it would also act as an additional incentive for the department to reduce initial processing times.

Appeals processing times need to be reduced dramatically. The State is effectively denying some people their right to a payment due to such lengthy processing times. For those whose appeals are successful, back-pay is a poor result for the often many months they had without means.

3.4. INAPPROPRIATE, AGGRESSIVE AND RACIST LANGUAGE

The National Action Plan Against Racism ended in 2008, but no successor plan was put in its place. According to the NGO Alliance Against Racism (NAAR) *Shadow Report to the Irish Government's National Report to the Committee on the Eradication of Racial Discrimination*:

Since then, the State has no integrated, strategic mechanism or stated goals for government action to address racism in Ireland (NAAR, 2011:14).

2008 also saw the abolition of the National Consultative Committee on Racism and Interculturalism. The following is an excerpt from the Irish Government's Third and Fourth report to UN Committee on the Elimination of All Forms of Racial Discrimination at the end of 2009 in relation to activities carried out by the then Department of Social and Family Affairs:

Anti-Racism Awareness

- Anti-discrimination awareness training has been part of the department's integrated customer training since 1998.



-
- Internal guidelines for staff when dealing with non-Irish national customers were circulated to the department's staff in early 2002. These guidelines were published in a booklet entitled *Non-National Customers: Guidelines for Staff*.
 - A detailed anti-discrimination and awareness module is delivered in a number of core training programmes, including Induction, Customer Service and Management Development programmes.
 - A poster campaign has been completed to raise awareness of diversity and anti-discrimination both among staff of the department and its customers.

The Department of Social and Family Affairs developed a one-day modular diversity awareness training course targeted particularly, but not exclusively, at front line staff.

Since 2002, five hundred staff have received this training. The main modules covered were race awareness, Traveller awareness and disability awareness. In 2005, the Department commissioned a diversity awareness trainer who provided training to 600 staff (Office of the Minister for Integration, 2009:58).

There are no specific references to 'racism' or 'anti-racism' in the 2010 annual report although there is one brief unspecific mention of diversity awareness training completed by an unspecified number of staff.

There are various commitments to courtesy, professionalism and sensitivity in various departmental documents including the *Customer Action Plan* and *Annual Report, 2010*.

One of the most disturbing findings of this report is the instances of inappropriate, aggressive and racist language reported directly by the people applying for payments or by NGOs working with them. Although the total number of such instances was small, three in 54, if translated across the immigrant community, this would represent a significant volume. The small numbers should not obscure the deeply wounding nature of such comments, especially when coming from someone with the status of a representative of the State. The starkest of these findings relates to the case of Bibi (already referenced) where she states that she found a Social Welfare Inspector 'unfriendly, unprofessional, rude and racist'. In the same case, an NGO worker reported that a CWO stated to him that he thought all people of a particular nationality (in this case Nigerian) were trying to defraud the system when he said 'all these Nigerians, you know what they are at'.

A similar attitude was identified in the case of a man with leave to remain status who applied for Jobseekers Allowance. He was denied on HRC grounds. He then went to a CWO and was told by an officer there 'if you are not happy, go back to Nigeria' in a manner which the man described as 'aggressive and racist'. While no NGO said that racist abuse or views were commonplace, all were of the opinion that clients felt that it would be detrimental to their application if they reported racism or other negative behaviour by a departmental official. It was stated by NGOs that applicants feared that they could be identified if they reported such abuse: they felt that whether they were granted a payment or not depended to a large extent on the deciding officer's discretion and personal opinion.

The case of Mary which has already been referenced highlights the issue of inappropriate and aggressive language as does the following case:



Radhi

Radhi was granted refugee status in February 2008. She was in receipt of One Parent Family Payment and Rent Allowance after she got her status. In July 2010 she went to a country bordering her country of origin to marry her fiancée Tio, the father of her eight month old son. Tio had voluntarily left Ireland after his asylum claim was refused. Radhi was out of the country for eleven days. She had begun a relationship with Tio long before she fled her home country where he too came from. On return she informed the local Social Welfare Office that she had got married and that Tio hoped to be joining her in the future. The office cut her One-Parent Family Payment and the local CWO also cut her Rent Allowance both on the basis that she could no longer be habitually resident. This was despite the fact that Radhi's actions never implied that she was going to make a home in another country and that she clearly continued to maintain a home in Ireland and that her husband had initiated the process of moving to Ireland.

What followed for Radhi and her baby son was a period of extreme trauma and stress. The landlord gave Radhi three months to find the money to pay the rent but she was unable to do so and she and her child became homeless. Radhi was told on numerous occasions to 'go home' by the local CWO, 'home' meaning her country of origin from which she was granted refugee status by the Irish State. The CWO and an official with responsibility for homelessness in the locality both stated that if Radhi and her child were to end up on the streets then they should go to the Gardaí. The CWO also stated that Radhi and her child could sleep on the floor of friends' houses if they needed to.

A local NGO tried to assist in sourcing accommodation for Radhi and her baby. In the end one homeless shelter agreed to accommodate the family but it was not appropriate for a mother and child. She did not have money to buy their food and was dependent on charity. After six weeks of communication between the NGO and the CWO in question, the reasons for cutting the rent payment were finally recognised as incorrect. As a result of her experience and treatment she received from the local CWO, Radhi is planning to relocate to a different town.

She said:

'I felt depressed after this happened, I felt segregated and I felt it was unfair treatment. I have a right to get married and it should not have led to this happening to me and my baby. They just left me standing with my baby. Nobody helped me but this NGO. The CWO interrogated me as to why I got married. I explained that I was in love with this man and he was the father of my son. He said, "Why didn't you stay there? You want him to come here and go on social welfare. There is no way we are going to pay you, you have to face life".

One staff member of an NGO remarked that while overtly racist incidents were not prevalent 'the level of unpleasantness by some staff in Social Welfare and Community Welfare offices towards immigrants was high in my experience'. One member of staff of another NGO noticed the contrast in approach by the local officers that her clients whenever they had an advocate with them compared to when they did not: 'it's like chalk and cheese, our clients are really noticing the difference in attitude towards them when they have an advocate with them'.



Recommendations

These findings clearly highlight the need for an up to date plan by government to address racism in Ireland. The Minister for Justice and Equality must send out a clear message that the imperatives of previous plans remain in effect and proceed to take the lead in developing a new strategy that reflects the type of issues highlighted here. The Department of Social Protection itself must also act urgently to ensure it has strong internal anti-racism measures:

- There must be more proactive and comprehensive measures to elicit the input of service users of the Department of Social Protection. Non-Irish users should be a focus of such measures and people should be explicitly asked, through a comprehensive independent survey, if they have experienced racism from staff of the Department of Social Protection.
- The Department of Social Protection must develop and communicate complaint and redress policies and mechanisms that are explicitly for service users who feel they have been subjected to racism by a staff member of the Department of Social Protection.
- Reminders should be provided to all staff that the 'race' ground of the Equal Status Acts 2000-4 applies to them in their dealing with customers and their applications, with clarification as to how its principles inform practice. It is arguable that a person's ethnicity was a contributory factor in the denial of payments in some of the cases mentioned in this section.
- Specific commitments to working respectfully with an ethnically diverse population must be explicitly stated in the *Customer Charter* and *Action Plan* and circulated to all staff.
- United Nations Day for the Elimination of Racial Discrimination should be formally marked by the Department of Social Protection and brought to the attention of all staff and the Department's commitments to anti-racism should be clarified and re-iterated.

It is important to note that the Ipsos MORI survey mentioned in the Grant Thornton review (see Key contexts section) refers to the need for the Department of Social Protection to undertake internal training on anti-racism and the MRCI report *Singled Out* also recommends that the Department of Social Protection should provide mandatory anti-racism measures for staff. This report supports these recommendations. As the Minister for Justice and Equality stated at the Irish government's appearance at the Universal Periodic Review of Human Rights in Geneva in October 2011 'Racism has no place in society' (Department of Justice and Equality, 2011).

