

**Casebase Number: G0064**

**Title of Payment: Family Income Supplement**



Community Law and Mediation Northside  
Northside Civic Centre  
Bunratty Road  
Coolock  
Dublin 17

**Date of Final Decision: 10/11/2014**

**Title of Payment:** Family Income Supplement (FIS)

**Date of final decision (Appeals Officer's Revised Decision):** 10/11/2014. Appeal Allowed.

**Keywords:** Family Income Supplement – definition of family – normal residence - appeal – oral hearing - section 317 - section 318

**Organisation who represented the Appellant:** Sligo MABS

**Casebase no:** G0064

See also Case Number G0073, which was decided by the Chief Appeals Officer on 29/06/2015.

**Case Summary:**

This case concerns a father of two children who applied for Family Income Supplement (FIS) on 17 October 2012. The Appellant does not live with the other parent, nor does he reside with his children. He maintains his children by way of monthly maintenance payments of €260. The children's mother is not in receipt of a social welfare payment other than Child Benefit. The Deciding Officer refused the Appellant's claim for FIS on the 24 October 2012 on the basis that he could not qualify for FIS unless he was wholly or mainly maintaining his spouse and children; or, alternatively, his children must be living with him the majority of the time.

Sligo MABS, on behalf of the Appellant, appealed this decision on 8 November 2012. On 3 April 2014, an oral hearing was held. On 9 June 2014 the Appeals Office issued its decision disallowing the appeal on the grounds that the Appellant's circumstances did not fall within the statutory definition of a "family" as provided by s.227 of the Social Welfare (Consolidation) Act 2005 (as amended) - "the Act", and that Article 13 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007, S.I. 142 of 2007, - "the Regulations", which refer to the "normal residence" of a child/ren, did not apply in this case.

On 26 August 2014 the Appellant requested a review by the Chief Appeals Officer of the Appeals Officer's decision in accordance with s.318 of the Act, submitting that the Appeals Officer had erred in law, that the Appellant's circumstances were in fact consistent with the meaning of "family" as provided by s.227 of the Act, and that the "normal residence" of his children should be decided in accordance with Article 13 of the Regulations.

The Appeals Officer subsequently reviewed his decision and decided to allow the appeal on 10 November 2014. The Appeals Officer accepted that the Appellant's circumstances were in fact consistent with the statutory definition of a "family" for the purpose of receiving FIS and that Article 13 of the Regulations did apply in this case. See also Case Number G0073, which was decided by the Chief Appeals Officer on 29/06/2015.

### **Summary of Benefit(s) Received:**

Family Income Supplement (FIS) is a weekly payment for working families with dependent children, including one parent families. An applicant for FIS must have at least one *qualified* child under the age of 18, or age 18 to 22, in full time education. That child must be regarded as normally residing with the applicant.

The rules governing the payment of FIS are contained in Part 6 of the Social Welfare Consolidation Act 2005 (as amended), and the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (as amended), S.I. 142 of 2007.

Section 227 of the Act defines child for FIS purposes as follows:

*Child, in relation to a family, means a qualified child as defined in section 2(3) who normally resides with that family;...*

Section 3(5) of the Act refers:

*Any question relating to the normal residence of a qualified child shall, subject to section 230(2), be decided in accordance with regulations made under that subsection.*

Section 227 of the Act defines a family for FIS purposes as follows:

*“family” means -*

- (a) a person who is engaged in remunerative full-time employment as an employee,*
- (b) where that person is living with or wholly or mainly maintaining his or her spouse, that spouse, and*
- (c) a child or children;*

With respect to the “normal residence” of a qualified child, Article 13 [6] of the Regulations provides:

*Notwithstanding the provisions of sub-article (4), a qualified child resident with one parent who is living apart from the other parent and who is not claiming or in receipt of benefit or assistance shall be regarded as residing with the other parent if that other parent is contributing substantially to the child’s maintenance.*

For the purpose of Article 13[6] above, Article 13[1] provides that “benefit or assistance” shall not include guardian’s payment (contributory), death benefit by way of orphan’s pension, guardian’s payment (non-contributory), one-parent family payment or supplementary welfare allowance).

