

Casebase Number: G0116

**Thematic Note on SWAO Case
Studies:
Right to Reside and Habitual
Residence Condition**



Community Law and Mediation

Northside Civic Centre

Bunratty

Road

Coolock

Dublin 17

Period of Analysis: 2009-2020

Theme: Right to Reside and Habitual Residence Condition

Period of Analysis: SWAO Annual Reports 2009-2020

Keywords: Habitual Residence Condition, Right to Reside

Casebase No. Case G0116

Summary of the relevant law:

The term "habitually resident" is not defined in Irish law. In practice it means that you have a proven close link to Ireland. The term also conveys permanence - that a person has been here for some time and intends to stay here for the foreseeable future.

The legislation providing for the habitual residence condition is contained in Section 246 of the Social Welfare Consolidation Act 2005 (as amended). However, Deciding Officers and Designated Persons must also have regard to S.I. No. 548/2015 - European Communities (Free Movement of Persons) Regulations 2015. , which deals with the right of residence for EU/EEA citizens and their families. Habitual residence in Ireland is a condition that you must satisfy for certain social welfare payments , for example Child Benefit. This condition took effect from 1 May 2004 and affects all applicants regardless of nationality.

With all social welfare payments in Ireland, you must satisfy the rules for each scheme to qualify.

Your spouse, civil partner or cohabitant and any dependent children you have are not required to satisfy the habitual residence condition in their own right. So if you apply for a social welfare payment only you, the applicant, has to satisfy the habitual residence condition.

Proving you are habitually resident relies heavily on fact. If you have lived in Ireland all your life, you will probably have no difficulty showing that you satisfy the factors which indicate habitual residence.

To satisfy the Habitual Residence Condition (HRC) you must:

Have the right to reside in the State **AND**

Show that you are habitually resident, having regard to all of your circumstances, including in particular the following which are set out in the legislation:

- the length and continuity of your residence in Ireland or in any other particular country
- the length and purpose of any absence from Ireland
- the nature and pattern of your employment
- your main centre of interest **AND**
- your future intentions as they appear from all the circumstances

These are sometimes called the “five factors”.

Who has the right to reside?

People who have a right to reside include:

- Irish nationals have a right of residence in Ireland;

- UK nationals coming in from the Common Travel Area (CTA) also have a right to reside here under the CTA agreement;
- EEA nationals who are employed or self-employed in Ireland have a right to reside;¹
- non-EEA nationals who have a residency or work permit to legally reside and work in the State, provided that there are no restrictions attached to that residency or work permit.

Permission to reside will generally be evidenced by an appropriate immigration stamp in the person's passport, a letter of authorisation or a Certificate of Registration issued by the Garda National Immigration Bureau (GNIB), that is a GNIB card.

Key grounds of appeals by appellants:

The majority of the appeals are brought on the basis that the deciding/appeals officer erred in applying the correct legislation and/or legal grounds and erred in finding that the conditions of HRC were not met.

Observations on appeal outcomes:

Given that the majority of the appeals are brought on the basis that the deciding officer / appeals officer erred in finding that the criteria for 'habitual resident' was not been met, the appeals reported below focus principally on how the conditions of 'habitually resident' must be met and the application of the correct legislation.

In accordance with Section 246 of the 2005 Act establishing habitual residence is a two stage process which firstly requires that the person has a right to reside in the State. If it is established that the person has a right to reside, an assessment of their situation under 5 factors is carried out to determine their centre of interest and future intentions.

The reports below suggest that appellants are usually unsuccessful where they cannot establish a right to reside or on the basis of fact that they don't fall under other factors to allow them to exercise this right. They further show that the majority of decisions may fall on the factual matrix of the particular case and the particular circumstances relevant to the person at issue.

Relevant Case Studies of the SWAO Annual Reports 2009-2020

A.	2009	
1.	N/A	
B.	2010	
1.	2010/01 Child Benefit - oral hearing	Question at issue: whether the appellant may be deemed to have been habitually resident in the State prior to January 2009 for purposes of her claim to Child Benefit.
C.	2011	
1.	2011/01 One Parent Family Payment – summary decision	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to One Parent Family Payment.
2.	2011/02 Disability	Question at issue: Whether the appellant may be deemed to

¹ Regarding the right to reside of EU workers, see Casebase Report G0113 and *Georgeta Voican v. Chief Appeals Officer, Social Welfare Appeals Office, Minister for Employment Affairs and Social Protection, Ireland and the Attorney General* [2019] No.748 J.R

	Allowance – summary decision	meet the Habitual Residence Condition (HRC) for purposes of her claim to Disability Allowance.
3.	2011/03 Domiciliary Care Allowance – summary decision	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Domiciliary Care Allowance.
4.	2011/04 Child Benefit – summary decision	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit.
5.	2011/05 Disability Allowance – summary decision	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of his claim to Disability Allowance.
6.	2011/06 Child Benefit – summary decision	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) when she made her claim to Child Benefit in 2010.
7.	2011/07 One Parent Family Payment & Supplementary Welfare Allowance – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of claims to One Parent Family Payment and Supplementary Welfare Allowance (Basic Income).
8.	2011/08 Jobseeker’s Allowance – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of his claim to Jobseeker’s Allowance. There were two claims for Jobseeker’s Allowance disallowed on grounds of habitual residence not being satisfied. The initial claim was made in 2009 and the subsequent claim had a date some fourteen months later in 2010.
9.	2011/ 09 Child Benefit – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit.
10.	2011/10 Disability Allowance – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of his claim to Disability Allowance.
11.	2011/11 Jobseeker’s Allowance – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Jobseeker’s Allowance.
12.	2011/12 Child Benefit – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit.
13.	2011/13 State Pension (Non-Contributory) – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to State Pension.
14.	2011/14 Child Benefit – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit
15.	2011/15 Supplementary Welfare Allowance (Basic Income) – oral hearing.	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Supplementary Welfare Allowance.
16.	2011/16 Child Benefit – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) before August 2008 for purposes of her claim to Child Benefit.
17.	2011/17 Child Benefit –	Question at issue: Whether the appellant may be deemed to

	oral hearing	meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit.
18.	2011/18 State Pension (Non-Contributory)	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of his claim to State Pension.
19	2011/19 Jobseeker's Allowance – oral hearing	Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Jobseeker's Allowance.
D.	2012	
1.	N/A	
E	2013	
1.	N/A	
F.	2014	
1.	N/A	
G.	2015	
1.	2015/01 Child Benefit Oral hearing	Question at issue: Habitual residence
H.	2016	
1.	2016/02 Child Benefit Summary decision	Question at issue: Habitual residence
2.	2016/24 – Jobseeker's Allowance Oral hearing	Question at issue: Eligibility (Habitual Residence Condition)
3.	2016/26 – Jobseeker's Allowance & Supplementary Welfare Allowance Summary decision	Question at issue: Eligibility (right to reside)
4.	2016/318/35 Jobseeker's Allowance Section 318 review	Question at issue: Habitual residence
I.	2017	
1.	2017/01 Child Benefit Oral Hearing	Question at issue: Habitual residence condition
2.	2017/25 Disability Allowance - Summary Decision	Question at issue: Eligibility (habitual residence condition)
3.	2017/39 Jobseeker's Allowance Oral Hearing	Question at issue: Eligibility (habitual residence condition)
4.	2017/318/ 59 Child Benefit	Question at issue: Habitual residence
5.	2017/318/60 Child Benefit	Question at issue: Right to reside in the State
J.	2018	
1.	2018/01 Child Benefit Summary Decision	Question at issue: Eligibility (habitual residence condition)
2.	2018/22 Disability Allowance Summary Decision	Question at issue: Eligibility (Medical Grounds and HRC)
3.	2018/42 Jobseeker's Allowance - Summary Decision	Question at issue: Eligibility (habitual residence condition)

4.	2018/43 Jobseeker's Allowance - Oral Hearing (not heard)	Question at issue: Eligibility (habitual residence condition)
5.	2018/318/62 Supplementary Welfare Allowance	Question at issue: Habitual Residence Condition
K.	2019	
1.	2019/02 Child Benefit Summary Decision	Question at issue: Backdating (Habitual Residence Condition)
2.	2019/25 Disability Allowance Summary Decision	Question at issue: (Eligibility – HRC right to reside)
3.	2019/26 – Disability Allowance - Oral Hearing	Question at issue: (Eligibility – HRC right to reside)
4.	2019/55 State Pension Non-Contributory - Summary Decision	Question at issue: Eligibility: Right to Reside/Habitual Residence
5.	2019/318/62 Disability Allowance	Question at issue: Eligibility (Right to Reside in the State)
L.	2020	
1.	2020/02 Child Benefit Summary Decision	Question at issue: Eligibility (habitual residence condition)
2.	2020/20 Disability Allowance - Summary Decision	Question at issue: Eligibility (habitual residence condition)
3.	2020/21 Disability Allowance - Oral Hearing	Question at issue: Eligibility (habitual residence condition)
4.	2020/35 Jobseeker's Allowance Summary	Decision Question at issue: Eligibility (habitual residence condition)
5.	2020/318/67 Jobseeker's Allowance	Question at issue: Eligibility (right to reside in the State)

A. 2009 - N/A

B. 2010

1. 2010/01 Child Benefit – oral hearing

Question at issue: whether the appellant may be deemed to have been habitually resident in the State prior to January 2009 for purposes of her claim to Child Benefit.

Background: The appellant came to Ireland from the Congo, on a date in 2004, and sought asylum. In February 2009, she was given permission to remain in the State until 2012. She made a claim for Child Benefit in April 2009 which was awarded with effect from the date that her permission to remain was granted. Her appeal refers to a request for arrears of payment on grounds that she met the Habitual Residence Condition (HRC) before that date.

Oral hearing: The appellant advised that she came to Ireland with her three children in

2004 and that she has remained in the State continuously since then. She said she had left the Congo as her children were being ostracized and life had become unbearable. She reported that their father was from Rwanda and said that anyone in the Congo that looked Rwandan was despised. She said she came to Ireland as a friend had told her she would be safe here. She went on to say that she no longer had contact with the father of her children and that, as far as she was aware, he had returned to Rwanda. She reported that her mother still lives in the Congo but that she cannot go back to visit her. She said her life was now in Ireland. The appellant said she had been working as an administrator on a FÁS scheme since October 2009; before that, she had worked in the same position for about a year on a voluntary basis. She said that her children were now in school here and doing very well. She described efforts she had made to integrate into the local community.

Consideration of the Appeals Officer: The Appeals Officer referred to the legislation which provides that applicants to Child Benefit must be habitually resident in the State in order to qualify for payment. In determining whether a person is habitually resident in the State, account has to be taken of the following: • the length and continuity of residence in the State or in any other particular country; • the length and purpose of any absence from the State; • the nature and pattern of the person's employment; • the person's main centre of interest, and • the future intentions of the person concerned as they appear from all the circumstances. In terms of the duration of residence, the Appeals Officer noted that the appellant had been living in Ireland for almost six years, more than four of which were as an asylum seeker. In relation to any absence from the State, he was satisfied that she had not left Ireland since she came here. In regard to employment, he noted that she had been working for over a year and had worked previously as a voluntary worker while she had not been allowed to take up employment. On the point of her main centre of interest, he was satisfied that her centre of interest was now in Ireland. He considered that it was more difficult to say where her centre of interest was when she first came to Ireland. While she had no obvious ties to Ireland at that time, it appeared also that she could not easily have returned to the Congo which had been her centre of interest up to then. Concerning her future intentions, he was satisfied that it had been her intention to stay from the time she arrived in Ireland. He considered that it was not reasonable to say that she had established a centre of interest in Ireland on her immediate arrival; while he accepted that she had cut her ties with the Congo, he viewed her as having had no significant ties of any kind to Ireland at that time. However, he considered that it was clear from her actions over the following years in relation to employment, her children attending school and her willingness to integrate into the community, that she had established a centre of interest in the State. Her position was recognised by granting her leave to remain here until 2012. The Appeals Officer examined a submission from the appellant's solicitor which made three main points on her behalf. Firstly, he argued that that she had suffered financial hardship due to the delay in processing her refugee claim and that it would have been reasonable to expect her claim to have been dealt with within six to twelve months. Secondly, he stated that the appellant would give evidence of similar cases where arrears of payments were made. Thirdly he made the point that the legislation outlined in the Social Welfare and Pensions (No. 2) Act, 2009, does not apply in this case. In relation to the delay in processing the appellant's application for refugee status, the Appeals Officer noted that there was no evidence as to the reason for the delay. However, he considered that the time taken in this case did seem unreasonable, although the solicitor's contention of six to twelve months seemed somewhat optimistic. While acknowledging that he did not have full details of the application, he suggested that processing within two years would be a more reasonable expectation. In relation to the contention that other applicants in similar circumstances had received arrears of payments, he noted that there was no evidence of

this on file, nor had any evidence of this been produced at the oral hearing. He drew attention to the fact that the legislation on HRC, as provided for in the Social Welfare and Pensions (No. 2) Act, 2009, did not apply in this case as the appellant's application for Child Benefit was received in the Department in April 2009, while the legislation came into effect from 21 December 2009. Accordingly, the only issue to be determined was the date from which the appellant could be considered to be habitually resident. While the Department had taken the date from which she was allowed to remain in the State, the Appeals Officer regarded this as unreasonable in view of all the other factors outlined, as well as the fact that her circumstances did not change in any other way on that date. He concluded that while habitual residence has to be established with reference to the five factors outlined, Section 246 of the Social Welfare Consolidation Act, 2005 must also be considered; this contains a presumption that until the contrary is shown, a person is not habitually resident in the State unless they have been present in the State or in any other part of the Common Travel Area for a continuous period of two years. He was not satisfied that the appellant had rebutted this presumption for that two year period. He noted, however, that this presumption no longer applies after two years. In view of the fact that by that time, the appellant had been in the State continuously since she arrived and could reasonably have expected a decision on her application for asylum by that time, the fact that she had later shown her intention to establish a pattern of employment and to integrate into the local community, he concluded that she could be regarded as habitually resident in the State with effect from 1 January 2007.

Outcome: Appeal partially allowed.

C. 2011

1. 2011/01 One Parent Family Payment – summary decision

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to One Parent Family Payment.

Background: The appellant was living in Ireland for four years at the time she made a claim for One Parent Family Payment. The Deciding Officer determined that she did not meet HRC and her claim was disallowed.

Consideration of the Appeals Officer: The Appeals Officer addressed each of the points cited by the Deciding Officer, as follows.

Length of time in Ireland: The Appeals Officer noted that there was evidence to confirm the date of the appellant's arrival in Ireland but that a question had been raised as to her continued residence during a (specified) period of four months in 2009. He noted also that the Social Welfare Inspector had not queried her means of support during that time. In the absence of any evidence to the contrary, he accepted that she had been in Ireland during the period at issue and, consequently, that she had been continuously resident since her arrival. In that context, he considered that residence in the State since 2007 would point to habitual residence. **Her centre of interest is not Ireland:** The Appeals Officer noted that the appellant's daughter resided with her and was registered at school in Ireland. In his opinion, this indicated an intention to remain in Ireland for the foreseeable future and would confer an established centre of interest in the State. **She has no family ties to Ireland; only her daughter lives here with her:** The Appeals Officer considered that the appellant's submission had dealt with her relationship with her parents and the fact that there was no longer contact between them. In addition, he noted that she was not married

to the father of her child and that the Polish Courts had not given him parental authority over the child, enabling her to reside here without obligations as to access. He considered that the evidence in the case pointed to the child's father no longer being part of the family. Property abroad: The Appeals Officer noted that the appellant denied that she had any property abroad and that this had been accepted by the Social Welfare Inspector. In addition, the Inspector had recorded details of an Irish bank account held in the appellant's name and reported that she had no other accounts. Future intentions to remain in Ireland are short term: In addition to his views as to her centre of interest, the Appeals Officer noted that the appellant had applied for Family Income Supplement (FIS), which he took to indicate a resumption of employment and an intention to remain here for a further period. No established record of employment in Ireland: The Appeals Officer noted that the Inspector had reported that the appellant had some 20 to 21 months of employment. Accordingly, he could not accept the Deciding Officer's contention in this regard. In conclusion, the Appeals Officer was satisfied that the appellant could be considered to be habitually resident in Ireland.

Outcome: Appeal allowed

2. 2011/02 Disability Allowance – summary decision

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Disability Allowance.

Background: The appellant's mother came to live and work in Ireland in 2003 and was granted a Stamp 4 visa. The following year, she was joined by her husband and children, one of whom was the appellant. As she was still a minor, the appellant's name was added to her mother's visa. Both of the appellant's parents were in employment and her mother applied for long-term residency (which was granted) and for Irish citizenship, which was being processed at the time the appeal was determined. Her mother had been in receipt of Domiciliary Care Allowance (DCA) in recognition of the level of disability and the extent of care required by the appellant. On reaching age 16 years, the appellant was required to apply for her own visa; she did so and was granted a Stamp 2A as she was still at school. She made a claim for Disability Allowance. While she was deemed to have met the medical qualifying criteria, her claim was disallowed on grounds that she did not meet HRC.

Appeal submission: The appellant's mother, supported by a social worker from the disability support group to which her daughter belonged, asserted that her daughter met HRC as she had been living in the State since she was 10 years old. She argued that it was inconceivable that a sixteen year old with an intellectual disability would be deported from Ireland while her mother continued to live and work here. She advised that she was liaising with the INIS as to the most appropriate visa for her daughter in view of her disability.