3.5. MISAPPLICATION OF THE HABITUAL RESIDENCE CONDITION (HRC)

As noted in chapter 1, in 2004 a new qualifying condition was introduced for all means-tested social welfare payments and Child Benefit, the Habitual Residence Condition (HRC). The HRC is a test to ascertain if an applicant has an adequately strong connection to Ireland.



By definition it is more likely to be satisfied by Irish nationals compared to non-Irish nationals, though returning nationals have been known to experience their share of difficulty. The organisations involved in this report have helped thousands of clients with issues related to the HRC since its introduction – both Irish and non-Irish nationals. The Habitual Residence Condition is unlike most other qualifying criteria in that its core component – level of connection to Ireland or ‘centre of interest’ is less amenable to accurate and objective measurement than other qualifying criteria such as income, age, family status or illness.

The factors that must be considered when making a HRC assessment are provided for in law under Section 246 (4) of the Social Welfare Consolidation Act, 2005:

Notwithstanding the presumption in subsection (1), a deciding officer or the Executive (i.e. the HSE), 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.

A significant phrase in this legal provision is ‘...shall take into consideration all the circumstances of the case...’ i.e. the deciding officer must consider all the circumstances and the five factors provided are not an exhaustive list of what must be considered. Another key phrase is ‘the future intentions of the person concerned as they appear from all the circumstances’. This factor is particularly open to subjective and varying interpretation and the HRC will always be problematic if this factor is obliged to be considered.

The measurement of Habitual Residence is at best a complex, subtle process that must be carried out carefully in the context of all the facts of the case and even then it is still open to subjective and varying opinion of deciding officers. Arguably, the test of habitual residence is too complex to be done accurately on a mass scale by a high number of different people in a fair and consistent manner. If used incorrectly, the subjective nature of HRC measurement can act as a vehicle for prejudice and exclusionary attitudes originally intended to protect the most vulnerable.

The application of the HRC has been identified as problematic by the Social Welfare Appeals Office on a number of occasions since its introduction. In its 2004 *Annual Report*, the application of the HRC to Child Benefit was first raised as an issue. This is an excerpt from the 2007 *Annual Report*: Appeals officers have noted that some deciding officers of the department were using the two year residency provision as the main basis for deciding that applicants were not habitually residents and were failing to look at other issues. Appeals officers have commented that the residency requirement is merely one of a number of indicators that a person is habitually resident in the State but is not conclusive in its own right. (Social Welfare Appeals Office, 2008:10).



The following is from the 2010 *Annual Report*:

The number of appeals relating to the HRC rose from 1,383 in 2009 to 4,146 in 2010. There was some discussion throughout the year relating to various aspects of this condition (Social Welfare Appeals Office, 2011:12).

While there is no clear breakdown on the number of HRC appeals that are successful, it is reasonable to assume that successful HRC appeals make up a significant proportion of the 42.7% (12,029) of cases that were flagged in the 2010 *Annual Report* of the Social Welfare Appeals Office as leading to a favourable decision. This in turn could provide further evidence of the poor application of the HRC.

The Department of Social Protection has acknowledged some of the difficulties with the application of the HRC and in June 2011 published another set of revised guidelines on its application. The new guidelines are improved and clearer. However, they still contain fundamental inaccuracies and in some cases serve to confuse rather than clarify the issue (see Annexe 1: Crosscare Migrant Project's submission on the revised guidelines).

The following are some statistical tables on HRC refusals:

Table of HRC refusals for 2010 :

Number of Applicants disallowed during 2010 HRC Disallowances	Irish Nationals	Nationals of Countries other than Ireland	Total
Carer's Allowance	51	206	257
Jobseekers Allowance	463	6,768	7,231
Child Benefit	57	1,431	1,488
Disability Allowance	54	495	549
One-Parent Family Payment	24	141	165
State Pension (Non-Con)	1	2	3
Total	650	9,043	9,693

Claims disallowed under Habitual Residence Condition, 2005-2011: ⁵

Scheme	2005	2006	2007	2008	2009	2010	End of May 2011
Jobseeker's Allowance	2,865	3,404	4,016	4,535	7,484	3,401	1,336
State Pension (Non-Con)	33	147	N/avail	0	16	3	1
Blind Pension	1	0	N/avail	0	0	0	0
Widow's, Widower's & Orphan's Non-Con Pensions	6	11	N/avail	0	7	0	0

⁴ Joan Burton, *Dáil Éireann Debates* 728, Col. 486, 23 March 2011.

⁵ Joan Burton, *Dáil Éireann Debates* 735, Col. 454, 15 June 2011.



One-Parent Family Payt.	382	179	289	295	381	165	84
Carer's Allowance	105	66	45	87	192	257	116
Disability Allowance	389	203	196	278	570	576	197
Domiciliary Care Allce.	N/avail	14	16	10			
Child Benefit	818	351	577	1,102	1,918	1,488	536
Total	4,599	4,361	5,123	6,297	10,582	5,906	2,280

* Figures for 2010 are incomplete due to industrial action when figures were not collected

It is clear from this information that HRC is a significant issue for people attempting to access social protection payments. HRC is an issue that clearly affects non-Irish citizens more often than Irish citizens.

The most prevalent issue faced by the sample of immigrants examined in *Person or Number?* was the Habitual Residence Condition. There were sixteen cases in the sample where it was clearly evident that the HRC was not applied correctly. This issue was identifiable in a number of ways in the case studies supplied by the organisations. The four main HRC related issues can be categorised as follows:

- Temporary absences from the State.
- Failure of officials to look at the full facts of the case.
- HRC simply stated as a reason for refusal without giving detail.
- Non-application of the HRC exemption for EEA workers

Each is addressed in turn.

Temporary absences from the State

Immigrants often have family members abroad that they may not have seen for many years or who they may have been separated from due to a conflict in their country. It is a common and natural desire for people, including immigrants, to wish to visit family members when possible. There were four cases in the sample where people left the country temporarily to visit family they had not seen in many years and on return they were told they no longer satisfied the Habitual Residence Condition.

David

David is a recognised refugee who has been resident in the State since 2005 and has been continuously resident in the State since then. David was in employment between July 2007 and February 2008. When the job finished, he was in receipt of Basic SWA and Rent Supplement until September 2010. David had planned to visit his family in a neighbouring State of his country of origin in September and October 2010. He informed his local Social Welfare Office of his intention to travel to visit his family and queried whether this would present any problem for his SWA claim.



He was informed that he would only receive payment for two weeks of his trip as he was told that this was the maximum period that was payable to a person who left the State for a holiday. When the client returned home as planned he went to his local Social Welfare Office to inform them that he had returned and he was told that he would have to make a fresh application for SWA. The client did this in November 2010 and he received a letter of refusal December 2010. The letter of refusal noted that in order to qualify for an allowance he was required to be habitually resident in the State and that on examination of all the factors of his case he was not considered to be habitually resident in the State. The letter also noted that his main centre of interest was in his country of origin – a country where the Minister for Justice and Law Reform recognised that he faced a threat of persecution. The decision to refuse him a payment is being appealed.

One member of staff of an NGO remarked that ‘with long distance journeys people tend to stay away for longer than two weeks, also it is often to visit people that they have not seen for many years’. This last point is particularly important as it was clear that people whose payments were terminated due to temporary absences from the State were well established and at home in Ireland. In some cases, people could not have returned to their country of origin as they are refugees. It would appear that deciding officers misinterpreted a temporary absence as a change in home or centre of interest.

While the department does have some guidelines in relation to absence from the State, they are somewhat patchy, unclear and do not take into account family situations that are common for immigrants, such as rare opportunities to visit families that are a considerable distance from Ireland. Nor is it adequately detailed how a person should notify the department of an impending trip or if they need to interact with the department in a particular way on return.