### **Key Arguments:**

- The Respondent [the Department of Social Protection] contended that the Appellant's circumstances did not fall within the statutory meaning of "family" as set out in s. 227 of the Act. The Respondent asserted that s.227 of the Act provides that in the case of parents who are not living together, FIS can only be awarded to the parent with whom the child lives the majority of the time or, to the 'other parent' if that parent is "wholly or mainly" maintaining their former spouse and children.
- The Appellant contended that the Respondent's interpretation of the meaning of "family" was incorrect. Specifically, the definition of a "family" as provided in s. 227 [b] of the Act does not provide for the exclusion of persons from that definition in the event that they are not maintaining a former spouse; rather, the definition provides for the inclusion of a spouse "where" that spouse is being maintained by the claimant. Therefore, s. 227[b] of the Act does not apply in circumstances where a former spouse is not being maintained. The Appellant asserted that as he was not maintaining his former spouse, his "family" status for the purpose of FIS should be determined with reference to s. 227 [a] and [c], s. 227 [b] having no application.
- The Appellant asserted that his circumstances were consistent with the statutory definition of a "family" as he had qualified children within the meaning of s.227 [c] of the Act, children whose "normal residence" fell to be determined in accordance with s. 3 [5] of the Act and Article 13 [6] of the Regulations.
- The Appellant further asserted that in previous cases concerning precisely the same question of statutory interpretation; the matter had been decided in accordance with s. 227 [a] and [c] of the Act, and Article 13 [6] of the Regulations. Two such cases had been referred to in the Social Welfare Appeals Office Annual Report 2011.
- The Respondent rejected these arguments, asserting that Article 13 of the Regulations did not apply in this case.

### **Background:**

This case concerns a father of two children who applied for Family Income Supplement [FIS] on 17 October 2012. The claimant does not live with the other parent nor does he reside with his children. He maintains his children by way of monthly payments of €260. The children's mother is not in receipt of a social welfare payment other than Child Benefit. His application was refused by the Deciding Officer on the 24 October 2012 on the basis that the claimant was:

*Not wholly or mainly maintaining your spouse/partner/civil partner/cohabitant and children. Your children must be living with you full time to qualify for FIS*

Sligo MABS, on behalf of the Appellant, appealed this decision on 8 November 2012. In written submissions, Sligo MABS asserted that the Appellant's circumstances did in fact fall within the statutory provisions governing the award of FIS. Specifically, Sligo MABS asserted that the Appellant was a "family" within the meaning of s. 227 of the Act, and that the "normal residence" of his children should be determined with reference to Article 13 [6] of the Regulations. Sligo MABS further asserted that the matter should be decided in a manner consistent with previous decisions of Appeals Officers as referred to in the Social Welfare Appeals Office Annual Report 2011.

On 3 April 2014, an oral hearing was held and the Appeals Office issued its decision on 9 June 2014 disallowing the appeal for the following reason:

*I have carefully examined all the available evidence in this case. I have concluded that the appellant's situation does not fall within the definition of "family" as set out in Section 227 of the Act, and that Article 13 of the Regulations does not apply in this case.*

**Date appeal taken: 8 November 2012**

**Date of oral hearing: 3 April 2014**

**At hearing:**

The Appellant was represented at the oral hearing by an officer from Sligo MABS.

**Relevant evidence put forth by the Department of Social Protection at oral hearing:**

- The Department of Social Protection was not represented at the hearing.

**Relevant evidence put forth by Appellant at oral hearing:**

- The facts in this case were not in dispute; that is, the Department did not refute that the Appellant was in fact maintaining his children in the amount of €260 per month. These facts were supported by Affidavits from the Appellant and his former spouse. Nor was it disputed that the Appellant's employment circumstances were consistent with the conditions governing the award of FIS. The matter at issue solely concerned the interpretation of the statute with respect to the award of FIS in circumstances where parents live apart.
- Sligo MABS orally restated arguments that had already been advanced in written submissions, and provided supplemental documentation referring to the two previous cases which concerned precisely the same question of statutory interpretation, both of which had been allowed. The two previous cases had also been taken by MABS, and the supplemental documentation referred to those cases

in particular. In addition, reference was made to the cases in question in the Social Welfare Appeals Office Annual Report 2011. The Appeals Office report refers:

*However, following legal advice, the Department revised its guidelines and take the view that the normal residence rules are not appropriate in the case of FIS as the question of normal residence is dealt with in section 227 which defines a family for the purposes of that scheme. It is not clear to Appeals Officers that section 227 addresses the issue of normal residence in cases where parents live apart, and, in two cases that arose during the year, the question was decided in accordance with the normal residence rules set out in Article 13.*

**Appeals Officer's decision: 9/6/2014**

Appeal disallowed:

*I have carefully examined all the available evidence in this case. I have concluded that the appellant's situation does not fall within the definition of "family" as set out in Section 227 of the Act, and that Article 13 of the Regulations does not apply in this case.*

**Submission to the Chief Appeals Officer in accordance with s. 318 of the Act: 26/08/2014**

On 26 August 2014 Sligo MABS on behalf of the Appellant made a written submission to the Appeals Office requesting that the Chief Appeals Officer review the Appeals Officer's decision in accordance with s. 318 of the Act. Sligo MABS asserted that the Appeals Officer had erred in law in his interpretation of the relevant statutory provisions governing the award of FIS in circumstances where parents live apart.