Consideration of the Appeals Officer: The Appeals Officer addressed each of the points cited by the Deciding Officer, as follows. 16 years old – no employment record in the State: The Appeals Officer noted that the appellant attended a school for children with special needs. In view of her age, quite apart from her disability, she considered that the appellant could not be expected to have an employment record. Main centre of interest not established in the State: The Appeals Officer took note of the fact that the appellant had been resident in the State since she was 10 years of age, that her mother had been in receipt of DCA in recognition of the care provided for her, that she was living continuously in the

State with her parents and siblings, that she had an intellectual disability and received support from the clinical team at the school she attended. She held that it had been established clearly that her only centre of interest was in the State. Claimant holds Stamp 2A residency permit which permits the holder to remain in Ireland to pursue a course of studies on condition that the holder does not enter employment, does not engage in any business or profession, has no recourse to public funds and does not remain later than a date specified: The Appeals Officer observed that the appellant's residence status was relevant in establishing that she had a right to reside in the State and, therefore, that the question as to habitual residence might be determined. She could see no basis, however, for the Deciding Officer's reference to that status in outlining his reasons for concluding that she could not be deemed to meet HRC. Nature and purpose of residence does not support HRC approval: The Appeals Officer considered that the meaning of this phrase in relation to the decision before her was unclear. Intend to rely on State supports and benefits: The Appeals Officer observed that the basis for this conclusion was not clear and lacked any reference to the provisions of social welfare legislation. Consequently, she considered that it could not be accepted as a reason to support the decision in the case. Evidence available does not substantiate habitual residence: Again, the Appeals Officer considered that this statement could not be accepted as a reason to support the decision in the case. In conclusion, and paying particular attention to the duration and continuity of residence and a clearly established centre of interest in the State, the Appeals Officer considered it to be beyond doubt that the appellant met the habitual residence condition.

Outcome: Appeal allowed.

3. 2011/03 Domiciliary Care Allowance – summary decision

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Domiciliary Care Allowance.

Background: The appellant was resident in Ireland along with her spouse and family prior to her making a claim for Domiciliary Care Allowance. Her husband had been engaged in insurable employment in the State during 2006 and 2007. She came to Ireland in the following year to join him. Her first child is attending school here and her second child was born here in 2009.

Consideration of the Appeals Officer: The Appeals Officer observed that in the determination of a person's habitual residence in the State for social welfare purposes, account is taken of those factors (as outlined above) in accordance with the governing legislation. He took account of the fact that the appellant's husband had been resident in the State during 2006 and 2007 and that he had registered 60 weeks of insurable employment. He noted that the appellant and their daughter had come to reside with him in Ireland and that, since then, the household unit had resided together in the State. He noted also that the appellant's husband had claimed and received payment of Jobseeker's Benefit from December 2008 to December 2009, at which point he had made a claim for Jobseeker's Allowance. Since that date, he had been in receipt of Basic Supplementary Welfare Allowance and Rent Supplement payments, while the appellant had been in receipt of Child Benefit since a date in 2008. Having considered the available facts and evidence in the case, the Appeals Officer considered that at the time of her claim for Domiciliary Care Allowance in November 2010, the appellant had already established Ireland as her place of habitual residence along with her husband and family. Accordingly, he concluded that the appeal should succeed and that her entitlement to Domiciliary Care

Allowance fell to be re-examined with effect from the date of claim, having regard to the other qualifying conditions under the scheme.

Outcome: Appeal allowed

4. 2011/04 Child Benefit – summary decision

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit.

Background: The appellant arrived in Ireland late in 2007 accompanied by one child, her spouse having preceded her earlier in that year. He commenced employment shortly after his arrival. His Pay Related Social Insurance (PRSI) record confirmed that he continued in employment. He was also registered as a fulltime student on a FETAC course between 2008 and 2009 and again between 2010 and 2011. He made a claim for Child Benefit on a date in 2008 but the application form was returned to him with advice that the claim must be made by the child's mother. The appellant gave birth to her second child in 2009 and made a claim for Child Benefit in respect of both children from a subsequent date.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant's spouse was a qualified person in respect of Family Benefits under Regulation (EEC) No.1408/71 21 with effect from the date of his commencement of employment and up to and including a date in 2009 when he completed the second year of the FETAC course, as he was insurably employed while enrolled for a relevant course of education and for which period HRC did not apply and no work permit was required. Accordingly, he concluded that the appellant was entitled to apply for Child Benefit at that time. The Appeals Officer noted also that, having applied within the prescribed time, i.e. within one year of becoming a qualified person, Child Benefit was payable to him with effect from the month following that in which he became a qualified person. The Appeals Officer held that from March 2009 to March 2010 (inclusive) the appellant's spouse was no longer a qualified person as he was not a registered student and required a work permit in order to continue to qualify under Regulation (EEC) No. 1408/71. He noted, however, that the appellant herself became the qualified person for Child Benefit purposes at that stage and that she was the one to whom HRC applied. In examining this issue, he referred to the fact that her spouse had been residing in Ireland for more than two years at the time the claim was made, with a substantial record of employment in Ireland (both legal and illegal). The appellant herself had been residing in Ireland for some 16 months at the time. Having examined the overall circumstances, he found that the appellant could be deemed to be habitually resident from March 2009. Accordingly, the appeal was successful and the Appeals Officer indicated that payment should issue with effect from the first date of entitlement (when her spouse became a qualified person) in respect of one child and from the month following the birth of the second child in respect of two children.

Outcome: Appeal allowed

5. 2011/05 Disability Allowance – summary decision

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of his claim to Disability Allowance.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant's

wife, with whom he resides, had already (by way of previous appeal decisions) been recognised as being habitually resident in the State for purposes of her claims for both Child Benefit and Domiciliary Care Allowance. In those circumstances, by association and as a matter of consistency, the Appeals Officer held that the appellant must be deemed to meet HRC requirements with effect from the date of his claim for Disability Allowance. Accordingly, he concluded that he may be entitled to payment from that date, having regard to the other conditions governing entitlement to payment under that scheme.

Outcome: Appeal allowed.

6. 2011/06 Child Benefit – summary decision

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) when she made her claim to Child Benefit in 2010.

Background: The appellant, a Thai national, came to live in Ireland in 1995. She went back to live and work in Thailand in 2003 and returned in 2010. She held a Stamp 4 visa, valid for two years until a date in 2012.

Consideration of the Appeals Officer: The Appeals Officer examined the appeal with reference to the five factors outlined in the governing legislation, as follows. Length and continuity of residence in Ireland or in any other particular country: He noted that the appellant was born in Thailand, came to live Ireland in 1995, and was allocated a Personal Public Services (PPS) number in 2010. Length and purpose of any absence from Ireland: He noted that she left the State in 2003 to return to Thailand, where she gave birth to her daughter and that she returned to Ireland following an absence of some seven years. Nature and pattern of employment: He noted that the appellant had no employment history in the State. Applicant's main centre of interest: He took note of the fact that the appellant lives in Ireland with her seven-year-old child, who attends school here. The child holds an Irish passport as her father is Irish, although he and the appellant are divorced. He noted that the appellant asserted that she had no properties abroad but that she retains a bank account in Thailand. Future intentions of applicant as they appear from all the circumstances: He observed that the appellant had stated that she intends to reside permanently so that her daughter may complete education to university level. The Appeals Officer observed that the appellant was less than two years in the State at the time she made her claim to Child Benefit. Accordingly, there is a rebuttable presumption that she was not habitually resident. He noted that she had not arranged employment before coming to Ireland and had not worked since her arrival. In addition, he referred to the lack of evidence to indicate a history of employment during her earlier stay. The Appeals Officer noted that in 2003 she had returned to live in Thailand for a period of seven years, during which time she gave birth to and raised her child, while helping her parents on their farm. He opined that it was clear that throughout that period her centre of interest was Thailand. The Appeals Officer referred to the lack of evidence to indicate that the appellant had any contact with the father of her child. He noted that in her letter of appeal she had stated that the only reason for her return to Ireland was to educate her daughter. Taking all of the available evidence into account, the Appeals Officer considered that the appellant had not rebutted the presumption that she was not habitually resident in the State at the date of her Child Benefit claim: she was some six months in the State after an absence of seven years spent at home with her parents in Thailand; she had no history of employment in the State and had made no arrangements to secure employment before she came; her links to Ireland were not particularly strong; she had not established a centre of interest in the State, and

there was no evidence to show that her stated intention to remain long-term while her daughter was educated was more than aspirational. Accordingly, he held that her appeal could not succeed.

Outcome: Appeal disallowed.

7. 2011/07 One Parent Family Payment & Supplementary Welfare Allowance – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of claims to One Parent Family Payment and Supplementary Welfare Allowance (Basic Income).

Background: The appellant, a Traveller, had been living in the UK. In 2010, she and her three young children returned to live with her extended family in Ireland. She made a claim to Supplementary Welfare Allowance (Basic Income) which was rejected on HRC grounds. The reasons cited for that decision were that she had not supplied sufficient information as to why she left the UK, that her only status in Ireland was that of an EU Citizen and that she had declared herself to be welfare dependent by stating that she was not available for work as she was caring for her children. A claim made subsequently to One Parent Family Payment was rejected on the same grounds.

Parties attending oral hearing: The appellant and a Community Development Officer.

Report of oral hearing: The appellant confirmed that she was a Traveller, and a member of a community which has a long history of a connection to the particular area in Ireland where they live. She described her family connections with the area going back generations. She said she was born there but moved to England with her parents as a child. She reported that they were frequent visitors to the area for family occasions over the years and that they lived in a caravan and moved from place to place both here in Ireland and in the UK. She said she had received little formal education as the family was always on the move. The appellant recalled living with her partner for a number of years; they have three children under the age of 10 years. She reported that they moved from place to place in a mobile home, and said that her children did not remain in any one school for long. She indicated that her partner was prone to violence and that there had been some problems over the years, at which times she had relied on her parents and family for support. However, she said that her parents and wider family had moved back to Ireland in the last few years, and she was left with no immediate family in England. She drew attention to a report which she had submitted, written by a police unit in the UK, which made reference to an assault which she had sustained. She stated that this had been carried out by her partner and his family and that, as a result, she had fled the UK and joined her family in Ireland. She submitted evidence that her children were enrolled in the local school, and that she was staying in a local authority halting site but was not paying the rent. She said that she had no income and was dependent on her family and the local St Vincent de Paul charity. She confirmed that she had been in receipt of welfare payments in the UK but that her Income Support and Child Benefit had ceased. The Community Development Officer spoke of his concern for the appellant's welfare and that of her children. He advised that the HSE social worker assigned to the case was anxious to support the appeal but had been unable to attend the hearing. He asked that the Appeals Officer might contact him. He reported that the appellant was in a dire situation and said that if she could get a better life in the UK, she would have returned there months ago. In conclusion, he submitted that her continued residence here in very poor circumstances was evidence of her commitment to

remain and create a stable home.

Further evidence: In response to the request made at oral hearing, the Appeals Officer spoke on the phone with the social worker in the case. He confirmed being involved with the family and described the difficulties they encountered, including having insufficient food due to lack of money.

Consideration of the Appeals Officer: The Appeals Officer noted that in the case of both claims, the reasons for concluding that the appellant did not meet HRC relied strongly on the short duration of her residence in the State and her lack of employment. He made reference to the five criteria outlined in the legislation, as follows. Length and continuity of residence in the State or another State: The Appeals Officer observed that where a person is resident for only a short time in a particular country, then the nature of that residence must be examined to determine if the facts indicate that they have changed their 24 habitual residence to the new country. He noted that a short period in a new country does not automatically mean a person cannot be habitually resident there; the rebuttable presumption provided for in legislation envisages that a person may make a case to say they are habitually resident from the time of first taking up residence. Having examined the facts of this case, he noted that the appellant's children were in the State and were enrolled in school, that the appellant had extensive extended family and strong familial connections to the area where she was living, and that she had a proven reason for moving from the UK and settling there. He observed that her traditional lifestyle did not tie her to a particular area: a person in her situation can move from one country and quickly establish residency in another as she has no property or material ties anywhere. In this case, he considered that the presence here of her children and extended family was extremely important and indicated that she was habitually resident notwithstanding the relatively short duration of her time here. The length and purpose of any absence from the State: The Appeals Officer noted that the evidence provided at the hearing indicated that the appellant has resided here continuously since her arrival. He noted also that the evidence indicated frequent visits to Ireland, over the years, due to family connections. However, he considered that the evidence presented at the hearing indicated that the appellant was not here for a short visit as may have been case in the past. The nature and pattern of a person's employment: The Appeals Officer noted that the appellant was not in a position to take up employment and that references had been made to this fact in both decisions before him. However, he took the view that there have always been people who come to the State on account of life events but are not in a position to work for a variety of reasons, and that due regard must be given to their overall circumstances when determining if their residence is habitual. He took the view that if a person had never worked in the country in which they lived formerly, it was an overly harsh interpretation of the HRC legislation to conclude that they were not habitually resident in this State by virtue of not having worked here. In such cases, he considered that less weight should be given to a person's employment status, where it is evident that there are valid reasons for their absence from the labour market; the person's main centre of interest, as evidenced by the other considerations governing their lives, takes on more significance. The person's main centre of interest: Having heard the appellant's evidence at the hearing, the Appeals Officer concluded that her centre of interest was in Ireland, and that her strong family ties with the area were indicative of a stable and durable residence here. Future Intentions from all the available evidence: The Appeals Officer was satisfied on the basis of the evidence available that the appellant's future intentions were in Ireland. In all the circumstances, the Appeals Officer held that the appeal should succeed.

Outcome: Appeal allowed.

8. **2011/08 Jobseeker's Allowance – oral hearing**

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of his claim to Jobseeker's Allowance. There were two claims for Jobseeker's Allowance disallowed on grounds of habitual residence not being satisfied. The initial claim was made in 2009 and the subsequent claim had a date some fourteen months later in 2010.

Background: The appellant, a Polish national, came to this country in 2007. He returned to Poland some three months later, and came back to Ireland early in 2008. He took up employment with a construction company, and worked there to the end of that year. In his letter of appeal, he stated that he had resided continuously in the State since that time. He asserted that his centre of interest was in Ireland and stated that his closest family lived here. For his part, the Deciding Officer considered that the appellant's length and continuity of residence in Ireland did not support habitual residence; he had resided outside Ireland for most of his life; his centre of interest was not in Ireland; he had no established employment record in Ireland; his future intentions of remaining were considered short-term and, from the evidence provided, there was nothing to substantiate that he was habitually resident in the State. The appellant was in receipt of Supplementary Welfare Allowance (Basic Income and Rent Supplement) for four months in 2010 when payment stopped as he became a student.

Parties attending oral hearing: The appellant attended the hearing alone.

Report of oral hearing: At the outset, the issue was explained and an outline provided of all relevant documentation available to the Appeals Officer. The appellant confirmed the details as to his residence in the State. He reported that he had returned to Poland in 2007 to pursue a training course and to improve his educational achievements with the purpose of enhancing his employment prospects. He stated that he had returned to Ireland subsequently as his father had sourced employment for him with the construction company where he worked. He reported that on his return to Ireland he worked with that company for eight months until he was let go, through a downfall in business. The appellant advised that since returning to Ireland in 2008, he had not left the country. He stated that he had received Supplementary Welfare Allowance, as a former EU worker, for dates specified in 2009. He stated that, thereafter, he lived off some accrued savings and was supported by his parents, with whom he resides. He reported that he found work again in 2010 which lasted for some four months. He advised that he commenced a training course (FETAC Level 5) later that year and was hopeful of finding related employment once he completed his studies. The appellant referred to his family and advised that his father came to Ireland in 2004 to take up employment and his mother and brother followed some time afterwards. He reported that that both his father and mother were employed and that their intentions were to remain in Ireland indefinitely. He advised that the family had always rented accommodation whilst residing in Poland and that they did not own any property there. He stated that he had two other siblings residing with a relative in Poland whilst they complete their education and said that both were intent on coming to Ireland to join the rest of the family once their studies were complete. In conclusion, he submitted that his centre of interest was in Ireland and that his future intentions were to remain here indefinitely.

Consideration of the Appeals Officer: The Appeals Officer took into account the details

of the appellant's residence in the State, and was satisfied that he had been continuously resident since 2008. He considered that the appellant's return to Poland was for a temporary period, to pursue a course in education as he was unable, at that time, to find work here. He noted that his father and mother had established some permanence in Ireland and that the appellant had made meaningful efforts himself to integrate into the local community and establish a centre of interest in this country. He noted also his current participation on an educational course and his involvement with the local sports club. Having considered all the available evidence, he concluded that the appellant's centre of interest, at that time, had been established as being in Ireland and that his future intentions were to remain here indefinitely. He concluded that the appellant was habitually resident in the State for social welfare purposes and held that this decision should take effect from the date of the oral hearing, at which time the appellant might be deemed to have established habitual residence.

Outcome: Appeal partially allowed.

9. **2011/ 09 Child Benefit – oral hearing**

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit.

Background: The appellant, a Mauritian national, arrived in Ireland in 2007 with her two children to join her husband who had been in the country since 2006. Both the appellant and her husband were initially granted student (Stamp 2) visas and subsequently applied for and were refused refugee status. A statement from the Irish Naturalisation and Immigration Service (INIS) indicated that consideration was being given under Section 3 of the Immigration Act, 1999 as to whether they should be given Leave to Remain in the State or returned to their country of origin. The appellant had no employment record in Ireland but her spouse had a total of 249 paid PRSI contributions. There was no record of either of them having applied for any social welfare payment prior to her application for Child Benefit in 2010. The Deciding Officer had applied the five factors outlined in legislation to determine habitual residence and concluded that the appellant did not satisfy these criteria.

Parties attending oral hearing: The appellant and her husband.