The Ipsos MORI report for the Department of Work and Pensions (UK) *Ethnic minority customers’ experiences of claiming disability benefits (2010)* also identified the issue of ‘absences abroad’ as causing problems:

Trips abroad and residence requirements often caused confusion and dissatisfaction with welfare services. Strong dissatisfaction has been unveiled regarding the four-week restriction on the length of such visits, which were felt to be too short. Regulations such as these also strengthen beliefs that the government fails to understand how different communities operate. Community groups often report that older people are unaware of this rule and return to the UK to find that their benefits have been terminated, or asked to repay benefits paid while they were away. (Jones and Tracy, 2010:18).

In relation to the UK set time allowances for ‘absence abroad’ the Ipsos MORI report states that:

The current allowance should be extended was suggested as it is not suited to the needs of ethnic minority customers who often need to stay abroad for a long period of time. ‘The two week allowance should be extended because people going to far eastern countries tend to go for at least six weeks. Also, ethnic minority groups will go to other countries for alternative treatment and can be away for more than two weeks’ (DCS staff member from the Midlands) (Jones and Tracy, 2010:25).



Failure to look at the full facts of the case

Failure to look at the full facts of the case was an issue in all 16 cases in the sample where the HRC was misapplied. Particular facts which lessen the chance of a positive decision were selected by deciding officers and used in isolation from their full context and other relevant facts to the application. The most common of such facts was a person's residency history i.e. as immigrants, the fact that they did not live all their lives in Ireland. The following is an excerpt from the revised Department of Social Protection guidelines on the Habitual Residence Condition that emphasizes the need to consider all facts together:

It should be noted, and as emphasized by the ECJ [European Court of Justice], these factors are not exhaustive. Therefore, the list should not be used as a means of scoring points for and against a person satisfying the condition.

Although no single factor is conclusive, the focus must be on determining the person's main centre of interest, having regard to all of the relevant facts and circumstances of the individual. [...]The evidential weight to be attributed to each factor will depend on the circumstances of each case. It is necessary to weigh up all the information and balance the evidence for and against an applicant satisfying the habitual residence condition and reach a decision based on the law, case law and available guidance.

HRC simply stated as a reason for refusal without giving detail

Related to the previous subsection on failure to look at the full facts of the case, there were two cases where people were simply informed that they did not satisfy the HRC without any elaboration as to why this was the case. All organisations contributing case studies felt that this issue was either common or very common in their service. One organisation remarked that:

Often only one piece of information is looked at and you get decision statements to the effect of 'we have considered the five factors' and nothing else. Another issue is the application process – people are not invited to address the HRC directly on the form.

Other organisations said that such an approach to the HRC was commonly used on a verbal basis in both Social Welfare and Community Welfare Offices i.e. people were simply told verbally that they would not be entitled to a payment because of the HRC or because they have not lived in Ireland for two years. One member of staff of an NGO remarked that:

'it has been our experience that officers will often latch onto an isolated fact from a person's case and appear to ignore all the other facts with a view to refusing the payment rather than examining a person's situation with care.'

⁶ Accessed from <http://www.dsfa.ie/EN/OperationalGuidelines/Pages/habres.aspx> on 23/08/2011.



Non-application of the HRC exemption for EEA workers

There were two cases in the sample when CWOs failed to apply the exemption to the HRC for 'EEA workers' who clearly had an adequate and relevant work record in Ireland to warrant the exemption. One contributing NGO said that they saw this issue frequently.

Toms

Toms is from Latvia and came to Ireland for the first time in 2005. After working for five months with a construction company he was made redundant, he then spent another nine months working and studying in Ireland before returning temporarily to Latvia. He returned to Ireland in 2007 and has been resident in Ireland since then. Toms had three different periods of employment in Ireland following his return – one for three months, one for four months and one for fourteen months. When his last job finished in 2010 he applied for Jobseekers Allowance and SWA - both applications were refused on HRC grounds even though as an EEA worker he was entitled to an SWA payment. At the time of writing Toms was homeless.

Recommendations

Drawing on data from the Social Welfare Appeals Office, it is recommended that the Department of Social Protection undertakes a detailed and published examination of allowed HRC appeals on a periodic basis. Specific approaches and deficiencies evident in the practice of departmental staff in allowed HRC appeals must be collated in detail and addressed comprehensively at front line level on a regular basis. Annual targets for proper implementation of the HRC should be set - based on allowed and disallowed HRC appeal decisions from the Social Welfare Appeals Office. The departmental guidelines on the HRC exemption for EEA workers need urgent revision as they are currently misleading and inaccurate (see annexe).

The guidelines for temporary absence from the State must be clearly stated for service users. More detail as to actions specifically required of service users must be provided. The absences currently allowed do not reflect the reality of immigrants' lives and the guidelines should be reviewed in conjunction with immigrants and immigrant NGOs and circulated widely and advertised clearly. It is also recommended that the guidelines be translated into the key foreign languages.

The guidelines on temporary absence from the State must specifically clarify which temporary absences from the State do not affect the Habitual Residence Condition.

The HRC1 Form should be revised to ensure that applicants are specifically invited to address each of the five factors that a deciding officer is obliged to consider.

3.6. DOMESTIC VIOLENCE

There appears to be no specific guidance provided to officers of the Department of Social Protection either in dealing with victims of domestic violence in general or specifically in applying the Habitual Residence Condition. Inquiries about such guidance were made to both Cosc and the Department of Social Protection.

⁷ EEA nationals who are classified as 'workers' do not have to satisfy the HRC in order to qualify for Supplementary Welfare Allowance – in accordance with Article 7(2) of EEC Regulation 1612/68



Cosc is the *National Office for the Prevention of Domestic, Sexual and Gender-based violence*, an executive office of the Department of Justice and Equality. The current primary function of Cosc is to drive the implementation of the first *National Strategy on Domestic Sexual and Gender-based Violence 2010-2014*. While the strategy identifies the then Department of Social and Family Affairs as one of the government departments that provides services to people who have experienced domestic violence, it does not detail the particular role of the department in the national strategy.

In November 2010, Women's Aid published a briefing paper on domestic violence. The following are two excerpts from the paper related to the Habitual Residence Condition. The first excerpt is a recommendation:

The Department of Social Protection should direct community welfare officers to grant welfare support to abused migrant women regardless of whether they satisfy the habitual residency conditions [...].

The second excerpt relates to findings:

Women who leave their partner because of violence and who do not satisfy the Habitual Residency Condition may find themselves and their children destitute [...].

Womens Aid's research *Making the Links* found that lack of a place to go and economic dependence on the perpetrator are the two main reasons why women do not leave violent partners. The Habitual Residency Condition may increase these barriers to leaving by negatively affecting the woman's access to both financial support and to a refuge.

Some of the most shocking situations that came to light here involved the treatment of women who had experienced domestic violence. There were seven such cases in the sample who asked for the support of the social protection system. In only three of these cases were the women aided immediately without recourse to the appeals system or advocacy by an NGO.

Laima

Laima is from Lithuania. She has two children aged five and ten years old. She came to Ireland in 2007 to join her partner, who was working. Laima found a job for four months. Things were going well in the beginning but her partner started partying and drinking with his friends. Then abuse started: her partner was calling her names, humiliating her in front of other people and not giving her money for food & clothing.

She separated from him in January 2009 and continued to look for some work. She applied for One Parent Family (OPF) Payment after they separated. Not long after, her partner broke the front door of where she was staying and threatened her. Laima went to an NGO for support. At that stage Laima's apartment was in rent arrears and the ESB bill was unpaid. One day she came home and found that electricity was cut off. She had to move to a homeless women's hostel with her two children.

The CWO officer attached to the local homeless hostel met Laima and gave her a one-off SWA payment stating that she was not habitually resident in the State. Even though the officer was sympathetic to Laima's case, she said she could not pay anything after that as per her superintendent's direction.