Sligo MABS asserted that s. 227 of the Act provides that a family shall include a claimant, their spouse (where relevant), and a qualified child/ren, a spouse being a person who is wholly or mainly maintained by the claimant. If that spouse is not living with the claimant, or being so maintained, then they are not part of that "family" (for FIS purposes). Accordingly, in circumstances where the claimant's family does not include a spouse s. 227 [b] of the Act has no application, and the matter to be decided is whether or not the claimant's child/ren are "qualified" children who "normally reside" with the claimant. If yes, then the claimant's circumstances fall within the statutory meaning of "family" for FIS purposes.

In determining whether or not children are "qualified children", Sligo MABS asserted that reference should be made to the following statutory provisions:

Section 227 of the Act which provides:

*a "Child", in relation to a family, means a qualified child as defined in section 2(3) who normally resides with that family;.."*

Section 3(5) of the Act, which provides:

*Any question relating to the normal residence of a qualified child shall, subject to section 230(2), be decided in accordance with regulations made under that subsection."*

Article 13 [6] of the Regulations, which provides:

*Notwithstanding the provisions of sub-article (4), a qualified child resident with one parent who is living apart from the other parent and who is not claiming or in receipt of benefit or assistance shall be regarded as residing with the other parent if that other parent is contributing substantially to the child's maintenance.*

Sligo MABS contended that the Appellant's circumstances were consistent with the statutory meaning of a "family" for FIS purposes on the basis that his children were "qualified" children within the meaning of the Act, and that their normal residence fell to be decided in accordance with Article 13 [6] of the Regulations. Accordingly, as the Appellant was substantially maintaining his children<sup>1</sup>, and the children's mother was not in receipt of a "benefit or assistance", the children could be regarded as normally residing with the Appellant.

Sligo MABS further asserted that the matter should be regarded as one of settled statutory interpretation; that in two previous appeals on public record<sup>2</sup>, the Appeals Officers did not accept that in the case of parents who live apart the claimants must be maintaining their former spouse and children, or living with the children the majority of the time. Rather, the

---

<sup>1</sup> The meaning of "contributing substantially" is not defined in the statute. The Department have consistently regarded the payment of an amount equal to, or greater than, the increase for a qualified child, as meeting the threshold of being substantial. Departmental guidelines refer:

*"Contributing substantially" in this context is taken to mean at least the current equivalent of the IQC.*

**Monetary Contribution**

*If the claimant is making a monetary contribution towards the maintenance of each child of at least the equivalent of the current IQC, it can be accepted that s/he satisfies the "contributing substantially" condition. Where the claimant is not currently making such a contribution but the Deciding Officer is satisfied that s/he would do so if IQC were awarded (e.g. if the claimant had previously been making this level of contribution when last in a position to do so), it may also be accepted that the condition is fulfilled.*

<http://www.welfare.ie/en/Pages/Increase-for-a-Qualified-Child.aspx>. Accessed 17/03/2015.

<sup>2</sup> Page 15, Social Welfare Appeals Office Annual Report 2011.

Appeals Officers in the cases in question decided the matter with reference to Article 13 of the Regulations in particular.

Finally, Sligo MABS asserted that it was relevant that s. 9 of the Social Welfare and Pensions Act 2014, if commenced, would amend the definition of “family” as provided for in s. 227 of the Act. In accordance with the amended definition, a claimant in the Appellant’s circumstances would not be eligible for FIS and the amended statutory provisions would in fact be consistent with the Department’s interpretation. Sligo MABS asserted that the amendment to s. 227 of the Act effectively confirmed the Appellant’s position, as an amendment to the statute would not be required if the Department’s current interpretation was correct<sup>3</sup>.

**Date of final Decision (Appeals Officer’s Revised Decision): 10/11/2014**

*The appeal is allowed.*

**Appeals Officer’s reasoning and conclusions:**

*I have carefully re-examined all the available evidence in this case. I have concluded that under current legislation the appellant’s situation does constitute a “family”. I have also concluded that is [sic] appropriate to determine the normal residence of the children in accordance with Rule 6, article 13, S.I. 142 of 2007.*

*Rule 6 states that “a qualified child resident with one parent who is living apart from the other parent and who is not claiming or in receipt of benefit or assistance shall be regarded as residing with the other parent if that other parent is contributing substantially to the child’s maintenance.”*

*In this case the evidence would indicate that the children’s mother is not claiming or in receipt of benefit or assistance as set out in Parts 2 or 3 of the Act. Therefore the question is whether the appellant is contributing substantially to their maintenance.*

*The appellant has stated that he contributes €30 per week for each child and that this exceeds the sum of €29.80 per week which the Department deems sufficient for the upkeep of a child - being the amount of increase for a dependent child. The appellant has also stated that he incurs other substantial costs to maintain a household suitable for the accommodation of the children when they stay with him.*

*I revise the previous decision and the appeal is allowed.*

---

<sup>3</sup> At the time of writing, 07/06/2014, s. 9 of the Social Welfare and Pensions Act 2014 had not been commenced. If reading this document after this date it is important to check if s. 9 as referred has been enacted.