Report of the oral hearing: The Appeals Officer outlined the criteria used in determining habitual residence for social welfare purposes. He referred also to the legislative provision which deemed that certain categories of persons could not be regarded as habitually resident for social welfare purposes, and he undertook to examine the legislation in this regard. The appellant confirmed the details as outlined above, although her husband stated that he had lost his job some time ago and that the family had been surviving on any casual / cash in hand work he could obtain such as gardening, or cleaning. They emphasised that their concern was for the wellbeing and rights of their children as they found it very difficult to provide for them. They also pointed out that they had never before applied for any social welfare payment for themselves despite the fact that the appellant's husband had lost his job. The appellant confirmed that there had been no change in their status from that outlined in the letter from the INIS. The appellant's written appeal submission was noted and, as it was agreed that all relevant issues had been discussed, the hearing concluded.

Consideration of the Appeals Officer: In examining this case, the Appeals Officer noted

the conclusions of the Deciding Officer and the appellant's appeal contentions, both written and oral, including those made in her written appeal submission. However, he concluded that the appeal fell to be decided under the applicable social welfare legislation. The Appeals Officer commended the fact that the appellant and her family had resided in Ireland independently for a number of years without any recourse to social welfare or other State aid. In this context, he noted that the Deciding Officer based his conclusions on the five factors outlined in legislation. Overall, given the appellant's duration of residence in Ireland, her husband's employment record ((albeit apparently partially illegal) and consequently their ability to maintain themselves in the years since their arrival, their ties to the community (including the children's attendance at local school) and their stated intentions, he indicated that he would disagree with the Deciding Officer and considered that, on balance, the appellant would satisfy the five factors. The Appeals Officer concluded, however, that the Deciding Officer had erred in considering the five factors without first determining if the provisions contained in subsections (5) to (10) of Section 246 of the Social Welfare Consolidation Act, 2005 [inserted by Section 15 of the Social Welfare and Pensions (No. 2) Act 2009] applied which, in his view, was the determining factor in the case. The appellant's application for asylum in the State had been refused and consideration was being given in relation to Leave to Remain under Section 3 of the Immigration Act, 1999. In this context, he noted that the Social Welfare Consolidation Act, 2005 states: • "The following persons shall not be regarded as being habitually resident in the State for the purpose of this Act (d) a person who has made an application under section 8 of the Act of 1996 which has been refused by the Minister for Justice, Equality and Law Reform;" [Section 246(7)]; and • "'Act of 1996' means the Refugee Act 1996" [Section 246(10)]. He noted that Section 8 of the Refugee Act, 1996 refers to an application for a declaration under the Act. As the appellant had been refused under this provision, he held that Section 246 (7) (d) as above applies and, accordingly, that the appeal must fail.

Outcome: Appeal disallowed.

10. 2011/10 Disability Allowance – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of his claim to Disability Allowance.

Background: The appellant came from South Africa to live in Ireland in 2006. He was in his teens at the time and travelled with his mother to join his father and brother, who had arrived here a year earlier. The appellant was in college and held a Stamp 2 visa when he sustained a traumatic injury, following an accident. He made a claim to Disability Allowance, which was disallowed on grounds that he did not meet the habitual residence condition.

Parties attending oral hearing: The appellant attended accompanied by his father.

Report of oral hearing: The Appeals Officer outlined the decision under appeal and those issues to which the Deciding Officer had regard in coming to his decision, as follows: - nature and purpose of his residence in Ireland at the time of application does not provide for approval of habitual residence - he has been granted permission to remain in Ireland as the dependant of an employed person - he holds a Stamp 3 permitting him to reside in Ireland as the dependant of his father who is working in Ireland - he is not permitted to enter employment while resident here on a Stamp 3 visa - he cannot be considered to be

habitually resident on the grounds under which he is permitted to reside in Ireland - his main centre of interest is not established in Ireland - the available evidence does not substantiate habitual residence. A discussion then ensued where the appellant confirmed the details of his arrival in the State, as outlined above. His father reported that they were in the process of applying for citizenship; that he and his other son had been recruited in South Africa to come and work for a company in Ireland; that he had been given a work permit for this purpose, and that his wife was working full time. He reported that the appellant had been in college in 2010, until he was involved in an accident and suffered neurological damage. He advised that the appellant had undergone surgery but had sustained visual impairment and major short-term memory problems. He has now reverted to a Stamp 3 visa. His father advised that he himself had been given a Stamp 4 and no longer needed a work permit.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant and his father came across as genuine and gave evidence in a credible manner. He noted also that the entire family had been in Ireland for over five years; following recruitment by a company [named] they had moved here 'lock, stock and barrel'; both parents and the appellant's brother were working here full time, and the appellant himself was in college before his accident. The Appeals Officer considered that the appellant's centre of interest could only be considered to be in Ireland at that stage. He accepted that this case was somewhat unusual insofar as the appellant did not have permission to work here as he holds a Stamp 3 visa. He took the view, however, that the appellant would not have applied for any social welfare payment in normal circumstances but that his accident had changed that. Based on the evidence before him, he was quite satisfied that the appellant was habitually resident in the State and that it was appropriate to allow the appeal.

Outcome: Appeal allowed.

11. 2011/11 Jobseeker's Allowance – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Jobseeker's Allowance.

Background: The appellant, a Polish National, came to live in Ireland in 2008. She was issued with a Public Social Services (PPS) number in March 2009. Her social insurance record showed a total of 22 weeks of insurable employment in the State.

Parties attending oral hearing: The appellant and her partner.

Report of the oral hearing: The Appeals Officer read the formal decision and advised the appellant of the information which had been relied on in making that decision. A discussion followed during which it was established that the appellant had lived in Ireland since 2008, despite not obtaining a PPS number until March 2009; that she worked in a number of jobs but only one employer would appear to have been PRSI compliant; that she was currently in a relationship with an Irish national, and that he was in receipt of a social welfare payment with payment being made for her as a qualified adult on his claim. The appellant reported that she holds a Polish bank account (but the Appeals Officer observed that in the age of modern technology, this was not unusual). She advised that she has gone back to Poland for holidays, usually at Christmas, but had always returned to Ireland. She indicated that she had spent a slightly longer break in Poland in 2008 when she had undergone surgery. She reported that she was registered with FAS and that she had made

numerous efforts to find work. She stated that she had supported herself from savings as most of her jobs had been live in, or she had relied on friends.

Consideration of the Appeals Officer: In reaching a conclusion in this case, the Appeals Officer indicated that she was mindful of the five factors to be considered in deciding on habitual residence, and she examined them separately, as follows: Length and continuity of residence in the State: She noted that the appellant came to Ireland as an au-pair in 2008 and had lived in the State since then. Length and frequency of absences from the State: She noted that the appellant had spent 'a few weeks' in Poland in 2008 for surgery and had returned to Ireland after this, only returning to Poland for holidays since. Nature and pattern of employment: She took account of the fact that the appellant had only 22 weeks of insurable employment. She also noted, however, that the evidence presented indicated that the appellant had worked for a number of different employers, some of whom did not comply with PRSI legislation and make returns on her behalf. Main centre of interest: She noted that the appellant was in a relationship with an Irish national, and had been for some time, and that he was in receipt of a Qualified Adult Increase on his Jobseeker's Allowance in respect of the appellant. Future Intentions: She took account of the statement made by the appellant in completing the HRC1 form, indicating that she intended to remain in Ireland for longer than five years and work in the State. She noted also that the appellant was in a relationship and was hopeful that this would continue. Having considered all of the evidence in this case, including that adduced at oral hearing, the Appeals Officer was satisfied that the appellant could be considered to be habitually resident in the State with effect from the date of her claim.

12. 2011/12 Child Benefit – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit.

Background: The appellant, a Romanian national, came to Ireland in 2007 with her partner. They resided with her partner's brother and his family, and engaged in employment over the years. The appellant applied for Child Benefit in July 2010 following the birth of their daughter.

Parties attending oral hearing: The appellant was accompanied at the hearing by her partner.

Report of the oral hearing: The Appeals Officer outlined the decision before him, and the details of the submission made by the Deciding Officer. He reviewed the appellant's letter of appeal, where she outlined the background to her time in Ireland, including her employment details. Having outlined the evidence in support of her appeal, the appellant stated that she and her partner had now secured employment, and were in the process of moving house to be nearer to their place of work. Her partner advised that they had received notification from the Immigrant Council of Ireland that with effect from 28 February 2012, the Romanian parents of Irish citizen children do not require an employment permit in order to access the labour market and work in Ireland. He supplied a copy of the letter he received to that effect, with enclosures taken from the Department of Jobs, Enterprise and Innovation website dated March 2012. In relation to their employment, the appellant's partner reported that they had both secured employment over the years and that the issue of the need for a work permit had not been raised by employers. He made the point that they did not use any illegal documents and worked as

'themselves'. He advised that, when the recession came, they both lost their jobs. He had received Supplementary Welfare Allowance (Basic Income) from a date in 2010 until he started work in 2012. The couple reported that they had returned about three times to Romania since they came here; they go to see their parents and take a break for about two weeks. They advised that they have no property in Romania and came to Ireland for a better life. They stated that it had always been their intention to remain here.

Consideration of the Appeals Officer: In considering his decision in this case, the Appeals Officer looked at the five factors governing HRC and, in particular, how the appellant met or did not meet them at the time of her application. In relation to those factors, he considered that it was clear from both the documentary evidence and that adduced at oral hearing that the appellant met four of the five conditions without much debate. He noted that she was here for five years, over three and a half years when she made her Child Benefit claim, and he considered Ireland to be her centre of interest. He noted also her future intention to remain here, given her statement to that effect. The one area where the Appeals Officer considered that there was some debate was that of employment, though he made the point that this of itself should not mean that she was not habitually resident. He noted that both the appellant and her partner worked for a number of years after they arrived in the State, albeit without a work permit. He made reference to the fact that the rules governing access of Romanian (and Bulgarian) nationals to the labour market had changed with effect from the end of February 2012, allowing the parents of Irish citizen children to take up employment without the need for a work permit. He noted that, almost immediately, the appellant and her partner had both secured employment and had moved to a rented house with their daughter. Having carefully examined the evidence in this case, the Appeals Officer concluded that the appellant may be deemed to meet the habitual residence condition for the purposes of her Child Benefit claim of July 2010 and that her appeal must succeed.

Outcome: Appeal allowed.

13. 2011/13 State Pension (Non-Contributory) – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to State Pension.

Background: The appellant, who is single, was born in Ireland and went to work in the UK in 1959. She visited her family on a number of occasions and came home to nurse her father when he became ill. Her claim to State Pension was disallowed on the basis that she was not habitually resident in the State. (In addition, she had been assessed with weekly means derived from a UK pension plus capital). Parties attending oral hearing: The appellant and the Deciding Officer.

Report of oral hearing: The question at issue was explained and the Deciding Officer outlined the factors to which he had regard in making his decision, as follows. - Length and continuity of residence in Ireland does not support habitual residence - Main centre of interest is not established in Ireland - Has no established pattern of employment in Ireland - Intends to rely on State supports and benefits whilst in Ireland - Has lived most of her life outside the State - The available evidence does not substantiate habitual residence In addition, he outlined the basis of the means assessment of some €140.00 derived from a UK pension plus net weekly means from capital of €50.00. A discussion ensued where the appellant confirmed the details of her background, as outlined above. She advised that

while she had worked in the UK, it had always been her intention to return to Ireland. She had visited on a number of occasions and she came home to nurse her father when he became ill. She reported that eventually her financial circumstances (she received a sum of money for vacating the house she lived in the UK) allowed her to return to Ireland. She said that she had family living in Ireland but no family or relations in the UK. With reference to her means, she stated that her capital had reduced and she submitted bank statements that confirmed this.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant was from Ireland and, while she had lived abroad for approximately 50 years, that it was always her intention to return to Ireland eventually. He noted also that her only surviving family lived in Ireland and that she had no relatives abroad. He considered that a person returning to Ireland after being abroad for a very long period would require a period of time to be spent here before being deemed to be habitually resident. In this case, he was satisfied that the appellant's centre of interest was in the State and that the period should be relatively short. Having considered all of the evidence, he concluded that it was appropriate to deem the appellant to be habitually resident from a specified date, which was six months after her coming back to Ireland. He also made a determination as to means (at a rate which allowed the appellant to qualify for State Pension at a reduced rate).

Outcome: Appeal allowed.

14. 2011/14 Child Benefit – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit.

Background: The appellant, a Nigerian national, arrived in Ireland as an asylum seeker in 2002. Her son was born here in that year. She returned to Nigeria in the following year as her husband had become seriously ill. Following his death, she returned to Ireland in 2007. She applied for Child Benefit in March 2011 (the claim form was date stamped). She was issued with a Stamp 4 visa in May 2011, and Child Benefit was awarded with effect from May 2011, with reference to the date from which she had been granted leave to remain. In her appeal submission the appellant contended that, as the parent of an Irish citizen child, she should be awarded Child Benefit from the date of her return to Ireland in 2007. In support of her appeal, she attached a copy of a statement which issued on 21/03/2011 from the Minister for Justice, Equality and Defence, in which he stated that the government had agreed to his proposal that early decisions be made in appropriate cases to which the Zambrano judgment applies, without waiting for further rulings from the Courts. The Zambrano reference is to the Court of Justice of the EU ruling in March 2011 in the case of Ruiz Zambrano which concerned parents who were non-EEA nationals but whose children were Belgian citizens. The ruling stated that " Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen." In paragraph 40 of the judgment the Court further states that "Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down they undeniably enjoy that status ..."

The Deciding Officer disallowed Child Benefit in respect of the period prior to May 2011 for the reason that she concluded that the appellant did not satisfy the habitual residence condition with reference to the five factors as provided for in legislation.

Parties attending oral hearing: The appellant was unaccompanied.

Report of oral hearing: Following the introductions, the Appeals Officer outlined the decision under appeal and explained the purpose of the hearing. The appellant stated that she believed that she was entitled to Child Benefit in respect of her son from May 2007 when she and her children returned to Ireland, as he is an Irish citizen and has been attending school since then. She confirmed that she had been in receipt of Child Benefit in respect of her three children since May 2011 when she was granted a Stamp 4 Visa, and agreed that she was not entitled to benefit prior to that date in respect of the two other children. The appellant contended also that she had applied for Child Benefit on her return in 2007 but that she had been told to await a decision on her status. The Appeals Officer reviewed the appellant's appeal submission and it was agreed that the issue was one of the law and its interpretation in relation to entitlement from May 2007 to April 2011. The Appeals Officer pointed out that, prior to December 2009, her entitlement would have been based only on the relevant legislative provisions which had to be considered in relation to habitual residence. From December 2009, the legislation was amended and certain categories of people (including asylum seekers) were excluded from being deemed to be habitually resident; more recently the Zambrano judgment held that third country parents of EU citizen children should be granted certain rights. As all relevant issues had been discussed, the hearing concluded.

Consideration of the Appeals Officer: The Appeals Officer examined the conclusions of the Deciding Officer. He noted the appellant's contentions, both written and oral. He noted, in particular, that there was no trace of an application for Child Benefit being received in the period between the appellant's return to Ireland in 2007 and her application in March 2011 following the Zambrano judgment. In addition, he noted that this judgment had the effect of clarifying the legal situation and, rather than limiting the implications for her in respect of her Irish citizen child only, it established the appellant's status and therefore had implications for her entitlement to Child Benefit in respect of her three children. Having considered all of the facts of this case, including those adduced at the oral hearing, the Appeals Officer concluded as follows. • The appellant is deemed to be habitually resident for social welfare purposes and, accordingly, Child Benefit is payable to her in respect of her three children with effect from April 2011, the month following that in which the application was submitted in respect of her Irish citizen child. • Although the appellant stated at the oral hearing that she had applied for Child Benefit earlier, he found no grounds to support this contention. He concluded also that, while it was likely that an application would have been refused in the period prior to March 2011, good cause had not been established for the delay in making an application during the period from May 2007 to March 2011.

Outcome: Appeal partially allowed.

15. 2011/15 Supplementary Welfare Allowance (Basic Income) – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Supplementary Welfare Allowance.

Background: The appellant and her husband were born in Africa, and went to Germany in

2003. Her husband applied for and was granted asylum there. They left Germany subsequently and moved to the UK with their two children. The family lived in the UK for three years, where the appellant worked full time until June 2010. The appellant and her family lived in a council flat which she surrendered, along with her DSS payments, to move to Ireland in 2010. The appellant made an application for Supplementary Welfare Allowance in September 2010 and this was refused. She did not appeal this decision until August 2011, at which time she was advised by the Health Service Executive (HSE) Appeals Office to re-apply as it was not possible to appeal that decision at that stage. She re-applied in August 2011 and her claim was refused on grounds that she was deemed not to meet the habitual residence condition. It is this decision that is the subject of her appeal.

Parties attending oral hearing: The appellant attended with a friend.

Report of the oral hearing: The Appeals Officer outlined the decision, the details of the Deciding Officer's submission and the appellant's own letter of appeal. The appellant confirmed the background to her arrival in Ireland, as outlined above. She reported that she came to Ireland to enrol her children in school for September 2010, and then returned to the UK to receive her last DSS payment before it was stopped, as she had advised the authorities there of her intention to leave. The appellant outlined that one of the main reasons she came to reside in Ireland was because of the gangs in the school which her children attended in the UK. She said she was concerned about the safety of her children. She stated that she did not want to return to the UK as Ireland is now their home and they have settled here and are getting a better education. The appellant reported that she and her family were living in a flat where the rent was €130 per week. She advised that the rent was in arrears as she had been unable to pay for it since she moved in, and she provided a statement from her landlord confirming this and requesting her to move. The appellant stated that she had been living off the kindness of friends. She produced copies of money grams which were sent to her from friends in Germany for various amounts throughout the year. She also provided documentation from charitable societies that had provided her with assistance towards the cost of food and clothing. She had been awarded Child Benefit in July 2011, payable with effect from December 2010. She stated that this monthly payment, and the arrears paid in July 2011, was the money that she and her family had been living on. The appellant confirmed that her husband was not in employment but stated that he was registered with FAS and on a panel to complete a course which would allow him to obtain a licence to pursue a career in which he had some experience abroad. The appellant advised that she was also registered with FAS and has attended a training course for three months.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant had been resident in the State since August 2010, and that the evidence made clear that she had not left the country since then. She noted also that the appellant had confirmed at oral hearing that she had surrendered the family's council flat in the UK as she regarded Ireland as their home. She considered that it had been established that the appellant had no ties or links to the UK as her husband and children were here with her since their arrival, and they were all living in the same rented accommodation since that date. She noted that the children were attending school, that the appellant and her husband were registered with FAS and that they had completed training courses. The Appeals Officer concluded that the appellant had established that main centre of interest was Ireland and that her future intentions were to remain. In addition, Child Benefit had been awarded with effect from December 2010. Accordingly, she held that the appellant could be deemed to be habitually resident in the State for purposes of her claim to Supplementary Welfare Allowance.