She was still getting Child Benefit and was paying rent for the homeless hostel out of her Child Benefit money. She was still looking for a job and doing different courses to improve her chances of employment. Her OPF claim was refused based on the fact that she was not considered habitually resident. Her Child Benefit was also cut in April 2010 as she was seen as not habitually resident. She could not afford to leave the homeless hostel until December 2010 when her Child Benefit was finally restored and back-dated. She had to stay in a homeless hostel for sixteen months with two children. In February 2011 she was finally granted her OPF after a long battle. The NGO in question worked with Laima intensively for one and a half years in order for her to get the supports she was always entitled to.

Sofia

Sofia married an Irish man in Morocco and came to live in Ireland with him in May 2008. They have one child together. The following year their relationship deteriorated and he became violent towards her. She secured a barring order against him in November 2009. Sofia was not able to access independent social protection after the barring order was issued. She was refused mainstream social protection payments and SWA payments based on failure to satisfy the HRC. Sofia was forced to drop the barring order so that she had some accommodation for her and her child. She now continues to live with her husband.

The 'HRC' and 'lack of a work record' in Ireland were cited by CWOs or Social Welfare Offices as reasons why the women in such situations could not have received financial assistance. In all these cases it is arguable that the HRC was being satisfied. They involved:

- A woman resident here for four years, one child who was born in Ireland, the mother as main carer.
- A woman resident here for three years, two children in school, the mother as main carer.
- A woman resident here for five years, three children, the mother as main carer.
- A woman resident here for two and a half years, one child, mother as main carer.

In all cases the father of the children was also resident in Ireland.

In some cases it was not just the time period the woman had been living in Ireland which was the issue, but also the very fact that the woman was proposing to or did separate from her abusive partner.

This issue highlights how some deciding officers took a narrow and inappropriate view of the situations presenting in front of them and their failure to look at the full facts of the case. It is also clear that some officers felt legally constrained by the HRC but nevertheless, SWA payments can be made to people with exceptional needs.



Importantly Kelleher observes that ‘immigrant women from outside the EU who experience domestic abuse encounter specific difficulties. For instance they may enter the country on a dependent visa and the renewal of their residency status may be dependent on the co-operation of their partner/husband. Women in such situations will find it difficult to seek help as they are at risk of becoming undocumented and deported. These women should not be deported and there should be a specific mechanism whereby they have a right to be considered for independent legal status’ (2011: 52).

Recommendations

A decision to separate from an abusive partner should in no way adversely affect a person’s habitual residence assessment. Such an approach should become part of the formal guidelines on assessing habitual residence and should be made clear by frontline staff to people in abusive relationships where habitual residence may be in question.

Deciding officers should have specific guidelines to aid them in their interactions with victims of domestic violence. Cosc should take the State lead with the Department of Social Protection in the development of such guidelines.

The Department of Social Protection’s role in the National Strategy on Domestic, Sexual and Gender-based Violence must be clarified and reinforced.

3.7. LACK OF UNDERSTANDING OF IMMIGRATION STATUS

Immigrants in Ireland, such as non-EEA citizens, have a wide variety of rights and obligations depending on the type of status granted to them by the Department of Justice and Equality. There are some categories where there is little clarity as to what someone’s rights are in relation to access to various social services such as housing and social protection. It is in this unclear and incomplete context that deciding officers of the Department of Social Protection must make their decisions. There has been significant improvement in the guidelines provided to deciding officers dealing with non-Irish nationals in relation to the Habitual Residence Condition, but there continues to be a significant gap between the stated guidelines and the practice. There were two cases where people were deemed not to be habitually resident simply because they had ‘leave to remain’ status even though the Department of Social Protection guidelines state that:

‘An applicant who is given such temporary leave to remain may be treated as habitually resident from the date of that grant.’

There were other misinterpretations of people’s status in the sample including the case of David (previously mentioned) and the case of Robert, a man with refugee status who had not left the country since getting his status:

Robert

Robert from Niger was granted refugee status in March 2010. He left direct provision accommodation in April 2010 and proceeded to look for work and apply for Jobseekers Allowance and Rent Supplement.

⁸ Accessed from <http://www.dsfa.ie/EN/OperationalGuidelines/Pages/habres.aspx#app1> on 6/09/2011.



From this point until January 2011, he was denied all payments and was forced to rely on the charity of friends to survive. His payments had been denied for a variety of reasons including ‘non-disclosure of means’; ‘failure to satisfy the Habitual Residence Condition’ and that ‘his immigration status did not warrant payment’. The non-disclosure of means relates to an untaxed and uninsured second hand car that he got from a friend – Robert has never used the car as he cannot afford the tax and insurance. It was not clear on what basis the deciding officers used the reasons of HRC and immigration status to refuse a payment to a recognised refugee who had not left the country. After NGO and then ministerial representations, a Jobseekers Allowance payment was granted.

Also in the sample is a case of a Brazilian woman who married her Portuguese partner in 2010 and presented to her local Social Welfare Office for her PPS number. Her EU treaty rights application was pending but the officials reported her to the Gardaí in the belief that she was in the country without permission, even though she had a right to reside under Irish and EU legislation.

Contributing NGOs felt that a lack of understanding of immigration status was a common issue – with specific reference to a lack of understanding of the HRC exemption for EEA workers, the rights of Romanians and Bulgarians and people with Stamp 5 status.

Recommendations

The Department of Justice and Equality must take the lead in establishing detailed descriptions of the rights, entitlements and obligations that accrue to the people in all the various immigration status categories that it grants and also to various categories of EU nationals. While guidelines on the social protection rights of people with various immigration stamps have been improved, they still do not include sufficient detail.

Specific and mandatory training for all frontline Department of Social Protection staff on the different types of immigration status and the rights attached to these different types of status must be conducted urgently.



3.8. FAILURE TO GRANT EXCEPTIONAL NEEDS PAYMENTS IN SITUATIONS OF HIGH VULNERABILITY

One of the most important mechanisms in the social protection system that can ensure that the most vulnerable people are protected is the Supplementary Welfare Allowance (SWA) scheme. The purpose of the SWA scheme is described as follows :

- To guarantee a standard basic minimum income;
- To provide a residual and support role within the overall income maintenance structure;
- To provide immediate and flexible assistance for those in need who are awaiting decision on payment of other State schemes;
- To provide people with low incomes with a weekly supplement to meet certain special needs (e.g. rent and mortgage interest payments) or a payment to help with the cost of any exceptional needs they may have;
- To help those whose needs are inadequately met under the major schemes;
- To help those confronted with an emergency situation.

There were eight cases in the sample where the person had no identifiable right in Irish law to a stable mainstream payment such as Jobseekers Allowance. However, some of their circumstances were of considerable vulnerability and poverty and exceptional needs payments could have been made but were not. In four of these eight cases, people had a work record of between three and eight years in Ireland but never had legal permission to work. In the other four cases, three involved situations where the person's legal permission in the country did not allow for a mainstream payment to be made (e.g. student status); and one case was of a person who never had legal permission in the country and never worked, but her partner did.

Recommendations

The development of inward migration, coupled with an inadequate response by the social protection system, means that Ireland now has growing numbers of people (both with and without legal status) who are in poverty but unprotected by mainstream payments of the social protection system. The SWA scheme must be fully and consistently used to ensure that no person is faced with destitution.

If a person has paid tax and social insurance and is being denied social protection payments due to lack of qualifying immigration status or lack of any legal immigration status, they should have the option of getting at least part of their financial contributions to the Irish State reimbursed.

If a person is legally required to be in the State for a pending court case then at minimum he/she should be provided with the means to subsist.