**Observations:**

This case concerned a question of statutory interpretation only. Sligo MABS advanced an interpretation that was consistent with the Department's position prior to 2009, and previous legally binding decisions made by Appeals Officers. While there is no system of precedent in the case of Social Welfare Appeals, in matters concerning statutory interpretation in particular, there should be legal certainty where possible in order that the public know the rules applicable to a particular scheme.

Therefore, in circumstances where legally binding decisions have been made by Appeals Officers, decisions which are contrary to the statutory interpretation advanced by the Department, it seems only reasonable that the Department review their position in order that a 'correct' statutory interpretation is settled. In so doing the Department should either change their interpretation to one that is consistent with that of the Appeals Office; or alternatively, challenge the Appeals Officers decisions by way of pleadings to the Chief Appeals Officer under s. 318 of the Act , and/or referring the matter to the High Court on a point of law.

At present, the Department's interpretation of statute governing the award of FIS in circumstances where parents live apart is entirely at odds with decisions made by the Appeals Office. In this regard, CLM have been advised that at the time of writing, 08/06/2015, a total of 11 cases taken by Money Advisors concerning precisely the same question of statutory interpretation have been allowed by the Social Welfare Appeals Office.

The correctness of the Appeals Officer's interpretation of the statute is made more certain by the fact that in 2014 legislation was passed to amend the relevant statutory definition of "family" for FIS purposes. This indicates that the Department have been implementing an incorrect interpretation of the statute for a considerable period of time, with the effect that an unknown number of potentially eligible claimants are unlikely to have applied for a payment, let alone appealed decisions made by the Department. More specifically, it was in 2009 that the Department changed their interpretation with respect to the relevant statutory provisions by amending all publicly available information. Prior to 2009, the Department's interpretation was consistent with that advanced by MABS in this case and others.

Finally, in this case, the Appeals Officer in disallowing the Appeal in the first instance did not provide a reasoned basis for taking a contrary view to that of previous Appeals Officers, other than to restate the Department's position. In revising his decision in favour of the Appellant, the Appeals Officer's reasoning confirmed the interpretation advanced by Sligo MABS therefore, it is not clear to CLM why the Appeals Officer elected to reject the Appeal in the first instance.

In this case, it took the Appellant two years before it was decided that he was eligible for FIS. In view of the fact that this matter concerned an issue of statutory interpretation that had

previously been decided by the Appeals Office it is difficult to find a reason to warrant such a protracted appeals process. Equally it is unacceptable that two organs of the state should present two entirely contrary interpretations of the same statutory provisions.

**For further information:**

[http://www.citizensinformation.ie/en/social\\_welfare/social\\_welfare\\_payments/social\\_welfare\\_payments\\_to\\_families\\_and\\_children/family\\_income\\_supplement.html](http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/social_welfare_payments_to_families_and_children/family_income_supplement.html) \*

<http://www.welfare.ie/en/Pages/Family-Income-Supplement.aspx>\*

\* Please note, the information provided on both the above websites is at odds with the interpretation of the Appeals Officer in this case and others. The Department's website refers:

*A separated parent can apply for FIS once he or she meets the qualifying conditions and*

*Is living with the children or*

*Is wholly maintaining the ex-spouse, ex-civil partner or ex-cohabitant with whom the children are living*

*Wholly maintaining means that maintenance paid by you, the FIS applicant, must be the main income of your ex-spouse, ex-civil partner or ex-cohabitant. Your former spouse or partner cannot have more than €100 a week income in their own right and cannot be married, in a civil partnership or cohabiting.*

It is also important to check whether or not s. 9 of the Social Welfare and Pensions Act 2014 has been commenced. Once commenced, a claimant in the Appellant's circumstances as set out above would not be entitled to claim FIS unless he was maintaining his spouse and children. The change in legislation should only apply to claims made on or after the date of commencement.

For **more information**, contact us at:

Community Law and Mediation Northside,

Northside Civic Centre, Bunratty Road, Coolock, Dublin 17

E: [info@communitylawandmediation.ie](mailto:info@communitylawandmediation.ie) | W: [www.communitylawandmediation.ie](http://www.communitylawandmediation.ie)

T: 01 847 7804