Outcome: Appeal allowed.

16. 2011/16 Child Benefit – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) before August 2008 for purposes of her claim to Child Benefit.

Background: The appellant, a Somali national, came to Ireland in April 2006 and sought asylum. She was assigned direct provision accommodation while her application was being processed. When she fled Somalia, she left her daughter in the care of a family member. Her son was born in Ireland in August 2006, and she made a claim for Child Benefit. That claim was refused on grounds that she was deemed not to meet the habitual residence condition. Ultimately, the appellant was granted refugee status in August 2008, on appeal to Refugee Appeals Tribunal. She applied again for Child Benefit in respect of her son, which was awarded with effect from August 2008.

Parties attending oral hearing: The appellant, a friend who acted as interpreter and a solicitor representing the appellant.

Report of oral hearing: The appellant's solicitor presented a written submission on her behalf. He confirmed that the appellant's status had been decided by the Refugee Appeals Tribunal. He reported that the appellant's daughter remained in the care of a family member but that she was now living in Kenya, as were the other members of the appellant's family. He advised that the appellant had applied for family reunification in respect of her daughter. He confirmed that the appellant had lived in direct provision accommodation since coming to the State in 2006 until granted refugee status, and said that she had not left the State since coming here. He reported that the appellant's son had a chronic medical condition and submitted that, in view of the child's consequent needs and the political situation in Somalia, Ireland had to be her centre of interest as she could not be sent back to Somalia. The appellant's solicitor made reference to the earlier claim, made in 2006, and stated that it would have been futile for the appellant to appeal the decision at the time as it would have been refused again because she was not at that stage present in the State or the Common Travel Area for a continuous period of two years ending on the date of application. He submitted, however, that as the appellant had since been recognised as a refugee, the award of Child Benefit should be backdated to the original application, with arrears paid to the appellant.

Consideration of the Appeals Officer: The Appeals Officer considered the contention advanced by the appellant's solicitor, that the letter from the Minister for Justice, Equality and Law Reform did not actually confer refugee status on the appellant but recognised that she was a refugee. He noted that her solicitor had quoted from the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees published by the Office of the UNHCR, as follows: A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee. The Appeals Officer noted also that the letter of notification of its decision sent by the Refugee Appeals Tribunal did not specify an effective date for the recognition of the appellant's

status as a refugee. In the absence of that date, he considered it reasonable to conclude that the Refugee Appeals tribunal was, in fact, recognising the appellant's refugee status from the date of her application for that status. In this regard, he took account also of the recent judgment of Cooke J in the High Court, IEHC 33, delivered on 9 February 2001, stating that 'the determination of an asylum application does not have as its purpose or outcome the discretionary grant or refusal of refugee status by the Minister. It is not, for example, analogous to the exercise of his discretion on an application for a certificate of naturalisation under the Irish Nationality and Citizenship Act, 1956. An asylum seeker is a refugee as and when the circumstances defined in the Geneva Convention arise and apply. The determination of the asylum application is purely declaratory of a pre-existing status.' Accordingly, the Appeals Officer accepted that recognition of a person's status as a refugee is declaratory of a pre-existing status, although he considered that this did not necessarily mean that the person must also be regarded as being habitually resident in the State from the date of his or her arrival or application for refugee status. In the appellant's case, however, and having regard to all five factors to be considered when determining habitual residence insofar as they may be applicable, he was satisfied that she was habitually resident in the State when her son was born in 2006. The Appeals Officer noted the Deciding Officer's contention that the appellant did not appeal the HRC decision made on her earlier claim of 2006, as well as her solicitor's assertion that it would have been futile for her to have done so. He noted also that the appellant did not delay in making another application as soon as she had new facts to present, in terms of the determination of her refugee status. He concluded that it would be unreasonable not to review the decision on the appellant's earlier claim in the light of those new facts. As he was satisfied that the appellant was habitually resident in the State at the date of her son's birth, he considered also that entitlement to Child Benefit should apply from that date.

Outcome: Appeal allowed

17. 2011/17 Child Benefit – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Child Benefit.

Background: The appellant, a Romanian national, arrived in the State in March 2007. She applied for Child Benefit in 2009 and 2010, both of which were disallowed on grounds that she did not meet the habitual residence condition. She made another claim in April 2011, which was also disallowed on the same grounds. It is this decision which was the subject of the appeal.

Parties attending oral hearing: The appellant, her father, and a solicitor acting on her behalf.

Report of oral hearing: The appellant, with her father acting as interpreter, stated that she arrived in the State in March 2007 with her partner and their two children. Her partner had been employed here until some twelve months earlier. She reported, however, that they had since separated and that he was unable to offer regular financial support but helped out when he could. The appellant provided details of various addresses at which she had lived since her arrival in the State, and advised that she had been resident at her current address for over twelve months. She said that she and her children were sharing the house with another couple, and that the situation was very difficult. She advised that she was surviving mainly on support from her father and brothers who were resident here since 2002, and

who have access to welfare support payments. She said that she also received financial support from the St Vincent de Paul charity and she submitted a written statement to that effect. The appellant reported that she had worked as a childminder/cleaner for a short period of time in 2009 and that she was continuing to seek work here despite the current work permit restrictions. She was adamant that she had no ties with her home country and that she had not left the State since her arrival. She advised that she had no family in Romania, nor had she any financial or property interests there. The appellant stated that she wanted to remain in the State for her own sake but most particularly for that of her children, two of whom are in full-time education and doing well. She stated that her youngest child was born in the State and, on that basis, submitted that she and her family should have access to Child Benefit and other welfare supports. She stated that she hoped eventually to be in a position to work here without the need for a permit¹. Her solicitor stated that he was very aware of the appellant's situation and her plight. He reported that her situation was dire and that without the financial support of her family and St Vincent de Paul, she and her children would not survive. He stated that he believed that the appellant intended to remain in the State as her parents, brothers and their families now reside here too. He contended that her centre of interest must be Ireland, and he produced copies of the following statements: • A statement from the Romanian Embassy, indicating that the appellant's passport expired in 2009 and had not been renewed. ¹ Oral hearing held prior to 28 February 2012 when work permit arrangements for Romanian and Bulgarian parent of Irish citizen children changed • A statement from St Vincent de Paul, outlining the financial support given to the appellant in 2011. • A statement from the school principal, confirming that the appellant's two elder children were pupils of the school. • A statement from a second school principal, stating that her youngest had a place reserved for her at that school.

Consideration of the Appeals Officer: The Appeals Officer noted that, in the determination of a person's habitual residence in the State for social welfare purposes, account must be taken of the five factors outlined in legislation. Having regard to those factors, he noted that: the appellant was here five years at that stage and had been supported to that point by her family and a local charitable organisation; she had remained in the State since her arrival in 2007 and did not have a current passport; she stated she had engaged in some employment, albeit for short periods of time but in the absence of a work permit, she could not be expected to have had a substantial employment record; her parents and siblings were resident here since 2002, and one of her children was born here. He noted also that the appellant had asserted that her centre of interest was most definitely here and that, in terms of her future intentions, she had made provision for her children's education well into the future. In all the circumstances outlined, the Appeals Officer concluded that the nature of the appellant's residence in the State must be regarded as habitual, having particular regard to the duration of that residence, the residence here of her family of origin and the evidence of her having established a centre of interest here.

Outcome: Appeal allowed.

18. 2011/18 State Pension (Non-Contributory)

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of his claim to State Pension.

Background: The appellant, a 66 year old divorced man, had lived and worked in the UK since he was 18 years of age. He had alcohol addiction problems and was in hospital in

England prior to coming back to Ireland in 2010. He was living with his brother in Ireland but had retained his council flat in England. He made an application for a State Pension in May 2011, and was refused on grounds that he was deemed not to be habitually resident in the State.

Parties attending oral hearing: The appellant and his brother.

Report of oral hearing: The Appeals Officer read the decision before him, and outlined those details to which the Deciding Officer had regard in making his determination on the question of habitual residence. He explained what was at issue in relation to habitual residence. He asked the appellant about the fact that he appeared to have no permanent address in Ireland, and was staying with his brother or his sister for weeks at a time. He asked also if he still had the council house in England. The appellant advised that the council property was still held in his name and said that his son, who was born and reared in England, was living there. The appellant's brother stated that he was trying to get him a place of his own in the same town he lived in, and that he was currently talking to the St Vincent de Paul who had a number of properties in the area. The Appeals Officer asked the appellant if he was going to move to Ireland permanently. He said that he would, if he had a place of his own and could get the Old Age (State) Pension. He advised that he would consider giving up the property in England if he got a place of his own in the same town as his brother. He reported that he was going back to England the following day for a family occasion, and said that he would talk to his sons and the council regarding moving home permanently.

Consideration of the Appeals Officer: Having carefully examined the evidence in the case, and taking particular account of the appellant's circumstances as outlined at oral hearing, the Appeals Officer concluded that he could not be deemed to meet the habitual residence condition for purposes of his State Pension claim.

Outcome: Appeal disallowed.

19. 2011/19 Jobseeker's Allowance – oral hearing

Question at issue: Whether the appellant may be deemed to meet the Habitual Residence Condition (HRC) for purposes of her claim to Jobseeker's Allowance.

Background: The appellant, a Romanian national, came to Ireland in 2006. He lived here with his partner and their child who was born here in 2010. They have another child, born in 2000, who remains in Romania. The appellant was engaged in part-time employment but did not have a work permit. His claim to Jobseeker's Allowance was disallowed on grounds that he had not established that he was habitually resident in the State for social welfare purposes. The Deciding Officer had concluded that details as to his residence and means of support for the period between his arrival and the date of his claim were unknown, and referred also to the fact that he did not hold a valid work permit. The appellant's partner was awarded Supplementary Welfare Allowance in 2011, with means assessed at €70 per week.

Parties attending oral hearing: The appellant attended alone.

Report of oral hearing: The appellant opened by saying that he had been working in his home country of Romania until 2006 when his sister was killed tragically in a road traffic accident in Ireland. He reported that he came to Ireland initially to represent his family in

legal and other proceedings arising from her death. He said that his sister was buried in Ireland and that her child lives here with her father. In addition, he indicated that all the legal issues of compensation arising from his sister's death had not been settled and said that he intended to remain until they were. The appellant referred to his employment here since 2006 and submitted tax certificates as proof. He acknowledged that he did not hold a valid work permit. He said he was unclear as to why his employer had not applied for a work permit on his behalf. He confirmed that his partner and child lived with him. He stated that his partner had been in the State for more than five years, and was currently engaged in some small self-employment, working at home. He submitted evidence of her registration with the Revenue Commissioners, and said that business was slow to pick up; she might earn €70 per week on average. He confirmed that she was in receipt of Supplementary Welfare Allowance but not Child Benefit, and he advised that she was pregnant. He said he could not understand that her work history appeared not to have been considered in relation to Child Benefit. In conclusion, the appellant stated that he was looking for work and had registered with FAS.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant was a Romanian national who did not hold a valid work permit. He considered, therefore, that any employment he had undertaken was illegal and could not be taken as a valid employment record for determining the question as to habitual residence. However, he took account of the fact that the appellant had formed a relationship with an EU national who did not require a work permit, and that the couple had one child and were expecting another. He noted that she had been in the State for more than five years and that she had been in employment, with 84 social insurance contributions paid. In addition, she had commenced self-employment and proof of her registration with Revenue had been submitted. He concluded, therefore, that the appellant's partner was legally permitted to reside in the State in accordance with the provisions of S.I. 656 of 2006, European Communities (Free Movement of Persons) (No. 2) Regulations, 2006. The Appeals Officer noted that the appellant's partner was in receipt of Supplementary Welfare Allowance which included an increase in respect of the appellant and their child. He observed that the appellant was, therefore, the dependant of a person who was legally resident in the State and as such was himself legally resident. Accordingly, he considered that the question as to habitual residence fell to be considered under the five factors set out in the legislation. He noted that the length and continuity of his residence was substantial. He noted also that his work record indicated that he had paid 101 PRSI contributions and, although the employment was undertaken without a valid work permit it could not be considered to constitute a valid work record, it did indicate his actual presence in the State. He noted also that there was no evidence to suggest that the appellant had been coming and going from Ireland since his arrival and considered that he could not, therefore, be said to have continued to maintain a centre of interest outside Ireland. The Appeals Officer considered that the appellant had a significant centre of interest in the State as he had a partner and a child. He noted the appellant's original reason for coming to Ireland, the tragic death of his sister, but considered that his connection with the State had moved beyond that. He noted also that the appellant's niece continued to reside in the State and that the appellant had indicated that he remained here in the child's interest. When considered with his own family commitments, the Appeals Officer considered that this added to the assertion that his centre of interest is now here. The Appeals Officer considered that there was a case to be made for regarding the appellant as habitually resident in relation to four of the five factors outlined in legislation. He concluded that the fact that his employment had been undertaken without a work permit, and that he continued without a work permit, should not determine the issue alone. He observed that he had recourse to obtaining a work permit2

which would remedy his situation into the future and held that, in all the circumstances, the appeal must succeed.

Outcome: Appeal allowed.

D. 2012– N/A

E. 2013– N/A

F. 2014– N/A

G. 2015

1. 2015/01 Child Benefit Oral hearing

Question at issue: Habitual residence

Background: The appellant, a national of a central European state, was living with her partner. She made a claim for Child Benefit in 2015, following the birth of their daughter, stating she was living in Ireland since 2007. Her claim was rejected in respect of an initial period as the baby had been placed in care in line with a Court order (by consent). A Social Worker with TUSLA, the Child and Family Agency, confirmed that the child had been returned to her mother's care on a date specified. The claim was disallowed with effect from that date on grounds that the appellant was not habitually resident in the State, and the following reasons were cited: o The nature of your residence in Ireland does not provide for the approval of habitual residency. o Neither you nor your partner is employed in Ireland and you do not appear to be in a position to support yourself without becoming a financial burden on the State. o You have not provided any evidence that confirms that you have a right to reside in Ireland. o From the evidence produced to date there is nothing to substantiate that you are habitually resident in the State.

Oral hearing: The appellant was accompanied by a relative and she requested that he assist with interpreting as she speaks English but was concerned that she might require the support of someone with a better grasp of the language. She reported that she came to Ireland in 2007, and that she had lived with her parents. She advised that she had three children living in Ireland: two of whom are in foster care while the third is a baby in respect of whom the claim at issue was made. She said that she and her partner are both unemployed but that they work sometimes, washing cars at the local garage. She said that they paid rent of €100.00 per week and received assistance from St Vincent de Paul. The appellant said that she has been living with her current partner for about five years, having been single prior to that. She stated that she had not left the State during the period of her residence in Ireland and said that all her family lives here now. She went on to say that she wanted to maintain contact with her two daughters who are in foster care. In terms of proof of residence, the appellant said that she had obtained a PPS number in 2008 and that she had submitted proof of residence in support of an earlier claim for Child Benefit, which she made in 2010. She said that the claim had been refused as she was not considered to have been habitually resident at that time. She went on to say that she had not made a further claim or pursued her appeal against that decision as the two children were taken into care subsequently. She submitted that, while her third child had been placed in care initially, the baby had been returned to her care and she needed Child Benefit to support her.

Further evidence: Details of the appellant's claim to Child Benefit in 2010, and the subsequent appeal, were confirmed.

Consideration: The Appeals Officer noted the duration of the appellant's residence in the State with reference to the European Communities (Free Movement of Persons) (No. 2) Regulations 2006, S.I. No. 656 of 2006, Article 12, which provides as follows in relation to permanent residence in the State: 12. (1) Subject to paragraph (3) and Regulation 13, a person to whom these Regulations apply who has resided in the State in conformity with these Regulations for a continuous period of 5 years may remain permanently in the State. She noted that there was nothing to indicate that the provisions of Article 12 of S.I. No. 656 of 2006 did not apply in the appellant's case. Having considered all the circumstances of the case including, in particular, the length and continuity of her residence and evidence as to an established centre of interest, the Appeals Officer concluded that the appellant could be deemed to be habitually resident in the State for purposes of her Child Benefit claim of 2015.

Outcome: Appeal allowed

H. 2016

1. 2016/02 Child Benefit Summary decision

Question at issue: Habitual residence

Background: The appellant came to Ireland in 2009 and had been living in 'direct provision' accommodation while awaiting the outcome of an application she made to the Office of the Refugee Applications Commissioner for a declaration as a refugee in accordance with the Refugee Act, 1996. Ultimately, the Minister for Justice and Equality declared her to be a refugee with effect from a date in 2016. The Deciding Officer determined that she was habitually resident in the State with effect from that date and her entitlement to Child Benefit was determined accordingly. In her appeal against that decision, the appellant referred to the considerable time it had taken to receive a declaration of refugee status, and she sought to have her claim backdated to the date on which she had applied for asylum.