⁹ Accessed from <http://www.welfare.ie/EN/OperationalGuidelines/Pages/swa.aspx> on 6/09/2011



3.9. FEAR OF REFUSAL OF CITIZENSHIP

Some of the issues faced by people in need of income support were not immediately related to problems with the social protection system. There were two cases in the sample where people were reluctant to even apply for social protection, as they felt it would adversely affect their citizenship application. The Irish Nationality and Citizenship Act 1956, as amended, does not require that an applicant has not accessed the social protection system in order for the person to be granted Irish citizenship by naturalisation. In practice, ministerial discretion has allowed citizenship to be refused on the basis that an applicant has accessed his or her right to social protection payments. All but one of the contributing NGOs flagged this issue as common in their service – with several cases cited of people who remained in poverty rather than apply for a payment to which they were entitled in order to be granted Irish citizenship.

Tania

Tania is from Russia. She came to Ireland eight years ago. She was a work permit holder for the first few years. She was working here all the time. She was granted Stamp 4 based on her and her husband's Irish child in 2005. Two years ago, Tania was diagnosed with cancer and had surgery and further ongoing treatment. She had to apply for Illness Benefit to be able to financially support herself during that difficult time. She had to stop working due to her illness in 2008 and was not able to restart work for health reasons. At that time she was awaiting the decision on her citizenship application. Her citizenship application was refused, based on the fact that she accessed her right to social protection. She has re-applied again but is not accessing any social protection payments now because she is afraid to be refused again. She is still in a poor health and is still recovering from her treatment, but she will not avail of her right to social protection payments because of the fear that she will never get citizenship.

The Immigrant Council of Ireland also cited two cases that are not included in the main sample used in this study:

- Rosa is a Filipino national who suffered domestic violence at the hands of her husband. She left her husband with their three children and applied successfully for One Parent Family Payment and Family Income Supplement. She was refused citizenship because she accessed these payments.
- Hugo is a Mexican national on an unlimited work permit. He had a serious accident at work and was unable to work for a period of time. He has a disability following the accident but has now been permitted to do part-time work. He has returned to his old employer but was refused citizenship as he had accessed both Disability Allowance and Illness Benefit prior to the making of his application.



Recommendations

If a person accesses the social protection system in Ireland, then it means they have gone through a verification process to ensure that they have the right to such a payment. The Department of Social Protection has its own checks and balances to ensure that people receiving those payments have the right to receive such payments. It is deeply unjust that an adverse decision can be made on someone's application for naturalisation on the basis that they have accessed a right that the Irish State has verified they are entitled to. It is recommended that accessing social protection is no longer used by the Minister for Justice and Equality as a reason to refuse naturalisation. Such a refusal not only questions the legitimacy of the Department of Social Protection's own checks and balances but, logically, all those who access social protection.

3.10. 'BURDEN ON THE STATE'

The Minister for Justice and Equality has the power to grant permission to remain in the State to non-EEA nationals under Section 4 (1) of the Immigration Act 2004. Section 6 of the same Act allows the Minister to attach various conditions to such permissions.

Five people in the sample who were granted permission to remain in the State on this basis encountered problems accessing social protection. They were refused a payment based on a deciding officer's reaction to their 'leave to remain' status letter from the Department of Justice and Equality, which stated that renewal of their status was dependent on them not becoming a 'burden on the State'. It continues to be unclear why some officers of the Department of Social Protection interpret any application for any payment as fitting the definition of what the Department of Justice and Equality vaguely refers to as a 'burden on the State'. Nor is it clear why officials from one department apply an undefined concept constructed in another department. It is inconsistent and fundamentally unfair that people granted permission to reside in the State (often after spending many years in the direct provision system) are then told they will not be given the means to subsist in the State. This practice has also been observed in status letters granted to partners of Irish citizens.

Malik

Malik is from Somalia and came to Ireland in May 2004 to seek asylum. He was not granted refugee status but in December 2009 he was granted leave to remain. However, due to administrative difficulties, Malik did not receive a GNIB card until July 2010. During this time Malik had no form of income and was unable to access any services including FAS or Social Protection. Malik stated that this placed him in a very disadvantageous position when he was seeking work as he could not establish that he had a Stamp 4 and an entitlement to work. Malik is in a long term relationship and had an Irish daughter with his partner in August 2010.



Malik applied for Job Seekers Allowance once he got his GNIB card in July 2010 and he successfully obtained Supplementary Welfare Allowance while a decision in his application for Job Seekers Allowance was pending. In a decision in September 2010 he received notification that his application had been refused because 'your leave to remain is dependent on you not becoming a burden on the State'. He also received a letter from the Community Welfare Officer in September 2010 that his supplementary welfare payments would be suspended unless he notified that office that he still had a claim pending with Department of Social and Family Affairs. The NGO working with Mailk helped him to submit an appeal on the Jobseekers Allowance refusal. The stress surrounding his GNIB card and his claim for social protection has exacerbated Mailk's poor health.

Generally people who need to access their right to social protection are people who are:

- Not able to work – i.e. people who are ill, have a disability or have family members that they need to care for
- or
- Are able to work and looking for work but not successful in finding work. It is a requirement for jobseeker payments that people prove they are making reasonable efforts to find employment.

The threat of being undocumented hangs over people if the Department of Justice and Equality refuses to renew status if it believes the 'burden on the State' condition has been breached. It is simply unfair and unjust that people who need social protection are forced into poverty or undocumented status or both due to the combined measures of the Department of Justice and Equality and Department of Social Protection. Such practice is particularly questionable considering that the Minister for Justice and Equality has already recognised that the person has a legitimate reason to be granted permission to live in Ireland.

Recommendations

People who have been granted status in the State who are unable to find employment should not be forced into poverty or undocumented status or both by the State. The practice of refusing payment to people with 'burden on the State' clauses in their immigration permission letters from the Department of Justice and Equality should be discontinued by the Department of Social Protection.

The Department of Justice and Equality should discontinue the issuing of immigration permission letters of status in Ireland with the 'burden on the State' clauses. Anyone granted full access to the labour market from an immigration status perspective should also be given the practical means to facilitate access to the labour market i.e. the means to subsist via, for example, Jobseekers Allowance.



3.11. HOMELESSNESS

The causes of homelessness are complex and multiple. However, when the core reason for someone becoming homeless is a State action or its failure to prevent homelessness when it could have done so, then the State must ask itself serious questions about its practices and its policies. The shortcomings identified here are all the more remarkable considering that the concept of 'preventable homelessness' is well understood and that the integrated government strategy on homelessness has been formally in place for many years. In the research sample of 54 cases, there were ten cases where people were made homeless due to one or more of the ten previous issues outlined in this *Findings and Recommendations* section. These ten situations of homelessness were triggered by the following:

- A woman not being told about the CWO service by her local Social Welfare Office;
- Overreliance on speculation leading to a refusal of a payment;
- Failure to issue an Exceptional Needs Payment to a man without status but required to remain in the State for a court hearing on alleged assault;
- Failure to implement the exemption on HRC for a man from Eastern Europe;
- Two people refused payments due to 'burden on the State' clauses in their immigration status letter. One of the cases was of a man living in Ireland for over seven years;
- Two people who had travelled abroad to visit family and were refused on return due to HRC – even though they clearly retained their habitual residency in Ireland;
- One woman who was refused a payment simply because of her status even though Department guidelines clarify that status is not a reason for refusal;
- One victim of domestic violence who was informed she did not satisfy the HRC.

These situations, which led to ten people becoming homeless, were largely preventable if other recommendations in this report on information provision, staff training, domestic violence, habitual residence and 'burden on the State' policies were implemented. Two other victims of domestic violence felt that in order to avoid homelessness with their children, they had to stay with their abusive partner. In addition, there were eight other cases where people were put at serious risk of homelessness unnecessarily.

Recommendations

Guidelines issued to departmental staff should be revised to specifically alert them to the dangers of any decision that might risk homelessness on the part of the client. They should draw staff to the importance of following the integrated homeless strategy. Protocols must be put in place to ensure that (1) service users are aware of the emergency function of the SWA in the prevention of homelessness and (2) the importance of liaison with local authorities to ensure that they discharge their statutory responsibilities under the Housing Act, 1998 in the provision of accommodation that will prevent homelessness from arising.



3.12 NO BARRIERS

There were four cases in the sample of fifty-four where there were no obvious barriers (legislative, policy or practice related) placed in front of the individual in accessing a basic means of financial subsistence. Three of these cases related to domestic violence against women and one related to a man from the UK with poor mental health.

3.13 GENERAL RECOMMENDATIONS

These 54 cases highlighted eleven specific problems areas, but also many features which they had in common. To address both these common and specific issues, the Department of Social Protection should establish a Migrant Consultative Forum, to operate in a similar fashion to the already established Disability Consultative Forum. Such a forum could lead to improvements in the general service provision of the Department of Social Protection for immigrants and on the implementation and overall understanding of issues such as the Habitual Residence Condition. It could also promote the inter agency co-operation proposed by the Grant Thornton report (*See Section 1: Key contexts*).

An early priority should be guidance for staff in dealing with non-Irish customers, for this requires comprehensive revision. This process of revision should be done in close consultation with non-Irish customers and the NGO sector.



4 CONCLUSIONS

One of the most striking overall findings of *Person or Number?* is not only the variety of barriers that immigrants face when they try to access their right to social protection, but the unfair and avoidable nature of many of these barriers.

The most basic duty of accurate information provision on the crucial right to social protection is not being carried out consistently. Adversarial approaches, reliance on speculation and the use of inappropriate, aggressive and racist language by departmental staff are alarming features of the social protection system that require urgent action. Some of the most vulnerable people were treated very poorly by the State's social protection system – in particular women experiencing domestic violence or women who were the sole or main carers of children.

The continued failure to fairly implement the Habitual Residence Condition requires new, deep-reaching and committed action that does more than simply amend guidelines. There must be an active and real commitment to dramatically reducing the number of people who are incorrectly refused their right to social protection due to misapplication of the HRC. Quite simply, bad State practice is putting people into poverty at an alarming level and for an ever-longer number of years.

A number of State policies were also identified as causing problems for immigrants in accessing social protection. The fear of refusal of citizenship by naturalisation is one of the most unfair of such policies, for it implicitly questions the character of anyone who needs to access their right to social protection. Perhaps the most punitive of policies identified is the one that allows a person to reside in the country but prevents them from accessing the means to subsist - forcibly squeezing people between destitution and undocumented status.

Perhaps the greatest indicator of the shortcomings of the social protection system for immigrants was the finding that ten people found themselves in situations of homelessness due its failings. Underlying many of the findings and recommendations was the sense that in their interactions with the system, some immigrants felt that they were not viewed in a full, understanding manner. The Department of Social Protection should question itself: 'in every local office, are we fully committed at every level to ensuring that our immigrant service users are getting the service and protection they deserve and to which they have a right'?

The report makes over 30 practical recommendations on how the system can be improved. These are improvements that will make the system more customer-centred and accessible, more efficient, transparent, inclusive and ultimately fairer. We hope these recommendations will be given serious consideration and we are committed to working with all to ensure that our social protection system genuinely facilitates the societal participation of immigrants.



5. FULL LIST OF RECOMMENDATIONS

5.1 POOR INFORMATION PROVISION AND ADVERSARIAL APPROACHES

- An audit of the knowledge level of frontline staff would accurately identify areas where more training is needed. We found that there are significant knowledge deficits among frontline staff in the area of qualifying criteria for various payments.
- All Department of Social Protection frontline staff should receive formal clarification as to their roles under the commitment of the *Customer Charter* to the provision of 'full and clear information' and in particular the undertaking in the Customer Action Plan to taking a '...proactive approach in providing information that is clear, timely and accurate, is available at all points of contact and meets the requirements of people with specific needs ' (Department of Social and Family Affairs, 2009:21).
- All Department of Social Protection frontline staff should be provided with detailed training to deliver these commitments.
- Now that the Community Welfare Officer (CWO) service is fully within the the Department of Social Protection, there is a significant opportunity to ensure that all people know of their option to apply for payments such as Supplementary Welfare Allowance and training must be provided accordingly.

5.2 DECISIONS BASED ON SPECULATION

- Circumstantial and indirect evidence must be used only with great care and awareness of its legal weight. More detailed guidance is recommended for deciding officers in the use of circumstantial and indirect evidence.
- Where the deciding officer comes to a conclusion, from circumstantial or indirect evidence that would be prejudicial to a person's application, the applicant should always be informed of such a conclusion and should always be given the opportunity to rebut it prior to a decision being made.
- Specific and explicit published guidance should be given to ensure that prejudice of any kind does not find a place in the decision-making processes. This is particularly important where circumstantial and indirect evidence is used and where there is room for subjectivity and discretion.

5.3 PROCESSING DELAYS

- Initial application processing times must be reduced dramatically. At the same time, people who have made initial applications for a payment should be allowed access to the Supplementary Welfare Allowance scheme, independently of HRC status at least until a HRC decision is made on the initial application. Such an arrangement would ensure that nobody entitled to a payment would be left without means once they apply. This would also act as an additional incentive for the department to reduce initial processing times.



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- Appeals processing times must also be reduced dramatically. The State is effectively denying some people their right to a payment due to such lengthy processing times. For those whose appeals are successful, back-pay is a poor result for the often many months they had without means.

5.4 INAPPROPRIATE, AGGRESSIVE AND RACIST LANGUAGE

- There is a clear absence of an up-to-date overall governmental plan to address racism in Ireland. This must be rectified urgently: the Minister for Justice and Equality should take the lead on developing a new plan.
- The Department of Social Protection should also act urgently to ensure it has strong anti-racism measures:
 - There must be more proactive and comprehensive measures to draw in the views and experiences of service users of the Department of Social Protection. Non-Irish users should be a focus of such measures. They should be explicitly asked, through a comprehensive independent survey, if they have experienced racism from staff of the Department of Social Protection.
 - The Department of Social Protection must develop and communicate complaint and redress policies and mechanisms designed explicitly for service users who feel they have been subjected to racism by a staff member of the Department of Social Protection.
 - Staff should be reminded of their obligations under the 'race' ground of the Equal Status Acts, 2000-4, with clarification of prohibited practices when dealing with customers and their applications. It is arguable that a person's ethnicity was a contributory factor in the denial of social protection payments in some of the cases of this research.
 - Specific commitments to working respectfully with an ethnically diverse population must be explicitly stated in the *Customer Charter* and *Customer Action Plan* and circulated to all staff.
 - United Nations Day for the Elimination of Racial Discrimination should be formally marked by the Department of Social Protection and brought to the attention of all staff. It is an opportunity for the Department's commitments to anti-racism to be clarified and re-iterated.

5.5 MISAPPLICATION OF THE HABITUAL RESIDENCE CONDITION (HRC)

- Drawing on data from the Social Welfare Appeals Office, it is recommended that the Department of Social Protection undertakes a detailed and published examination of allowed HRC appeals on a periodic basis. Specific approaches and deficiencies evident in the practice of departmental staff in allowed HRC appeals need to be collated in detail and addressed comprehensively at front line level on a regular basis. Annual targets for proper implementation of the HRC should be set, based on allowed and disallowed HRC appeal decisions from the Social Welfare Appeals Office.



- The departmental guidelines on the HRC exemption for EEA workers must be urgently revised, for they are currently misleading and inaccurate (see annexe).
- The guidelines for temporary absence from the State must be significantly augmented and written for service user access. More detail as to specific required actions of service users must be provided. The absences currently allowed do not reflect the reality of immigrants' lives. These guidelines should be reviewed in conjunction with immigrants and immigrant NGOs and circulated widely and advertised clearly. It is also recommended that the guidelines are translated into key foreign languages.
- The 'temporary absence from the State' guidelines must specifically clarify what temporary absences from the State do not affect the Habitual Residence Condition.
- The HRC1 Form should be revised to ensure that applicants are specifically invited to address each of the five factors that a deciding officer is obliged to consider.