Consideration: The Appeals Officer, having considered the evidence in accordance with the governing legislative provisions, noted that it is a primary condition of entitlement to Child Benefit that a person must establish that he or she is habitually resident in the State. He made reference to the legislation on habitual residence and, in particular, to Section 246(5) of the Social Welfare Consolidation Act 2005, noting that it provides that a person who does not have a right to reside in the State may not be regarded as being habitually resident. He noted that the governing legislation provides that persons who have made application for a declaration of refugee status may not be regarded as habitually resident while awaiting the outcome of such an application, as provided for in Section 246(7) of the Act and, where granted permission to remain, that they may not be regarded as being habitually resident in the State for any period prior to that date. The relevant provision is cited as Section 246(8) of the Social Welfare Consolidation Act 2005. The Appeals Officer concluded that the appellant had not established that she met the habitual residence condition prior to the date in 2016 when she was declared a refugee, and determined that her claim to Child Benefit was awarded appropriately from a date in 2016.

Outcome: Appeal disallowed

2. 2016/24 – Jobseeker's Allowance Oral hearing

Question at issue: Eligibility (Habitual Residence Condition)

Background: The appellant, in her late 20s, was born in Spain. She came to live in Ireland originally in 2010 and worked for periods between 2010 and 2013. She went back to Spain, where she worked until her return to Ireland in 2015. She made a claim for Jobseeker's Allowance some six months later. This was refused on grounds that she was not habitually resident in the State.

Oral hearing: The appellant reported that during her previous residence in Ireland, she had worked in a number of jobs and lived with her Irish partner. She advised that she had made a claim for Jobseeker's Allowance in 2013 and had been paid for a few months at a reduced rate as her means had been assessed with reference to her partner's earnings from employment. She advised that she returned to live with her family in Spain when the relationship ended. She outlined details of her living arrangements since her return in 2015 and advised that, between then and the date of making her claim, she had one day of employment and ten days subsequently. She said that she was registered with an agency and paid on the basis of self-employment. She said that, since her return, she had been to Spain only once to renew her identity card and that she considers Ireland to be more her home than Spain at this stage. She advised that she had been refused renewal of her European Health Insurance Card (EHIC) in Spain and had been told that she had to apply for her card in Ireland. She submitted a certificate from the Spanish Embassy stating that she is resident in Ireland, a copy of her current tenancy agreement, Notice of Income Tax registration with Revenue, a Spanish identity card with an Irish address, as well as documentary evidence confirming her involvement in a range of social activities.

Consideration: The Appeals Officer noted that the decision in the case had been made with reference to the five factors to be taken into account in determining habitual residence, outlined in Section 246(4) of the Social Welfare Consolidation Act 2005. She observed that the appellant must be assumed to have a right to reside in the State as this had not been addressed in the decision. Accordingly, habitual residence fell to be determined with reference only to the five factors. She noted that the appellant had been paid Jobseeker's Allowance in 2013 so that she must have satisfied the habitual residence condition at that time. She noted that the Department of Social Protection has issued Guidelines on the Habitual Residence Condition (HRC), which state that a person who had previously been habitually resident in the State, moves to live and work in another country and then resumes his/her long-term residence, may be regarded as being habitually resident immediately on their return. The Appeals Officer noted that the appellant had been deemed to be habitually resident in 2013 and that her circumstances were in line with those outlined in the HRC Guidelines. She noted that the evidence submitted had served to establish that her centre of interest was in Ireland and concluded that the appellant must be deemed to meet the habitual residence condition for purposes of her Jobseeker's Allowance claim.

Outcome: Appeal allowed.

3. **2016/26 – Jobseeker's Allowance & Supplementary Welfare Allowance Summary decision**

Question at issue: Eligibility (right to reside)

Background: The appellant had two short periods of employment in Ireland, having worked for seventeen weeks in 2014 and for a further ten weeks in 2015. He had been doing seasonal farm work which finished in August 2015. He made a claim for a basic income payment under the Supplementary Welfare Allowance scheme in November 2015 and a claim for Jobseeker's Allowance in April 2016. Both claims were disallowed on grounds that he was not habitually

resident in the State as he was held not to have a right to reside. In an appeal against those decisions, the appellant submitted that he was seeking further employment since finishing work in August 2015 and had remained in Ireland as a jobseeker. Governing legislation: Section 141(9) of the Social Welfare Consolidation Act 2005 provides that a person must be habitually resident in the State for purposes of establishing entitlement to Jobseeker's Allowance, while Section 192 outlines the same requirement in relation to Supplementary Welfare Allowance. The legislation governing application of the Habitual Residence Condition (HRC) is outlined in Section 246 of the Act and subsection (5) provides that a person who does not have a right to reside in the State may not be regarded as being habitually resident. The legislation which governs the rights of European citizens to reside in Ireland is outlined in the European Communities (Free Movement of Persons) Regulations 2015 (Statutory Instrument No. 548 of 2015). Article 6(2) prescribes that an EU citizen who has entered the State seeking employment continues to have a right of residence as long as he or she continues to seek employment and to have a realistic prospect of engagement.

Consideration: In determining whether the appellant had established that he had a right to reside, the Appeals Officer considered his presenting circumstances in accordance with Statutory Instrument No. 548 of 2015. Having done so, he noted the appellant's employment in Ireland since he arrived first as a jobseeker: seventeen weeks in 2014 and a further ten weeks in 2015. He concluded that these periods of employment gave him a right of residence in accordance with Article 6(3)(d) of Statutory Instrument No. 548 of 2015. This prescribes that where a person has been employed for a period of less than one year and becomes involuntarily unemployed, he or she may retain a right of residence as a worker for six months after the cessation of employment. Accordingly, as the appellant ceased working on a date in August 2015, his right to reside as a worker ended on a date in February 2016, as he had not secured further employment within that six month period. The Appeals Officer noted that the governing legislation, outlined in Article 17(2) of Statutory Instrument No. 548 of 2015, prescribes that a person whose right to reside derives from Article 6(2) of that Regulation is not entitled to receive assistance under the Social Welfare Acts. He noted further that the only question before him for appeal purposes was whether or not the appellant had established a right to reside and whether he could be held to meet the habitual residence condition for purposes of his social welfare claims. He concluded that it had been established that he had a right to reside in Ireland as a jobseeker in accordance with Article 6(2) of the European Communities (Free Movement of Persons) Regulations 2015 (Statutory Instrument No. 548 of 2015). With regard to the habitual residence condition, he was satisfied that the appellant could be deemed to be habitually resident in accordance with the statutory criteria provided in Section 246(5) of the Social Welfare Consolidation Act 2005. He noted, however, that the governing legislation prescribes that a person whose right to reside derives from Article 6(2) is not entitled to receive assistance under the Social Welfare Acts. He observed, therefore, that it was for the Department of Social Protection to determine whether the other statutory qualifying criteria were met in this case.

Outcome: Appeal allowed.

Further comment: The Appeals Officer observed that where a person's claim to social assistance is disallowed with reference to the habitual residence condition on grounds that they no longer retain a right to reside, the case should be examined on all available facts, prior to appeal, for any indication that they may hold a right to reside on alternative 85 grounds or in a different capacity. By way of example, he cited the case of an EU jobseeker, as occurs in this case, or a family member of an EU national who has a right to reside. He made reference to the European Court of Justice Judgment in Case C-67/14 Jobcenter Berlin Neukölln v Nazifa, Sonita, Valentina and Valentino Alimanovic, where it was held that where a person relies, for

right-of-residence purposes, solely on Article 6(2) of the European Communities (Free Movement of Persons) Regulations 2015 (Statutory Instrument No. 548 of 2015), any entitlement to social assistance may be further assessed by reference to *idem* Article 17(2)(a), which prescribes that a person to whom Article 6(2) applies, shall not be entitled to receive assistance under the Social Welfare Acts.

4. 2016/318/35 Jobseeker's Allowance Section 318 review

Question at issue: Habitual residence

Grounds for Review: A review was requested on the grounds that the Appeals Officer erred in finding that the appellant was not habitually resident in the State. The terms of the request specifically referred me to a statement in the Appeals Officer's decision that the appellant's family, including his wife, live in [country], so that his centre of interest could be deemed to be stronger there. It was submitted that the Appeals Officer erred by giving undue weight to this as if it were fact.

Background: The appellant came to Ireland in 2005. He applied for Jobseeker's Allowance in October 2015 having been outside of the State for a period of 3 months and in that connection he also completed an application form entitled Habitual Residence Condition (HRC1). By a decision in November 2015 and relying on Sections 149(1) and 246 of the Social Welfare Consolidation 2005, a Deciding Officer of the Department advised him that he did not satisfy the habitual residence condition for the following reasons: length and continuity of residence in the State does not provide for HRC approval – three absences in two years; centre of interest stronger elsewhere – got married on last visit to [country], close family members abroad – wife, mother, brother and sister; residency not continuous; no established employment record in the State; no apparent means of financial support: one of the conditions of temporary permission to remain in the State is that persons make every effort to gain employment and not be a burden on the State. By a decision in March 2016, an Appeals Officer disallowed the appeal. Having examined the evidence with reference to the five factors to be considered in determining if the appellant met the habitual residence condition, the Appeals Officer outlined the reasons for the decision as follows: The appellant was refused as he was absent for three periods in three years, his centre of interest is stronger elsewhere, his close family members are abroad, his residency is not continuous, and he has no established employment record or apparent means of support.

Review: Habitual residence is a question of fact depending on the circumstances of each case, decided in accordance with the statutory provisions set out in Section 246 of the Social Welfare Consolidation Act 2005. Section 246(4) sets out the following five factors to be taken into account when deciding whether a person is habitually resident in the State: (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, and (e) the future intentions of the person concerned as they appear from all the circumstances. From my review, I noted that the appellant had been living in Ireland since 2005. He is a [specified] national and returned to [country] for the following periods: July-September 2013, July- September 2014 and July-October 2015. It appeared, but this was not clear from the evidence, that he had been in receipt of Jobseeker's Allowance and did not encounter any difficulties with re-claiming until his return to Ireland in October 2015. The main reason cited by the Deciding Officer for the disallowance related to length and continuity of residence in the State, in particular the fact that the appellant returned to [country] on three occasions and, on his third visit, got married to a person who had no stated plans to come to Ireland. I noted also an incorrect reference to a '2 year presumption clause' in the Department's appeal submission of January 2016. The Appeals Officer in disallowing the

appeal expressed the view that the appellant's centre of interest could be stronger in [country] and found that his centre of interest had shifted there. On behalf of the appellant, it was submitted that he had lived in the State for a period of 12 years and that the only change in his position was that he got married. It was stated that he had made many friends and acquaintances in Ireland and had integrated fully in his local community and that his intentions were to remain indefinitely. In support of his request for a review the following was submitted: • Letter from the Irish Naturalisation and Immigration Services (INIS) informing the appellant that the Minister for Justice and Equality had decided to renew his temporary permission to remain in the State, on a Stamp 4 basis, for three years until 2019. Certain conditions were attached to that permission. • Letter from his local Education and Training Board (ETB) confirming that he had been accepted on a Computer Basics (Equal Skills) Course. • A number of documents as evidence that he had been actively and genuinely seeking employment in the State. It seems to me that the overwhelming reason in finding that the appellant was not habitually resident in the State was that both the Deciding Officer and the Appeals Officer considered that his marriage in his home country had the effect of shifting his centre of interest from Ireland where he had lived since 2005, to the country where his wife and immediate family members reside. It was stated that he married in 2012, whereas the Deciding Officer and Appeals Officer were of the view, based on information he provided, that he married during his most recent visit in 2015. The appellant merely stated that the third time he went to [country] he got married. The certificate relating to the marriage is somewhat ambiguous – a date in 2015 is shown but it is not clear if this is the date of issue or the date of marriage. In any event, the date does not coincide with his absence in 2015. It appeared to me that, despite the lack of clarity surrounding the date of marriage and certain other aspects of the information available, the only change in the appellant's position since he came to Ireland in 2005 was that he got married and his wife resides in [country]. While accepting that he has a centre of interest there, this does not of itself preclude him from satisfying the habitual residence condition in Ireland. From my review of the evidence, I find that insufficient weight was given to the fact that he had been resident in Ireland since 2005 and I note that he provided evidence of his efforts to find employment and that he was given a place on an ETB course. While accepting that the appellant's marriage is a significant event which is relevant in the consideration of whether he is habitually resident in Ireland or not, I am satisfied that its significance is far outweighed by the length and continuity of residence in Ireland since 2005 – some 11 years. I am satisfied that the Appeals Officer gave disproportionate weight to the appellant's marriage and the fact that his wife resides outside the State and did not fully consider all the other factors in determining if he could be deemed to be habitually resident in the State at the date of his claim in October 2015. In the circumstances I revised the decision of the Appeals Officer and allowed the appeal.

Outcome: Decision revised and appeal allowed

I. 2017

1. **2017/01 Child Benefit Oral Hearing**

Question at issue: Habitual residence condition

Background: The appellant applied for Child Benefit in February 2017 in respect of his three children. The claim was disallowed on habitual residence condition grounds. The Department argued that the appellant and his children only came to live in Ireland in January 2017, that the appellant arrived without arranging any work in advance and with no means of financial support and that he had to seek emergency social welfare payments from the Department upon arrival. Prior to moving here, he had lived all his life in the UK with his

only link to Ireland being his mother and younger sister who live here.

Oral hearing: The appellant, in his thirties, was born and raised in the UK. His father is English and his mother is Irish. They separated when he was a child and his mother and sister returned to Ireland while he remained in the UK with his father. He came to Ireland for most of the school holidays to stay with his mother and to spend time with his grandparents and other extended family. The appellant and his ex-partner have three children. They lived in the UK and the appellant supported the family with a variety of jobs. His partner experienced health problems and was in receipt of a disability payment. In 2016 the relationship broke down and he left the family home. After spending Christmas in Ireland with his mother, he decided to move over permanently if his ex-partner would allow him to bring the children with him to live in Ireland. She agreed and he moved over with the children in January 2017. Initially they moved in with his sister and her family. The appellant stated that he and his partner had always intended to move to Ireland as he has much stronger family ties here than in the UK. He applied for Supplementary Welfare Allowance, One Parent Family Payment and Child Benefit soon after arriving in Ireland in February 2017. He had very little money and received a few Exceptional Needs Payments from the Department. However, his stated intention was to find work and the evidence showed he had applied for several jobs. He also began doing odd jobs for friends and other family members and managed with that money and help from his family to move into his own rented house. He had recently been offered a job but could not take it up as he needed an Irish Safe Pass card and could not afford the course. He was just about managing to get by but would love to set up his own business after he gets more established. He intends to remain in Ireland permanently as the majority of his family members are in Ireland. Two of his children are attending primary school since February 2017 and are doing well.

Consideration: It is a qualifying requirement for Child Benefit that a person is deemed to be habitually resident in the State. Section 246 of the Social Welfare Consolidation Act 2005 provides that in determining whether a person may be regarded as habitually resident, particular attention must be paid to the following: the length and continuity of residence in the State; the length and purpose of any absence from the State; the nature and pattern of employment; main centre of interest, and future intentions as they appear from all the circumstances. The Appeals Officer considered that the appellant had established a centre of interest in the State with effect from February 2017, when two of his children started school in Ireland. The Appeals Officer noted that the appellant was working, doing odd jobs as a handyman, and had secured rented accommodation. He also noted the appellant's stated intention to remain in Ireland permanently where his support network to help him raise his children is much greater than in the UK. In the circumstances, the Appeals Officer concluded that the appellant was habitually resident in the State with effect from February 2017.

Outcome: Appeal allowed.

2. 2017/25 Disability Allowance Summary Decision

Question at issue: Eligibility (habitual residence condition)

Background: The claim for Disability Allowance was disallowed by the Department on two grounds: that that appellant did not meet the medical qualifying criteria for the scheme and she was not habitually resident in the State. As part of the appeal process the appellant's case was reviewed by the Department and then deemed to meet the medical criteria. Therefore, the issue remaining to be determined by the Appeals Officer was whether the appellant was habitually resident in the State. The relevant legislation in this case is Section 246 of the Social Welfare Consolidation Act 2005 and Article 5 of the European Communities (Free

Movement of Persons) Regulations 2015 (S.I. No. 548/2015.)

Consideration: The Appeals Officer referred to the relevant legislation: Section 246 of the Social Welfare Consolidation Act 2005 and Article 5 of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015.) In order to be habitually resident, a person must first establish that they have the right to reside. Article 5 of the Regulations provides for “permission for permitted family members to enter the State”. This article applies to a person “who is the partner with whom a Union citizen has a durable relationship, duly attested”. The documentary evidence indicated that the appellant was living with her partner. The Appeals Officer noted it was open to the appellant to apply directly to the Irish Naturalisation and Immigration Service for a decision that she be treated as a “permitted family member” in order to establish her right to reside in the State but until the appellant established her right to reside in the State, she could not be assessed for habitual residence for social welfare purposes.

Outcome: Appeal disallowed.

3. 2017/39 Jobseeker’s Allowance Oral Hearing

Question at issue: Eligibility (habitual residence condition)

Background: The appellant, an EU national, applied for Jobseeker’s Allowance. That application was refused on the basis that the appellant was not regarded as being habitually resident in the State. The Department’s decision was based on the ‘five factors’ outlined in the legislation and found that the appellant had not worked since arriving in Ireland, did not have sufficient resources to support herself, and that her right of residence had expired.

Oral Hearing: According to her evidence, the appellant came to Ireland with her partner on foot of a job offer he had. The couple was apparently confident that between the resources they brought with them and his earning potential he could support both of them while she looked for employment. The promised job did not last, however, as a contractual dispute arose almost immediately after her partner started work. Despite being highly qualified in IT, he failed to secure alternative employment. The couple became homeless and there was evidence on file from various organisations to attest to their presence in the State for the previous two years. Despite the difficulties encountered, the appellant and her partner stated that they were determined to remain in Ireland. She had secured employment shortly before the appeal hearing and at the time he was still looking for employment.