5.6 DOMESTIC VIOLENCE

- A decision to separate from an abusive partner should in no way adversely affect a person's habitual residence assessment. This should become part of the formal guidelines on assessing habitual residence and should be made clear by frontline staff to people in abusive relationships where habitual residence may be a question.
- Deciding officers should have specific guidelines to guide them in their interactions with victims of domestic violence. Cosc should take the State lead, with the Department of Social Protection, in the development of such guidelines.
- The Department of *Social Protection's role in the National Strategy on Domestic, Sexual and Gender-based Violence* must be clarified in detail and reinforced.

5.7 LACK OF UNDERSTANDING OF IMMIGRATION STATUS

- The Department of Justice and Equality must take the lead in establishing detailed descriptions of the rights and entitlements that accrue to the people in all the various immigration status categories that it grants, including the various categories of EU nationals. While guidelines on the social protection rights of people with various immigration stamps have been improved, they still do not include adequate detail.
- Specific, mandatory training for all frontline Department of Social Protection staff on the different types of immigration status and the rights attached to these different types of status must be conducted urgently.



5.8 EXCEPTIONAL NEEDS PAYMENTS IN SITUATIONS OF HIGH VULNERABILITY

- Ireland now has growing numbers of people (both with and without legal status) who are in poverty but unprotected by the mainstream payments of the social protection system. The SWA scheme must be fully and consistently used to ensure that no member of society is faced with destitution.
- If a person has paid tax and social insurance and is denied social protection payments due to lack of qualifying immigration status or lack of any legal immigration status, they should have the option of getting at least part of their financial contributions to the Irish State reimbursed.
- If a person is legally required to be in the State for a pending court case then at minimum he/she should be provided with the means to subsist.

5.9 FEAR OF REFUSAL OF CITIZENSHIP

- If a person accesses the social protection system in Ireland then it means they have gone through a verification process to ensure that they have the right to such a payment. The Department of Social Protection has its own checks and balances to ensure that the people who receive such payments have the right to receive such payments. It is deeply unjust that an adverse decision can be made on someone's application for naturalisation on the basis that they have accessed a right that the Irish State has verified they are entitled to. It is recommended that accessing social protection is no longer used by the Minister for Justice and Equality as a reason to refuse naturalisation. Such a refusal questions the legitimacy of the Department of Social Protection's own checks and balances and, logically, all those who use it.

5.10 'BURDEN ON THE STATE'

- People who have been granted status in the State but who are unable to find employment should not be forced into poverty or undocumented status or both, least of all by the State. The practice of refusing payment to people with 'burden on the State' clauses in their permission letters from the Department of Justice and Equality should be discontinued by the Department of Social Protection.
- The Department of Justice and Equality should discontinue the issuing of immigration permission letters with the 'burden on the State' clauses. Anyone granted full access to the labour market from an immigration status perspective should also be given the practical means that actually facilitate access to the labour market e.g. the Jobseekers Allowance.



5.11 STATE RESPONSIBILITIES TOWARD HOMELESS PEOPLE

- Guidelines issued to departmental staff should be revised to specifically alert them to the dangers of any decision that might risk homelessness on the part of the client. They should draw staff to the importance of following the integrated homeless strategy. Protocols must be put in place to ensure that (1) service users are aware of the emergency function of the SWA in the prevention of homelessness and (2) the importance of liaison with local authorities to ensure that they discharge their statutory responsibilities under the Housing Act, 1998 in the provision of accommodation that will prevent homelessness from arising.

5.12 GENERAL RECOMMENDATIONS

- The Department of Social Protection should establish a Migrant Consultative Forum to operate in a similar fashion to the already established Disability Consultative Forum. Such a forum could lead to improvements in the general service provision of the Department of Social Protection for immigrants and on the implementation and overall understanding of issues such as the Habitual Residence Condition. It could prompt the external inter agency co-operation proposed by the Grant Thornton (*See Section 1: Key Contexts*).
- Guidance for staff in dealing with non-Irish customers requires comprehensive revision. This process of revision should be done in close consultation with non-Irish customers and the NGO sector.



ANNEXE 1

CROSSCARE MIGRANT PROJECT SUBMISSION ON THE REVISED (JUNE 2011) GUIDELINES ON THE OPERATION OF THE HABITUAL RESIDENCE CONDITION – JULY 2011

Crosscare Migrant Project is an information and advocacy service for immigrants, emigrants and returning Irish emigrants. Since the introduction of the Habitual Residence Condition (HRC) in 2004, we have been working with people from a variety of backgrounds and nationalities who have been refused a payment based on the HRC. On several occasions since 2004 we have made submissions to the Department of Social Protection with suggestions for improvement in the operating guidelines of the HRC. In June 2011 the Department of Social Protection issued revised operating guidelines.

This document outlines a number of areas where Crosscare Migrant Project believes that the new guidelines need further improvement. Some of these points relate to inaccuracies in information and guidance provided. The subheadings in this document relate to the subheadings of the guidelines.

Introduction

The second paragraph of the Introduction to the guidelines is misleading in that the first sentence implies that a person needs to have accumulated a considerable residency history in Ireland to satisfy the HRC.

The term “habitually resident” is not defined in Irish law, but it 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.

This is of course not the case as it is possible for someone to have arrived in Ireland for the first time and be habitually resident immediately. For example Programme Refugees are immediately habitually resident.

Section 3. Circumstances giving exemption from the HRC for Family Benefits and Supplementary Welfare Allowance.

There is a serious inaccuracy under the subsection on ‘Supplementary Welfare Allowance’ where it states that *‘this provision applies only to employed workers, not to self-employed persons.’* The provision in question of course also applies to ‘former workers’ as defined by EU law who are generally unemployed rather than employed, yet there is no mention of ‘former workers’ in this section.

While there is an unclear and unspecific reference in the previous paragraph to those ‘who have been employed’ the above mentioned inaccuracy could lead to deciding officers incorrectly assuming that the exemption does not apply to a group of people to whom it does clearly apply. This has been an ongoing issue for some years and this guideline has potential for making the issue worse rather than better.



Entitlement to SWA is determined by the Health Service Executive. However, it is important for DO's to note that for the purposes of any claim to SWA an EEA national who is engaged in genuine and effective employment in Ireland is regarded as a migrant worker under EC law and does not need to satisfy the HRC. This means that EEA nationals who have been employed since arriving in Ireland may be entitled to SWA, even if they do not satisfy the HRC for Jobseeker's Allowance or one of the other payments subject to the condition.

This provision applies only to employed workers, not to self-employed persons.

(Details of those who are exempt from the habitual residence condition for SWA are contained in Appendix 5).

The same incorrect sentence is also repeated in Appendix 5. Appendix 5 as a whole is not helpful for deciding officers in clarifying that 'former workers' who retain 'worker' status are entitled to SWA. In fact the Appendix serves to confuse rather than clarify. Re-writing of the Appendix 5 is recommended to include the points mentioned in Appendix 6 (a) concerning former workers or more accurately the points of Article 7 (3) of EC Directive 2004/38. Alternatively there is another standing set of guidelines on 'SWA Habitual Residence Guideline' that cover the issue of 'former workers' in a much clearer and more comprehensive fashion. It is recommended that this Guideline is adopted into the broader HRC Guidelines.

1. Section 7. Who is Habitually Resident?

The Guideline on 'The Common Travel Area' in no way clarifies for deciding officers the relevance of Section 246 (1) of the 2005 Act. This is largely because the section has no clear relevance. By leaving the section in the legislation confusion is being perpetuated and despite attempts at clarification in the guidelines its purpose is no clearer.

The Common Travel Area Section 246(1) of the Social Welfare Consolidation Act 2005 provides that: "For the purpose of each provision of this Act specified in subsection (3), it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date."

A person does not necessarily satisfy the HRC merely because they have lived here for 2 years immediately preceding a claim. Also, a person is not necessarily disallowed on habitual residence grounds because they have NOT lived here for 2 years immediately preceding a claim.

The HRC is a complex condition and the length and continuity of residence in the State immediately prior to a claim is only ONE aspect of the condition.

It is important to note that this does not mean that such persons are presumed to be habitually resident. On the contrary, such applicants' status must still be examined by reference to the five factors to determine whether the person has actually transferred their habitual residence to this State.



In Section 7.3 on 'Nationals of Romania and Bulgaria', there are some significant omissions in terms of other exemptions from the 'work permit rule'. There are people who would have had permission to remain in Ireland prior to 2007 based on their Irish child, based on the Minister granting them general leave to remain or indeed those who may have had refugee status prior to 2007 – none of these people require a permit to work in Ireland. These situations are not referred to in Appendix 8 either.

Nationals of Romania and Bulgaria

Romania and Bulgaria joined the EU on 1st January 2007. Romanian or Bulgarian nationals are not permitted to engage in employment within the State unless they hold or have held an employment permit for the first continuous 12 months of employment (see Appendix 8 for details of Romanian and Bulgarian workers and family members who are not required to hold an employment permit). An exemption from the work permit rule applies to Romanians and Bulgarians who have graduated from an Irish third level institution with a primary (level 7) degree or higher, and who were employed for at least 12 months since 1/1/2007 while a student.

If they were not in possession of a work permit or exempt under the above conditions, the employment was illegal and cannot be counted for habitual residence purposes.

If they are engaged in self-employment, they are required to be registered with the Revenue Commissioners and be in possession of a certificate of registration. They must also have been actively engaged in self-employment prior to Jobseekers Allowance claim. They do NOT need a work permit for self-employment. (See work permit requirements for Romanian and Bulgarian nationals at Appendix 8).

In section 7.5 'Future intentions of applicant' we see the following wording:

A stated intention to reside in Ireland for the foreseeable future does not, of itself, mean that the main centre of interest has been established here, and must be evaluated in the light of the other factors discussed above. For example, a person staying with friends would on the face of it appear to have a less settled intention; whereas purchasing a house and paying a mortgage or entering into a long term lease would be indicative of a more settled intention to remain in Ireland.

The example given is skewed against people who do not have large savings or a significant income stream. People in a position to buy a house or pay a mortgage will usually not qualify for a means tested welfare payment. Conversely the example implies that because you cannot afford these things then the officer can assume your future intentions are of a less permanent nature. It has been our direct experience of working with permanently returned emigrants over the years that they most commonly stay with family or friends after arrival. Very few landlords will accept a deposit from someone they have never met so it is common for people to stay with friends first before they source more permanent accommodation. We would ask for this example to be removed.



2. APPENDIX 1

Under section (c) 'Categories where examination of 5 factors may be required' there is a problem under the subsection titled 'Non-EEA nationals and visa requirements' where it states that:

Permission to remain in Ireland must be verified by both the letter from the Department of Justice and Equality outlining the grounds on which permission to remain has been granted and an up-to-date and valid residency permit, Stamp 4 issued by GNIB.

This problem is also reflected earlier on in the guidelines under Subsection 5 'Who has a right to reside?' where it states that:

Persons who at the date of application for a payment do not have a current residence or employment permit should be advised to provide documentary evidence from the Department of Justice and Equality clearly stating their current status as regards their right to reside in the State.

There are quite a number of legal permissions for non-EEA nationals where there will be no letter issued by the Department of Justice stating current status. For example from Appendix 7 of the Guidelines the following categories of Stamp 4 holders will often not have a letter from the Department of Justice because the permission can be given by a local immigration officer:

- Spouses of Irish nationals
- Parents of Irish children
- Dependent family members of persons granted IBC status
- Partners of Irish nationals
- Persons who have had 5 consecutive work permits
- Green card holders who have worked in the State for 24 months

More recently there will be a considerable group of people who will have been granted a Stamp 4 on foot of the Zambrano decision of the European Court of Justice, because of their Irish child. If such people previously had a Stamp 1, 2 or 3 then they will not have a letter from the Department of Justice as GNIB can process such applications directly, as is the case with the other examples. There is also an issue with the subsection titled 'Periods spent in prison'. It is simply not correct to state that *'In all cases outlined, periods spent in prison in the State, invalidate the grounds on which a person has been granted permission to reside in the State.'* There is no automatic invalidation of permissions to reside in the State for all these categories. In particular people granted refugee status are protected by legislation in this regard.

3. APPENDIX 7 ENDORSEMENT STAMPS AND WORK VISAS/PERMITS

Under Stamp 1 'Categories to whom it applies' there appears to be significant confusion and lack of clarity regarding those nationalities who can be granted such a visa. The following sentence in particular needs revision:

Persons availing of the work and travel Ireland programme. Persons from US and Bulgaria can receive stamp for 5 months, and persons from Canada receive a year stamp to avail of casual employment and travel.



ANNEXE 2: EXTRACTS FROM GRANT THORNTON REPORT

- *Support – Another common area of feedback was in relation to the level of support by Local Offices to customers. As with the Local Office control functions, those consulted felt that the current interaction with customers in Local Offices (outside of the SFSS) does not add value and does not in their view add ‘meaningful engagement’ in that each customer is provided with a similar service, regardless of their profile or what is appropriate to their needs. Those consulted believe that the culture in the Department, and specifically in the Local Offices, does not support this as in the current process and the most experienced person is not always facing the customer.*
- *Information Provision – We received a wide range of feedback in relation to the role of the Department in information provision, highlighting the importance of this role with the majority of customers (72% and 62% respectively). With regard to this role there was a common view that there was a need for a more ‘holistic’ and ‘co-ordinated’ approach to information provision in Local Offices. The Ipsos MORI Customer Service Survey for the South East Region (2008), highlights the amount of information available regarding social welfare services and benefits as a key area requiring improvement, while an earlier survey carried out in 2005 indicates that 23% of customers believe that they had not been told about everything that might have applied to them. The lack of consistency with regard to the approach to information provision is considered, among other things, to be due to a lack of a dedicated Information Officer in some Local Offices. It is also considered to be due to inconsistency in the delivery of training to staff in a customer facing role despite the operation of a dedicated Staff Development Unit (SDU) and a suite of training material being made available [...] Current gaps with regard to the provision of information by staff in Local Offices were highlighted at different stages in the service delivery process [...] Examples of some of the issues raised during the consultation process are set out below*

Making a Claim:

- *Customer not being made aware of other service providers – e.g. Community Welfare Officers (CWO) for urgent need*
- *Customers not being made aware of other benefits that they may be entitled to*
- *Customers not being advised of the most appropriate scheme to meet their circumstances*

Processing a Claim

- *Customers not being provided with up to date information with regard to the status of their claim Signing Off*
- *Customers not being advised of alternative schemes – Back to Work (BTW), Family Income Supplement (FIS)*
- *Training – Closely aligned to the issue of information provision, as stated above, is the issue of adequacy and consistency of staff training. The feedback received during the review indicates that there is a lack of a dedicated Training Officer in some Local Offices and as such there is an inconsistent approach across with regard to training, with some Training Officers having other duties and some not receiving adequate training themselves [...] In addition, the volume and reported ambiguity with regard to the interpretation of circulars make it difficult for staff to know the most up to date position with regard to individual schemes [...]*

The feedback from the review indicates that there is scope for greater co-operation and information sharing between regional staff and other external bodies (Grant Thornton, 2008:35-38).

¹⁰ Social and Family Support Service



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