Consideration: The habitual residence condition is a two part provision which requires the establishment of a right of residence and then an assessment of the person’s situation in accordance with the ‘five factors’ outlined in Section 246 of the Social Welfare Consolidation Act 2005. The Department had decided that the right of residence had expired and that the five factors were not satisfied.

Right of residence

Right of residence is governed by Regulation 6 of S.I. 548 of 2015 (the European Communities (Free Movement of Persons) Regulations 2015). All EU citizens have an unqualified right of residence for up to three months. Thereafter, the right of residence (and associated entitlements) is qualified and paragraph (3) requires that the person: “(i) is in employment or in self-employment in the State, (ii) has sufficient resources for himself or herself and his or her family members not to become an unreasonable burden on the social assistance system of the State, and has comprehensive sickness insurance in respect of himself or herself and his or her family members, (iii) is enrolled in an educational

establishment accredited or financed by the State for the principal purpose of following a course of study there and has comprehensive sickness insurance in respect of himself or herself and his or her family members and, by means of a declaration or otherwise, satisfies the Minister that he or she has sufficient resources for himself or herself and his or her family members not to become an unreasonable burden on the social assistance system of the State, or (iv) subject to paragraph (4), is a family member of a Union citizen who satisfies one or more of the conditions referred to in clause (i), (ii) or (iii).” While the appellant came to Ireland with her partner, they were not married and so the Appeals Officer concluded that she did not meet the definition of a ‘family member’ contained in this legislation or any of the other criteria set out above. Accordingly, he decided she must establish that she is entitled to be resident in her own right. The appellant stated that she came to Ireland to look for work and on that basis the Appeals Officer decided that she came within the terms of Regulation 6(2) of S.I. 548 of 2015 which states: “(2) A Union citizen to whom Regulation 3(1)(a) applies, who has entered the State seeking employment, and his or her family members, may continue to reside in the State for a period that is longer than 3 months where the Union citizen concerned can satisfy the Minister that he or she continues to seek employment and has a realistic prospect of being engaged in employment.” Subsequent to her claim for social welfare, she did commence employment and so her residence became based on Regulation 6(3)(i) as set out above, from the date of commencement of that employment. The Appeals Officer also had regard to Regulation 17(2)(a), which provides that a person to whom Regulation 6(1) or 6(2) applies shall not be entitled to receive assistance under the Social Welfare Acts. Paragraph (b) of the same Article does, however, allow recourse to exceptional needs payments. Accordingly, the Appeals Officer found that at the time of claiming Jobseeker’s Allowance the appellant had an established right of residence as a jobseeker, but that status did not and does not confer any entitlement to access the social assistance system of which Jobseeker’s Allowance is part.

An assessment under the ‘five factors’ set out under Section 246 of the Act of 2005

Based on supporting documentation from voluntary bodies dealing with people who are homeless, the Appeals Officer accepted that the appellant had been in the country since the summer of 2015. The Appeals Officer accepted that the appellant’s centre of interest was now in Ireland. The appellant had experienced very serious difficulties over the previous two years, but had persisted with her efforts to make a life in Ireland and had finally secured permanent employment. However, the Appeals Officer found that at the time of claiming Jobseeker’s Allowance her status was as a jobseeker only and while that gave her a right of residence in accordance with EU legislation, that status did not confer any right to access the social assistance system.

Outcome: Appeal disallowed.

4. 2017/318/ 59 Child Benefit

Question at issue: Habitual residence

Grounds for review: That the Appeals Officer erred in law in his decision of January 2008 on the basis that as the appellant was granted One Parent Family Payment and deemed to be habitually resident in the State this would mean that she is habitually resident for the purposes of Child Benefit.

Background: The appellant, who is an EU national and came to Ireland with her parents and siblings in 2006, applied for Child Benefit in respect of her child who was born in May 2007. The claim was disallowed on the grounds that she did not satisfy the condition of being habitually resident in the State. The appellant was subsequently awarded Child Benefit with

effect from June 2009, therefore the appeal covered the period from June/July 2007 (date of application for Child Benefit) to June 2009 (when Child Benefit was awarded by the Department). An Appeals Officer disallowed the appeal on the grounds that the appellant did not meet the habitual residence condition at the date of claim for Child Benefit in June/July 2007. The Appeals Officer noted that: The Appellant has only been resident in Ireland from June 2006. Having considered all of the evidence I am not satisfied that the Appellant has established that she is habitually resident in the State, being here less than 2 years, having no record of employment in this State or permit to work in this State.

Review: Habitual residence is a question of fact depending on the circumstances of each case, decided in accordance with the statutory provisions set out in Section 246 of the Social Welfare Consolidation Act 2005. Section 246(4) sets out five factors to be taken into account when deciding whether a person is habitually resident in the State. In my review I noted that Section 246 of the Social Welfare Consolidation Act 2005 applicable at the time of the appellant's application for Child Benefit contained a provision that "...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." While this provision was removed from the legislation in its entirety with effect from July 2014 by the Social Welfare and Pensions Act 2014, it was never a requirement to be resident in the State for a period of 2 years - or for any period – the provision was at the time of its operation a rebuttable presumption. I was of the view that the Appeals Officer erred in law in stating that he was 'not satisfied that the Appellant has established that she is habitually resident in the State, being here less than 2 years...' In this respect I considered that the Appeals Officer had effectively applied a minimum period of residence and did not consider at all if the appellant had rebutted the presumption as provided for in the governing legislation. I noted also the Appeals Officer's additional reasoning stated that 'having no record of employment in this State or permit to work in this State' he was not satisfied that the appellant could be regarded as being habitually resident in the State. While the nature and pattern of the person's employment in the State is set out in the governing legislation as a factor to be considered in determining if a person is habitually resident in the State, it is only one factor to be considered. I noted that at the time of the Appeals Officer's consideration of the appellant's appeal in January 2008, the appellant was 17 years of age and she was 16 years of age at date of application for Child Benefit. Like any other 16 or 17 year old one would not expect to find any significant record of employment. In this respect I found the Appeals Officer's decision in relation to his consideration of the appellant's record of employment to be unreasonable. It has been the Department's policy to apply 'once and done' approach in considering if a person is habitually resident in the State such that if a person has been found to satisfy the condition for one scheme/payment type then that decision should stand unless there has been a significant change in circumstances or new facts or evidence emerge. It is that very fact that the appellant had asked me to apply to her application for Child Benefit. Although some key papers relating to the appellant's claim history were no longer available, my review of the file indicated that the appellant had been awarded Supplementary Welfare Allowance (not One Parent Family Payment as submitted) for the period 12 July 2007 to 24 June 2009 which largely coincided with the period under consideration for Child Benefit. As receipt of Supplementary Welfare Allowance is also subject to satisfying the habitual residence condition I could only assume that the Department was satisfied that the appellant was habitually resident in the State in the period in question and that in keeping with the 'once and done' approach the decision should stand for the purposes of the appellant's application for Child Benefit.

Outcome: Decision revised and appeal allowed.

5. 2017/318/60 Child Benefit

Question at issue: Right to reside in the State

Grounds for review: The Department in its request for a review of the Appeals Officer's decision contended that the Appeals Officer erred in law in finding that the appellant had a right to reside in the State.

Background: The appellant in this case came to Ireland in 2003 with her mother and siblings to join her father who had been living and working in Ireland since 2001. At the time her child was born in 2006 the appellant's residence was based on a student visa and she claimed and received Child Benefit up to October 2008. Her claim was suspended at that time when she failed to reply to a Residency Certificate issued by the Department in August 2008. The claim was finally disallowed in December 2008 when the appellant failed to make contact with the Department. By November 2015 the appellant had regularised her residence in the State and her claim for Child Benefit was awarded from that date. The appellant sought to have payment of Child Benefit backdated to 2008. The Appeals Officer while noting that the appellant did not have a right of residence from about 2008 when her student visa expired allowed the appeal based on the difficulties the appellant faced in seeking to have her residency status regularised. The Department requested a review of that decision on the grounds that the Appeals Officer erred in law in allowing the appeal.

Review: In order to qualify for Child Benefit a person must, amongst other conditions, satisfy the condition of being habitually resident in the State. This is a two stage process involving establishing a right of residence and assessing the person's situation under the factors outlined in Section 246 (4) of the Social Welfare Consolidation Act 2005. Section 246 (5) provides that a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State. The various categories of people who shall be regarded as having a right of residence for the purposes of Section 246 (5) are set out in Section 246 (6) of the Social Welfare Consolidation Act 2005. Section 246 (8) provides that where a person is granted a right of residence under the Immigration Acts "he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration or permission concerned was given or granted as the case may be and, in the case of a declaration or permission deemed to be given, for any period before the date on which the declaration or permission concerned was originally given." The Courts have confirmed that this provision has the effect of removing any discretion when considering the back-dating of a claim. Having reviewed the Department's request for a review of the Appeals Officer's decision and having regard to the legislative provisions I concluded that the appellant did not have a confirmed legal right of residence in the State. Her right of residence was only established when she was granted leave to remain by the Irish Naturalisation and Immigration Service (INIS). The legislation is clear and provides that a person without a right of residence cannot be regarded as being habitually resident in this State. Furthermore, Section 246(8) of the Social Welfare Consolidation Act 2005 precludes the payment of benefit for any period before the granting of a right of residence under the Immigration Acts. In those circumstances I concluded that in back-dating the appellant's application the Appeals Officer erred in law.

Outcome: Decision revised and appeal disallowed.

J. 2018

1. 2018/01 Child Benefit Summary Decision

Question at issue: Eligibility (habitual residence condition)

Background: The appellant, an EU national, made a claim for Child Benefit in December 2017 in respect of her daughter who came to Ireland to live with her in September 2017. Supporting documentation was provided, including a statement from the school secretary, indicating that the child was enrolled in school since September 2017 and was attending school at present. The claim was disallowed in January 2018 on the grounds that the appellant was not habitually resident in the State. The decision was appealed and the appellant submitted details of her employment, which had commenced in March 2018. On foot of this evidence the Department made a revised decision and awarded Child Benefit from March 2018. The appellant was held to have migrant worker status, as she had become employed, and was not required to satisfy the habitual residence condition while she remained in employment.

Consideration: Section 220 (3) of the Social Welfare Consolidation Act 2005 provides that a person must be habitually resident in the State for the purposes of establishing entitlement to Child Benefit. Section 246 of the Act outlines the provisions with respect to habitual residence. The question at issue was whether the appellant could be deemed to be habitually resident in the State for the purposes of her claim to Child Benefit in December 2017, in line with the provisions of the governing legislation. Social welfare legislation provides that in determining whether a person may be regarded as habitually resident, particular attention must be paid to the following: the length and continuity of residence in the State; the length and purpose of any absence from the State; the nature and pattern of employment; main centre of interest, and future intentions as they appear from all the circumstances. The Appeals Officer noted that the appellant came to live in Ireland in August 2016 and had been living in the State since then, apart from a brief absence for a holiday. She made a claim for Child Benefit in December 2017 as her six year old daughter had come to join her and was enrolled in school. The appellant had some limited employment in the period prior to her daughter's arrival and had again commenced employment in March 2018. The Appeals Officer concluded that the appellant could be held to have established a centre of interest in the State and could be regarded as habitually resident for the purposes of her claim for Child Benefit in December 2017.

Outcome: Appeal allowed.

2. 2018/22 Disability Allowance Summary Decision

Question at issue: Eligibility (Medical Grounds and HRC)

Background: The appellant, a third country national in his 20s, came to Ireland with his mother, and lives with her and his step-father. In connection with a claim for Disability Allowance, he completed Form HRC1. Details provided on the form indicated that he came to Ireland to live with his mother and step-father (a copy of their marriage certificate was enclosed); he was being supported by his step-father, who was in employment since early 2016; he had a social pension deposit account in the country where he had been living, and hoped to make his permanent home with his family in Ireland and to obtain employment suitable for a person with a disability. The claim was disallowed on grounds that the appellant did not meet the medical qualifying criteria. He was deemed not to be habitually resident in the State as he was held not to have demonstrated a right to reside in line with the European Communities (Free Movement of Persons) Regulations, 2015 (S.I. No. 548 of

2015). With reference to the five criteria provided for under Section 246 (4), it was held that the evidence in his case did not substantiate habitual residence. In his appeal, the appellant submitted that he came to Ireland to join his family; he is disabled from childhood and he cannot live without his mother who is his carer; as a disabled person, he has a right under the Convention for the Rights of Persons with Disabilities (CRPD) to live with his mother who cares for him; he is in receipt of €110 per month from a disability pension, and his centre of interest is in Ireland as he needs to live with his family. The appellant was granted temporary residency status while his step-father's application for residency on his behalf (and that of his mother) was being processed with reference to the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015); ultimately, he was granted EUFAM Stamp 4 status. His claim was re-examined in light of a notification from the Irish Naturalisation and Immigration Service (INIS) in relation to the latter status. However, the Department concluded that this did not automatically mean entitlement to social welfare payments, and it was contended that the provisions of S.I. No. 548 of 2015 applied, in terms of the requirement to have sufficient resources not to become an unreasonable burden on the State.

Consideration: The Appeals Officer identified the governing legislation as Section 210 of the Social Welfare Consolidation Act 2005 which provides that Disability Allowance may be payable to a person who meets the qualifying criteria as to age, specified disability, and means. In addition, it is a requirement of the legislation that a person is habitually resident in the State. Section 246 of the 2005 Act sets out the provisions as to habitual residence, and the relevant provisions of EU law are outlined in the European Communities (Free Movement of Persons) Regulations, 2015 (S.I. No. 548 of 2015). In relation to habitual residence, the Appeals Officer noted that Section 246 (4) provides that when determining whether a person is habitually resident in the State for purposes of the Act, all the circumstances of the case must be taken into account including, in particular, the following: the length and continuity of residence in the State or in any other particular country; the length and purpose of any absence from the State; the nature and pattern of the person's employment; the person's main centre of interest, and the future intentions of the person concerned as they appear from all the circumstances. Section 246 (5) provides that a person who does not have a right to reside in the State may not be regarded as being habitually resident in the State. The Appeals Officer referred to the two stage process which involves establishing, in the first instance, whether a person may be held to have a right to reside in accordance with EU law and, secondly, determining whether that person may be deemed to be habitually resident with reference to the provisions of Section 246 (4). She noted that INIS advised the appellant that the Minister for Justice and Equality had decided to approve his application for a residence card under Regulation 7 of the Regulations (S.I. No. 548 of 2015) on the basis that he is a qualifying family member of a Union citizen who is residing in the State in exercise of their rights under the Directive (220/38/EC). Accordingly, she concluded that he may be held to have a right to reside in accordance with EU law. Moreover, she considered that the evidence served to establish that his main centre of interest is in the State and that he may be deemed to meet the habitual residence requirement for purposes of his claim. In terms of the medical qualifying criteria, the Appeals Officer noted that the appellant has a diagnosis of Intellectual Disability and Congenital Adrenal Hyperplasia. Having assessed the evidence, including the medical history which referred to severe birth trauma and global developmental delay, details of prescribed medication, clinical findings, his expectation that the condition would continue indefinitely, she concluded that he may be deemed to meet the qualifying condition which applies in terms of a specified disability. Accordingly, she held that the qualifying criteria for receipt of Disability Allowance were met.

Outcome: Appeal allowed

3. 2018/42 Jobseeker's Allowance Summary Decision

Question at issue: Eligibility (habitual residence condition)

Background: The appellant applied for Jobseeker's Allowance. The decision of the Department was that the appellant did not fulfil the 'habitual residence condition' attached to the payment of Jobseeker's Allowance. She was a Spanish national with some work experience in Dublin and a high level of formal education and good English language skills.

Consideration: The Appeals Officer at the outset outlined that the question for this appeal was in relation to the right to reside and the habitual residence condition only. Other qualifying criteria for the payment of Jobseeker's Allowance were not under consideration as they were not part of the Department's decision to refuse the application. Regulation 6 of S.I. No. 548 of 2015, the 'European Communities (Free Movement of Persons) Regulations 2015', which gives further effect to Directive 2004/38/EC, provides that EU/EEA nationals have an automatic and unqualified right of residence in Ireland for 3 months only. Thereafter, certain conditions apply, depending on the profile of the person. The appellant's evidence in her application form and letter of appeal indicated that she came to Ireland in February 2015. She came looking for work and for opportunities to develop her career as the Irish economy was more favourable than the Spanish economy. She had a Master's Degree in Psychology and very good English language skills. She was not married and did not have children, but had a partner in Dublin (who was employed and had resided here since 2014) and several close friends. She was in her 30s. Her parents lived in Spain. She described Dublin as 'home'. Although she indicated on her application form that she might only stay in Ireland for 1-2 more years, she stated in her letter of appeal that her intention was to stay in Dublin long-term with her partner. She described efforts she made to make this possible, including registering this intention with the Spanish Embassy and applying for chartered membership to the PSI (Psychological Society of Ireland; the professional body for psychologists) and discussing a potential job with an established psychology clinic. An economically inactive person from the EU/EEA maintains a right to reside only for as long as they have both comprehensive sickness insurance cover and sufficient financial resources to maintain themselves so as not to become an unreasonable burden on the social assistance system of the State and persons who were previously an EU/EEA national worker or self-employed person for a period of less than one year retain the status of worker and the right to reside for a further six months. The appellant contended that since she came to Ireland in 2015 she worked as a childminder, was partly supported by her parents and partner, and then worked for 3 months in 2017 for a recruitment firm. This suggested that she had a legal right to reside at the time of her application for Jobseeker's Allowance. The Appeals Officer outlined that it was important to note that having a right of residence is distinct from being 'habitually resident'. Section 141(9) of the Social Welfare Consolidation Act 2005 provides that a person shall not be entitled to Jobseeker's Allowance unless he or she is habitually resident in the State. In order to be habitually resident in Ireland, a person must be both legally residing in Ireland and have their 'centre of interest' in Ireland. The question for this appeal, therefore, was whether the appellant had moved her 'centre of interest' to Ireland. Section 246(4) of the 2005 Act provides that when determining whether a person is habitually resident in the State, a decision maker 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, and (e) the future intentions of the person concerned as they appear from all the circumstances. In that context, the information on file indicated that the appellant had lived in Ireland for over three years, was in a long-term relationship with an employed person, had good employment prospects here, but would have lesser prospects in Spain due to its level of unemployment, and had made efforts to establish a steadier career path here. The Appeals Officer assumed that the Department would conduct a financial means assessment and would look into any co-habiting arrangements. However, subject to those other conditions of the Jobseeker's Allowance scheme being met, the appeal succeeded.

Outcome: Appeal allowed

4. **2018/43 Jobseeker's Allowance Oral Hearing (not heard)**

Question at issue: Eligibility (habitual residence condition)

Background: The appellant applied for Jobseeker's Allowance in January 2018. The decision of the Department was that the appellant did not fulfil the 'habitual residence condition' attached to the payment of Jobseeker's Allowance. He was a UK national with no previous connection to Ireland.

Consideration: The file evidence indicated that the appellant was a 28 year old UK national. He came to Ireland in December 2016. He had no previous connection to Ireland. He secured work for a few months in 2017. All his close family members, including a young daughter, lived in England, but he stated on his letter of appeal that he had no contact with any of them. UK nationals enjoy an unqualified right of residence in Ireland. The Appeals Officer outlined that it was important to note that having a right of residence is distinct from being habitually resident. In order to be habitually resident in Ireland, a person must be both legally residing in Ireland and have their 'centre of interest' in Ireland. The question for this appeal, therefore, was whether the appellant had moved his 'centre of interest' to Ireland. The legislation requires, in accordance with Section 246(4) of the Social Welfare Consolidation Act 2005, that when determining whether a person is habitually resident in the State, a decision maker 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, and (e) the future intentions of the person concerned as they appear from all the circumstances. The appellant had never lived or worked in Ireland before and had no Irish family connections. He only worked for a few months in 2017, having first arrived in late 2016. While he stated he had no contact with family in England, he had no strong links in Ireland either. He had been residing with a friend in Ireland, but, as stated in his letter of appeal, the friend wanted him to move out if he could not pay the rent. His stated intention was to stay in Ireland into the future and to secure employment. The appellant was called to an oral hearing, but did not attend and did not provide any reason for same. The Appeals Officer considered that this was a missed opportunity to make a more convincing case that his centre of interest had indeed moved to Ireland for the purposes of meeting the habitual residence condition. Having considered the evidence, the Appeals Officer concluded that it appeared more likely than not that the appellant's centre of interest remained in the UK and not Ireland, particularly in the context of his family ties, lack of previous connections to Ireland and the fact that a young man of his profile was likely to want to seek employment opportunities wherever in the world they may be.

Outcome: Appeal disallowed

5. **2018/318/62 Supplementary Welfare Allowance Question at issue: Habitual Residence**

Condition

Background: The appellant, an EU national, first came to Ireland in the mid-1990s and was employed in Ireland for a number of years. On becoming unemployed he initially received Jobseeker's Benefit and in January 2010 was awarded Jobseeker's Allowance which ceased in May 2013 when the appellant returned to his country of origin. The appellant returned to Ireland in January 2017 and submitted an application for Supplementary Welfare Allowance. This application was initially disallowed on two grounds – failure to satisfy the habitual residence test and that his means were not fully disclosed. Following an appeal it was decided that means had been disclosed and therefore the remaining issue, and the subject of the request for a review under Section 318 of the 2005 Act, related to the habitual residence condition. The Appeals Officer concluded that although at the time of claiming Supplementary Welfare Allowance the appellant had an established right of residence as a job-seeker that status did not confer any entitlement to access the social assistance system of which Supplementary Welfare Allowance is part.

Grounds for Review: It was contended as part of the submission underpinning the request for review that the Appeals Officer erred in law in considering in the first instance if the appellant had a right to reside in the State. In this respect it was submitted that the Appeals Officer should have considered the 5 factors first and in not doing so had erred in law. It was also contended that the Department of Employment Affairs and Social Protection's Guidelines relating to returning migrants or resuming previous residence should have been considered by the Appeals Officer. It was asserted that the approach taken by the Appeals Officer could be construed as discriminatory against EU citizens and that the Appeals Officer failed to apply the law set out in Section 311(3) of the 2005 Act.

Review: Habitual residence is a question of fact depending on the circumstances of each case, decided in accordance with the statutory provisions set out in Section 246 of the Social Welfare Consolidation Act 2005. Sub-sections (1) to (5) of Section 246, which were at the centre of this request for a review, provide as follows:

Provisions with respect to habitual residence.

246. (1) A requirement, in any of the provisions specified in subsection (3), for a person to be habitually resident in the State means that— (a) the person must be habitually resident in the State at the date of the making of the application, and the person must remain habitually resident in the State after the making of that application in order for any entitlement to subsist (b) the person is a worker or a self-employed person, residing in the State pursuant to article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 from— (i) a Member State, or (ii) a member state of the European Economic Area, (c) the person is a family member of a person referred to in paragraph (b), (d) where a person referred to in paragraph (b) ceases to be such a worker or such a selfemployed person, the person must be habitually resident in the State immediately after the date of such cessation, and must remain habitually resident in the State in order for any entitlement to subsist, or (e) where a person referred to in paragraph (b) ceases to be such a worker or such a selfemployed person, a family member of such a person must be habitually resident in the State immediately after the date of such cessation, and the family member must remain habitually resident in the State in order for any entitlement to subsist. (3) The provisions of this Act referred to in subsection (1) are sections 141(9), 153C, 161A(d), 163(3), 168(5), 173(6), 180(2), 186A(2), 186D(1), 192, 210(9), 220(3) and 238B(5). (4) A deciding officer or a designated person, when determining whether a person is habitually resident in the State for the purposes of this Act, 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, and (e) the future intentions of the person concerned as they appear from all the circumstances. (5) Notwithstanding subsections (1) to (4) and subject to subsection (9), a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State....” From my review of the Appeals Officer's decision I did not consider that the Appeals Officer erred in law by considering in the first instance if the appellant had a right to reside. I formed the view that the legislation is unequivocal on this point in that Section 246(5) provides that notwithstanding the preceding subsections, a person who does not have a right to reside in the State shall not for the purposes of the Act, be regarded as being habitually resident in the State. In any event it was not at all clear to me that the outcome would have been any different if the Appeals Officer considered the 5 factors first and then conclude, as she did, that the appellant did not have a right to reside. I therefore did not consider that the Appeals Officer has erred in law or in relation to the facts in this respect.

Right of residence

Right of residence for EU nationals and their families is governed by EU Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. That Directive was transposed into Irish law by the European Communities (Free Movement of Persons) (No. 2) Regulations, 2006 (S.I. No. 656 of 2006), which were replaced with effect from 1st February 2016 by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015). All Union citizens have an unqualified right of residence for up three months. The right of permanent residence is acquired after 5 years legal residence. After the initial three months right of residence is conditional in accordance with Article 6(3) of S.I. 548/2015 as follows: That the person..... (i) is in employment or in self-employment in the State, (ii) has sufficient resources for himself or herself and his or her family members not to become an unreasonable burden on the social assistance system of the State, and has comprehensive sickness insurance in respect of himself or herself and his or her family members, (iii) is enrolled in an educational establishment accredited or financed by the State for the principal purpose of following a course of study there and has comprehensive sickness insurance in respect of himself or herself and his or her family members and, by means of a declaration or otherwise, satisfies the Minister that he or she has sufficient resources for himself or herself and his or her family members not to become an unreasonable burden on the social assistance system of the State, or (iv) subject to paragraph (4), is a family member of a Union citizen who satisfies one or more of the conditions referred to in clause (i), (ii) or (iii). In considering if the appellant had a right to reside in Ireland I concluded that the Appeals Officer correctly identified Article 6 of S.I. 548/2015 as the applicable legislation and concluded that as the appellant did not meet any of the conditions outlined in Article 6(3) he could not be considered to have a right to reside in Ireland. I therefore did not consider that the Appeals Officer had erred in her consideration of the appellant's right to reside. With regard to the contention that the appellant's habitual residence should have been considered in accordance with the Department of Employment Affairs and Social Protection's Guidelines on returning migrants or resuming previous residence, I concluded that those Guidelines relate specifically to the consideration of habitual residence and the 5 factors outlined in Section 246 (4) of the Social Welfare Consolidation Act 2005 but do not override the provision in Section 246 (5) of the 2005 Act that a person who does not have the right to reside shall not be regarded as being habitually resident in the State. I did not find any basis for the assertion that the approach taken by the Appeals Officer could be construed as discriminatory against EU citizens. I outlined that the Courts have accepted that the rules are not discriminatory in that the determination of entitlement is based on provisions set out in national and EU Regulations made pursuant to EU Directive 2004/38 on the right of citizens of the Union and

their family members to move and reside freely within the territory of the Member States and these rules are applied to all applicants on the same basis. I did not find any evidence that the Appeals Officer had failed to apply the law pursuant to Section 311 (3) of the 2005 Act which provides that an Appeals Officer when deciding a question referred to him/her, shall not be confined to the grounds on which the decision of the Deciding Officer or the determination of the Designated Person was based, but may 'decide the question as if it were being decided for the first time'. In subsequent correspondence I outlined that Article 6 (1) of the European Communities (Free Movement of Persons) Regulations 2015 [S.I. 548 of 2015] provides that a Union citizen and family members may reside in the State for up to 3 months provided they have a national identity/valid passport and do not become an unreasonable burden on the State. Article 6 (2) of S.I. 548 of 2015 provides that where a person has entered the State to seek employment he/she may continue to reside for longer than 3 months where he/she continues to seek employment and has a realistic prospect of being engaged in employment. I also outlined that Article 17 (2)(a) of S.I. 548 of 2015 provides that a person to whom Regulation 6 (1) or 6 (2) applies shall not be entitled to receive assistance under the Social Welfare Acts. Based on her consideration of these provisions the Appeals Officer concluded that the appellant's status as a jobseeker in accordance with Article 6(1) or 6(2) of S.I. 548 of 2015 did not confer any entitlement to access to the social assistance system of which Supplementary Welfare Allowance is part. Article 17 (2) is a mandatory provision and the only exception made to this exclusion is set out in Article 17 (2) (b) which provides that this exclusion to receive assistance under the Social Welfare Acts does not apply to a payment under Section 201 (payment for exceptional need) and Section 202 (grant of Supplementary Welfare Allowance in cases of urgency) of the 2005 Act.

Outcome: Decision not revised

K. 2019

1. 2019/02 Child Benefit Summary Decision

Question at issue: Backdating (Habitual Residence Condition)

Background:

The appellant applied for Child Benefit in May 2018 and was awarded from March 2018. The appellant requested backdating of her claim to March 2014 the date on which she applied for approval of her immigration status. As the appellant did not have leave to remain in the State prior to March 2018 she could not be regarded as habitually resident under Social Welfare legislation.

Consideration: Section 220 (3) of the 2005 Act provides that a person must be habitually resident in the State for the purposes of establishing entitlement to Child Benefit. Section 246 of the 2005 Act outlines the provisions with respect to habitual residence, including that a person who does not have a right to reside in the State shall not be regarded as being habitually resident in the State. Section 246(8) of the 2005 Act also provides that where a person is granted permission to remain in the State he or she shall not be regarded as being habitually resident for any period before the date on which the declaration or permission concerned was granted. The Appeals Officer noted that the appellant was granted permission to remain in the State from March 2018 but had no such permission prior to this date. While the Appeals Officer noted the contentions put forward on behalf of the appellant that there was an inordinate delay by the Department of Justice and Equality in

processing her application for immigration status, the Appeals Officer concluded that she was bound by Social Welfare legislation. The legislation requires that the person making the application for Child Benefit is habitually resident in the State. The evidence confirmed that the appellant did not have permission to remain in the State prior to March 2018. The provisions of the governing legislation precluded the award of Child Benefit from an earlier date in those circumstances.

Outcome: Appeal disallowed

2. 2019/25 Disability Allowance Summary Decision

Question at issue: Eligibility (HRC)

Background: The appellant, an EU National, made a claim for Disability Allowance in August 2016 and this was disallowed in November 2018 and re-stated in a decision in May 2019. The appellant was living at an address with his partner who is an Irish national and the appellant was an adult dependant on his partner's claim. He stated that he came to Ireland in March 2016. He was allocated a PPSN in May 2017 and was employed for part of the period between May 2017 and September 2018. Records show that during this period the appellant had 38 paid PRSI contributions. He returned to his country of origin for 3 months from September to December 2018. He had a health diagnosis of hepatitis B with cirrhosis and attended a hepatology clinic but was not on medication nor had he had any recent hospital admissions. It was indicated that these conditions which commenced in 2015, prior to his arrival in Ireland, would continue indefinitely. In the appeal submission, the appellant acknowledged that he was out of the State for a three month period in 2018.

Governing Legislation: European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015) sets out the circumstances in which an EU citizen has the right to reside in the State. Section 210(9) of the 2005 Act states that in order to qualify for Disability Allowance the person must be habitually resident in the State. Section 246(5) of the 2005 Act provides that a person, who does not have a right to reside in the State, shall not be regarded as being habitually resident in the State. The main legislative provisions relating to Disability Allowance are contained in Sections 209 to 212 of the Act of 2005 and Articles 137 to 140 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007).

Consideration: The Appeals Officer identified the governing legislation as Section 210 of the 2005 Act which provides that Disability Allowance may be payable to a person who meets the qualifying criteria as to age, specified disability, and means. In addition, it is a requirement of the legislation that a person is habitually resident in the State. Section 246 of the 2005 Act sets out the provisions as to habitual residence, and the relevant provisions of EU law are outlined in the European Communities (Free Movement of Persons) Regulations, 2015 (S.I. No. 548 of 2015). The Appeals Officer referred to the two stage process which involves establishing, in the first instance, whether a person may be held to have a right to reside in accordance with EU law and, secondly, determining whether the person may be deemed to be habitually resident with reference to the 5 factors outlined in Section 246 of the 2005 Act. The Appeals Officer noted that Section 246 of the 2005 Act provides that when determining whether a person is habitually resident in the State, all the circumstances of the case must be taken into account including, in particular, the following: the length and continuity of residence in the State or in any other particular country; the length and purpose of any absence from the State; the nature and pattern of the

person's employment; the person's main centre of interest, and the future intentions of the person concerned as they appear from all the circumstances. Section 246 (5) provides that a person who does not have a right to reside in the State may not be regarded as being habitually resident in the State. The Appeals Officer noted that the appellant retained worker status for 6 months after his employment ended in September 2018. However, as the appellant was no longer in employment or self-employment, was not self-sufficient or a student he did not have a right to reside in the State. The Appeals Officer also concluded that the appellant did not have access to social assistance beyond the 6 months following the cessation of his employment. In those circumstances the Appeals Officer concluded that the appellant did not have a right to reside in the State and could not be regarded as being habitually resident in the State.

Outcome: Appeal disallowed

3. 2019/26 – Disability Allowance Oral Hearing

Question at issue: (Eligibility – HRC right to reside)

Background: The appellants, both EU nationals, first came to Ireland in 2015 to join their daughter who was living in Ireland for some years and was in employment, and applied for Disability Allowance. While they were considered medically suitable for Disability Allowance they were refused on the grounds that they did not have the right to reside in the State and therefore did not meet the habitual residence condition for Disability Allowance. Neither appellant had any employment history in Ireland.

Oral Hearing: The hearing was attended by the appellants and their daughter. The habitual residence condition was explained to the appellants including the information required by the Appeals Officer to make the decisions. The appellants outlined their history and family circumstances before coming to Ireland in 2015. They stated that their daughter was their only child. They had some siblings in their country of origin but the links were tenuous and their parents were now deceased. They had both been in employment in their country of origin. Since they ceased employment they had both been in receipt of a state pension and had lived on these pensions. They no longer had a family home in their country of origin and had no bank accounts there or in Ireland. They received one-off financial assistance from their daughter in 2014 while they were living in their country of origin. There was no documentary evidence of this financial transaction. They confirmed that they did not receive any other financial support from their daughter prior to coming to Ireland. They continued to get their pensions via a family friend who collected their pensions and transferred the money to Ireland. They stated that their daughter had been supporting them since coming to Ireland but they did not want to be a burden on her. They stated that they would love to work in Ireland but there were too many barriers for them given their medical conditions.

Consideration: Section 210 (9) of the 2005 Act provides that a person shall not be entitled to Disability Allowance unless he or she is habitually resident in the State. Section 246 (4) of the 2005 Act provides generally for the defining characteristics of what it means to be 'habitually resident' in particular 5 factors to be considered when assessing the person's main centre of interest and future intentions. Section 246(5) of the 2005 Act states that a person who does not have a right to reside in the State shall not be regarded as being habitually resident. Determining if a person is habitually resident is a two part process

which firstly requires that the person has a right to reside in the State and secondly, if a right to reside is established, an assessment under 5 factors to determine the person's centre of interest and future intentions. Section 246(6) of the 2005 Act provides for persons who shall be taken to have the right to reside in the State and includes "a person who has the right under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) to enter and reside in the State or is deemed under those Regulations to be lawfully resident in the State". The first step was therefore to consider the appellants' right to reside having regard to the fact that they were now resident in the State for more than 3 months. The appellants came to Ireland in 2015 and as they had not resided in Ireland for a continuous period of 5 years did not have the right to reside under EU Regulations. Their only income was small pensions from their country of origin and support from their daughter who had a limited income herself and was caring for her own child. They were applying for Disability Allowance as a long-term support having both indicated that they would be unable to work due to their medical conditions. This indicated that they did not have sufficient resources not to become an unreasonable burden on the social assistance system of the State. Neither of the appellants were in education or studying. The appellants did not therefore have a right to reside under Article 6 of EU Regulations S.I. 548 of 2015. The appellant's daughter is a Union citizen who has a right to reside as she is in employment. The question to be considered was if the appellants had the right to reside as qualifying family members which is defined in Article 3(5) of EU Regulations. The appellants were direct relatives in the ascending line of their daughter but to be considered qualifying family members they must both be considered to be a 'dependent' relative of their daughter. Based on the guidance from the EU Commission in 2009 the 'dependency' must have already existed in the previous country of residence and cannot be created by virtue of the fact that they moved to Ireland. The dependency covers material supports received to meet essential needs having regard to financial and social conditions and requires documentary evidence. The appellants supported themselves through work in their country of origin and subsequently through their combined pensions. The only support they reported from their daughter prior to coming to Ireland was one off financial support in 2014 of which there was no documentary evidence. The evidence did not establish any pre-dependency on their daughter prior to coming to Ireland. The Appeals Officer concluded that the appellants could not be considered to be dependent direct relatives of their daughter and did not as a result have the right to reside in Ireland under S.I. 548 of 2015. In those circumstances they did not meet the habitual residence condition for the purposes of Disability Allowance.

Outcome: Appeal disallowed

Section 317 review request: The appellants subsequently requested a review of the Appeals Officer's decisions and provided additional information. The Appeals Officer reviewed the decisions in light of the information provided and noted that the contentions raised were not presented by any attendees during an in depth examination of the issue at the oral hearing and that these new contentions had not been substantiated. The Appeals Officer concluded that there was insufficient evidence to revise the decisions and that the decisions not to allow the appeals stood.

Section 318 review request: The appellants requested a review by the Chief Appeals Officer of the decisions given by the Appeals Officer. The Chief Appeals Officer having reviewed the Appeals Officer's decisions and the outcome of the review conducted by the Appeals Officer pursuant to Section 317 of the 2005 Act, did not consider that the Appeals Officer had erred in fact or law and declined to revise the decisions of the Appeals Officer

4. 2019/55 State Pension Non-Contributory Summary Decision

Question at issue: Eligibility: Right to Reside/Habitual Residence Condition

Background: The appellant applied for State Pension Non-Contributory in April 2018. The claim was refused on the basis that the appellant had not established a right to reside in the State. In her appeal, the appellant outlined that she moved to Ireland from another EU country with her husband in 2016. They sold their property and bought a house in Ireland to be close to their daughter. The appellant's husband passed away in 2018 and as a result her pension from her country of origin had been reduced and she applied for the State Pension Non-Contributory.

Consideration: Section 246(5) of the 2005 Act makes it clear that a decision in relation to whether a person fulfils the habitual residence condition is a two-step process. Firstly, the person must establish a right to reside in the State. Social welfare legislation prescribes that a person who does not have a right to reside in the State shall not be regarded as being habitually resident in the State. All EU citizens have an unqualified right of residence for up to three months. Thereafter the right of residence is conditional on the person satisfying one of the conditions set out in Article 6 of the European Communities (Free Movement of Persons) Regulations 2015. A right of permanent residence is acquired after five years legal residence. The appellant in this case had not been resident in the State for five years and, given her circumstances, there was only one option in the legislation by which she could establish a right to reside at that time i.e. as a person with sufficient resources so as not to be an unreasonable burden on the social assistance system of the State. Sufficient resources/unreasonable burden are not defined in legislation but the EU Commission has provided some guidance in this area and focuses, amongst other things, on issues such as the length of time the person is likely to require support, the possibility that the EU citizen will exit the safety net, the length of residence in the host State, any history of contributing to the finances of the host State, etc. Given the fact that the appellant had a pension from her country of origin and her own home in the State, the Appeals Officer did not consider that the appellant would represent an unreasonable burden on the social assistance system. Based on the evidence the Appeals Officer concluded that the appellant satisfied the habitual residence condition.

Outcome: Appeal allowed

5. 2019/318/62 Disability Allowance

Question at issue: Eligibility (Right to Reside in the State)

Grounds for review: An advocate acting on behalf of the appellant requested a review of the Appeals Officer's decision on the basis that the Appeals Officer erred in law. The question at issue was whether the appellant had a right to reside in the State.

Background: The appellant, an EU national, came to Ireland to live with her daughter who was herself living and working in Ireland for a number of years. The appellant applied for Disability Allowance and this was refused by the Department on the grounds that the appellant had not established that she had a right to reside in the State. The Appeals Officer found that while the appellant had established a right to reside as a direct dependent in the

ascending line of a worker she nonetheless did not have access to social assistance.

Review: From my review of the Appeals Officer's decision it was clear that the Appeals Officer was satisfied that the appellant was a dependent direct relative in the ascending line of a Union citizen who was a worker in Ireland. In accordance with guidance from the EU Commission on implementing these provisions, the Appeals Officer was also satisfied that the appellant had established that the dependency existed prior to her joining her daughter in Ireland. Notwithstanding that, the Appeals Officer concluded that the appellant was not entitled to receive assistance under the Social Welfare Acts. The grounds for review were to the effect that, once the right to reside had been established, the appeal should have been allowed and the question of whether the appellant was habitually resident could be considered thereafter. From my review of the Appeals Officer's decision it was clear that the Appeals Officer considered that the appellant had a right to reside on the basis of being a dependent direct relative in the ascending line of a Union citizen who is a worker in Ireland, and accordingly the provisions of Article 6 (3)(a) (iv) of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) applied. In my review I outlined that in accordance with the Directive 2004/38/EC and the Regulations of 2015 (S.I. 548 of 2015) giving further effect to the Directive, the right to reside in the State is not unconditional. The Directive and the Regulations draw a distinction between economically active persons and those who are not. Article 11 of S.I. 548 of 2015, dealing with the retention of rights of residence provides: A person residing in the State under Regulation 6, 9 or 10 shall be entitled to continue to reside in the State for as long as he or she satisfies the relevant provision of the regulation concerned and does not become an unreasonable burden on the social assistance system of the State. While the appellant was residing in the State under Article 6 the right to reside was not unconditional and she may continue to reside for as long as she satisfied the provisions of Article 6 and did not become an unreasonable burden on the social assistance system of the State. In those circumstances I did not consider that the Appeals Officer had erred in law on the grounds submitted on behalf of the appellant.

Outcome: Decision not revised

L. 2020

1. 2020/02 Child Benefit Summary Decision

Question at issue: Eligibility (habitual residence condition)

Background: The appellant applied for Child Benefit in respect of her two children in April 2020. The appellant was a third country national and lived in Southeast Asia for a number of years. She was separated from the father of her children, an Irish citizen. She stated that she and the children relocated to Ireland in October 2019 in order to be close to family and for the children to grow up Irish. Her claim was disallowed on the grounds that she did not meet the habitual residence condition. The decision stated that the length and nature of her residence did not provide for approval of habitual residence; she had not entered employment; her centre of interest was not Ireland; her future intentions to remain in Ireland were uncertain and from the evidence produced there was nothing to substantiate that she was habitually resident in Ireland. In appealing the decision, the appellant stated

that she relocated to Ireland permanently in October 2019 and was in and out of Ireland for two years prior to that as she separated from her partner. There were no reported absences from the State from October 2019. She attached her ex-partner's passport and evidence of the family's travel back to Ireland. She stated that she had not entered employment because of the young age of her children, and she was supported by her ex-partner. She stated that her centre of interest was Ireland – the children were young and needed to be close to their father and they were in school full-time. She had rented a house and had an Irish bank account. She stated that it was not true that her future intentions were uncertain, it was a permanent decision to relocate so that her children could grow up with their father and their cousins.

Consideration: Section 220(3) of the 2005 Act provides that a person shall not be a qualified person for the purposes of Child Benefit unless he or she is habitually resident in the State. The habitual residence condition is a two-part process: establishing a right of residence and an assessment under the five factors contained in Section 246(4) of the 2005 Act: (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, and (e) the future intentions of the person concerned as they appear from all the circumstances. As the appellant had been granted a Stamp 4 permission to live/work in Ireland she had a right to reside in the State. It was necessary to examine her circumstances in line with the five factors set out in the legislation in order to establish if she was habitually resident in the State. Having examined the circumstances of the appellant's residence in Ireland, the Appeals Officer was satisfied that when the family returned to Ireland in October 2019 this represented a change of their centre of interest to Ireland for the longer term. The Appeals Officer did not consider that the evidence supported a conclusion that her centre of interest was elsewhere. The fact that the children were Irish, their father was Irish, their extended family lived in Ireland and that the appellant and her ex-partner had made the decision to raise the children in Ireland with that family, all pointed to their future intentions being centred in Ireland. The Appeals Officer was satisfied that the appellant satisfied the habitual residence condition from October 2019.

Outcome: Appeal allowed

2. 2020/20 Disability Allowance Summary Decision

Question at issue: Eligibility (habitual residence condition)

Background: The appellant, an EU national aged 16 years, came to Ireland in 2018 to reside with his uncle who had been granted guardianship of the appellant. Prior to coming to Ireland the appellant lived with his mother, grandmother and other relatives. His grandmother cared for him but owing to ill-health neither his mother nor grandmother could continue to care for him. An application for Disability Allowance was disallowed as the Department determined that the appellant was not habitually resident in the State. This was based on the determination that the appellant did not derive a right to reside in the State as he was not a qualified or permitted family member under the European Communities (Free Movement of Persons) Regulations 2015, (S.I. No. 548 of 2015). On appeal, the appellant submitted that he was a dependent of his uncle both prior to and since coming to Ireland and that in those circumstances he had a right to reside in the State under the 2015 Regulations.

Consideration: The Appeals Officer relied on Sections 210(9) and 246 of the 2005 Act and Articles 3 and 5 of the European Communities (Free Movement of Persons) Regulations 2015, (S.I. No. 548 of 2015). The Appeals Officer concluded that the appellant did not satisfy the condition of being a qualified family member as he was not a spouse, civil partner, direct descendant or dependent direct relative in the ascending line of the Union citizen. The Appeals Officer went on to consider if the appellant was a permitted family member under the 2015 Regulations. Article 5 of the 2015 Regulations makes provision for family members who are not the spouse/partner, direct descendants or dependent direct relatives in the ascending line. Under the provisions of Article 5 such other family members, referred to as permitted family members, have the right to have their entry and residence facilitated in the host EU country if: • they are dependent on the EU citizen; or • they are members of the EU citizen's household; or • where on serious health grounds strictly require the personal care of the EU citizen. The Appeals Officer concluded that, based on the facts of the case, the appellant did not satisfy any of these requirements.

Outcome: Appeal disallowed

3. 2020/21 Disability Allowance Oral Hearing

Question at issue: Eligibility (habitual residence condition)

Background: The appellant, an EU national in her late 20s, applied for Disability Allowance in May 2019. Her application was refused in September 2019 on the grounds that she was not habitually resident in the State. The length and continuity of her residence in the State was specifically cited. In her application, the appellant stated she had lived in her home country until coming to the State in February 2017. She indicated she had lived continuously in Ireland since her arrival. She had been in employment but had been on sick leave since February 2019. The appellant stated she had been renting a house with an ex-partner but became homeless when the relationship broke up. She was registered with the local homeless outreach team and the local multidisciplinary team regarding her mental health. She was attending therapy twice a week. She had an Irish bank account. She had no dependents or property in the State. In her appeal, the appellant stated that she came to Ireland with the intention of working and studying here. She stated that her mother was living close by and she recently moved to a new tenancy. She had three jobs since coming to Ireland but had to resign from her last employment due to her mental health.

Oral Hearing: The appellant provided a letter from her Local Authority advising she was eligible for local authority housing and had been placed on the housing list. She said she had returned to her home country for less than a fortnight on a holiday to visit her grandmother. She indicated that she was not in work in Ireland at that stage. She had been permanently employed but had to resign her job in March 2019. She stated that she explored the possibilities of getting a job in Ireland before she arrived. She stated that she was looking for, and actively seeking, employment. She stated that she planned to stay and live in Ireland and to go back to work, if that was possible. She had participated in local sport events, planned to join a local club and to do some more volunteer work. She stated that she was going to therapy. She indicated that she did not hold bank accounts in other countries. She stated that her mother resided in Ireland. She provided a copy of her tenancy agreement and a letter confirming that her tenancy had been registered with the Residential Tenancies Board. **Consideration:** The Appeals Officer identified the governing legislation as Section 210 of the 2005 Act which provides that Disability Allowance may be payable

to a person who meets the qualifying criteria as to age, specified disability, means. In addition, it is a requirement of the legislation that a person is habitually resident in the State. Section 246 of the 2005 Act sets out the provisions as to habitual residence. In relation to the length and continuity of residence in the State or in any other particular country, the appellant had resided continuously in the State since 2017, with the exception of one brief absence. In relation to the length and purpose of any absence from the State, she had one holiday, of less than a fortnight duration, to visit her grandmother. In relation to the nature and pattern of her employment, she had been in almost continuous employment since her arrival in the State, up to the date on which she ceased employment due to illness. In relation to her main centre of interest, she had no property in the State or abroad and her mother resided in the State. She had also been deemed eligible for local authority housing. In relation to her future intentions as they appeared from all the circumstances, the appellant intended to remain in the State and there was no evidence that demonstrated otherwise. On the basis of the evidence, the Appeals Officer concluded that the appellant was habitually resident in the State.

Outcome: Appeal allowed

4. 2020/35 Jobseeker's Allowance Summary

Decision Question at issue: Eligibility (habitual residence condition)

Background: The appellant's application for Jobseeker's Allowance submitted in December 2019 was disallowed by the Department on the grounds that the appellant was not habitually resident in the State. In its decision, the Department outlined that since his arrival in the State in December 2018 the appellant had two brief periods of employment in 2019 and that he previously resided in another country for ten years.

Consideration: The evidence before the Appeals Officer was that the appellant, in his early 40s, was born outside of Ireland in the late 1970s, had a difficult childhood and was fostered by a family in Ireland in the early 1990s and resided in Ireland for some 20 years up to the end of 2010. The evidence showed that the appellant left Ireland in 2010 to spend some time with his birth-mother who died in 2018. On his return to Ireland in 2018 the appellant was supported by his foster family and also accessed services for mental health issues. The appellant submitted that he was returning to Ireland as a place where he had history and current supports. In his consideration of the appeal the Appeals Officer outlined that in accordance with Section 246 (4) of the 2005 Act in determining whether a person is habitually resident in the State account shall be taken of all the circumstances of the case, including the five factors outlined in that provision. Having regard to the circumstances in this case and in particular the reason for the appellant's absence from the State and his strong connection to Ireland over a substantial period of his life the Appeals Officer was satisfied based on the totality of the evidence that the appellant was habitually resident in the State for the purposes of his claim for Jobseeker's Allowance.

Outcome: Appeal allowed

5. 2020/318/67 Jobseeker's Allowance

Question at issue: Eligibility (right to reside in the State)

Grounds for Review: The Department in its request for a review of the Appeals Officer's decision submitted that the Appeals Officer erred in law in that the appellant's status in the State was that of an asylum seeker who has applied to the International Protection Office for recognition as a refugee in accordance with the Refugee Act 1996 or the International Protection Act 2015 and whose application had yet to be determined. The Department, while acknowledging that the Deciding Officer erred in carrying out a full habitual residence test rather than finding the appellant did not satisfy the habitual residence condition under Section 246(7) of the 2005 Act, submitted that under Section 311 (3) of the 2005 Act the Appeals Officer was obliged to use the correct legislation in making his decision. In those circumstances it was submitted that the Appeals Officer erred in law in arriving at his decision as it was contrary to Section 246 (7) of the 2005 Act which provides that such a person cannot be regarded as habitually resident and as such may not access standard social assistance payments.

Background: The appellant resided in Ireland and was the holder of an international protection card which was valid for six months. Her claim for Jobseeker's Allowance was disallowed by a Deciding Officer on the grounds that the appellant did not meet the habitual residence conditions set out in Section 246(4) of the 2005 Act i.e. the five factors. The appellant submitted that she resided in the State under the protection of the Minister for Justice and had a right to access the same social welfare benefits under the same conditions as applied to Irish citizens. Relying solely on Section 246(4) of the 2005 Act the Appeals Officer found that the habitual residence condition was satisfied and allowed the appeal.

Review: In accordance with Section 246 of the 2005 Act establishing habitual residence is a two stage process which firstly requires that the person has a right to reside in the State. If it is established that the person has a right to reside, an assessment of their situation under 5 factors applies to determine their centre of interest and future intentions. From my review of the material that was before the Appeals Officer it was clear that the appellant resided in the State as the holder of an international protection card. The reverse side of that card outlined, inter alia, that this temporary card indicates that an individual claiming to be the person named on the card has applied for international protection in the State. I was satisfied that the Appeals Officer accepted at face value an extract from a Department of Justice document which was submitted by the appellant in support of her appeal and which outlined a person's rights if granted international protection. The relevant section which was submitted outlined that when a person receives a refugee declaration or a subsidiary protection declaration under the provisions of the International Protection Act, 2015 various entitlements arise, including access to medical care and social welfare benefits subject to the same conditions applicable to Irish citizens. However, the appellant had not received a refugee declaration or a subsidiary protection from the Minister for Justice and her status in the State was that of an asylum seeker who had applied for recognition as a refugee in accordance with the Refugee Act 1996 or the International Protection Act 2015. In those circumstances and in accordance with the provisions of Section 246(7) of the 2005 Act she could not be regarded as being habitually resident in the State. In those circumstances I considered that the Appeals Officer had erred in law.

Outcome: Decision revised

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