Casebase Number: G0123

Thematic Note of SWAO Case Studies:

Child Benefit

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

Period of Analysis**:** 2009-2021

Theme: Child Benefit
Period of Analysis: SWAO Annual Reports 2009-2021
Keywords: Child Benefit, Qualified Child, Qualified Person, Full-time Education, Normal Place of Residence, Ordinarily Resides, Habitual Residence Condition
Casebase No. Case G0123

Summary of the relevant law:

Child Benefit is a monthly payment that is made to a qualified person for a qualified child. It is not means tested or taxable and there are no PRSI conditions.

(1) **Qualified Child**

Section 219 of the Social Welfare Consolidation Act 2005 (as amended)(the "**2005 Act**") defines a "qualified child" as the child is (i) under 16 years of age or (ii) between 16 and under 18 years of age if the child is in full-time education or full-time training or has a disability and cannot support themselves.

In accordance with Section 14(2) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (the "**2007 Regulations**"), full-time education and training does not include courses (i) which form part of an employment or apprenticeship or work experience programme; (ii) which arise from employment; (iii) where the period of paid work experience exceeds the time spent in the classroom; and (iv) where the period of work experience in a course run by Teagasc exceeds the time spent in the classroom in the academic year.

Section 219(1)(b) provides that a child between the age of 16 and 18 shall be eligible where, by reason of physical or mental infirmity, the child is incapable of self-support and is likely to remain incapable for a prolonged period. A Deciding Officer will seek the advice of the Chief Medical Officer as to the acceptability of the relevant medical certification.

Child benefit is not paid on behalf of children 18 or older, even if they are in education or training.

The child must be ordinarily resident in the State. There is no statutory definition of ordinarily resident for these purposes. This requirement can be satisfied, pursuant to Section 2019(2) of the 2005 Act, in cases where the qualified person or that person's spouse, civil partner or cohabitant is: (i) a member of the Defence Forces or the Irish Civil Service serving abroad, (ii) a volunteer development worker or (ii) persons temporarily employed abroad by an Irish employer and paying Irish social insurance contributions.

In addition, pursuant to Section 219(1)(d) a child will not qualify for Child Benefit if they are currently detained in a child detention school or imprisoned or detained in legal custody.

(2) **Qualified Person**

Section 220(1) of the 2005 Act defines a qualified person as "[a] person with whom the qualified child normally resides." Section 220(2)(a) of the 2005 Act provides that the Minister may make rules for determining with whom a qualified child shall be regarded as normally residing. Those rules are contained in Article 159 of the 2007 Regulations. An example of those rules includes the following Rule 4, which has been applied by Appeals Officers in cases:

> *Subject to Rule 8, a qualified child, who is resident elsewhere than with a parent or a step-parent and whose mother is alive, shall, where his or her mother is entitled to his or her custody*

whether solely or jointly with any other person, be regarded as normally residing with his or her mother and with no other person.

Additionally, Section 220(3) provides the applicant must satisfy the Habitual Residence Condition, which applies to all applicants regardless of nationality.

The Habitual Residence Condition consists of two parts. Firstly, a person must have an established right of residence in the State, pursuant to Section 246(5) of the 2005 Act and in accordance with S.I. No. 548/2015 – European Communities (Free Movement of Persons) Regulations 2015. This right of residence must be unconditional in that it does not preclude the person from accessing social welfare payments. Secondly, pursuant to Section 246(4) of the 2005 Act, a person's situation and intentions will be taken into consideration by a Deciding Officer or Designated Person, in particular: (i) the length and continuity of residence in the State or any other country; (ii) the length and purpose of any absence from the State; (iii) the nature and pattern of the person's employment; (iv) the person's main centre of interest, and (v) the future intentions of the person concerned. This list is non-exhaustive and other information may be considered relevant in arriving at a decision. **Also see Thematic Note on Right to Reside and Habitual Residence Condition (Thematic Note G0116).**

It is worth noting that Child Benefit is classified as a Family Benefit under EU law. Accordingly, employed and self-employed EEA Nationals, whose entitlement derives from the application of EEC Regulation 883/04 on the coordination of social security systems and have become subject to Irish PRSI, do not have to satisfy the Habitual Residence Condition. This entitlement continues even if they become unemployed and receive Irish Unemployment Benefits.

Key grounds of appeals by appellants:

A. Qualified child ordinarily resident in the State

There were four appeals relating to whether a child was ordinarily resident in the State. The majority of appeals dealt with whether a period of absence meant that the appellant was no longer entitled to the benefit. For example, in Case 2019/03 it was held that the child was no longer qualified following an absence of 6 months from the State. Another deciding factor in these decisions was whether the appellant had custody of the child at the time of claiming the payments.

B. Qualified child's normal place of residence

There were four appeals relating to a qualifying child's normal place of residence which mainly dealt with who was considered the qualified person in accordance with Article 159 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007). The various grounds for disagreement included: making educational and medical payments (**Case 2016/01**); providing payments from employment in the State to the qualified child's mother in another state (**Case 2018/02**); being in regular contact, visiting and providing food, shelter and clothing during their child's time in shared and full-time care (**Case 2020/01**); and having legally shared custody but arguing the amount of time actually spent in one parent's home over another should be taken into account (**Case 2021/01**).

C. Qualified child attending full-time education between age of 16 and 18 years

There were two appeals where the appellant challenged whether sufficient evidence was provided to demonstrate that the child was either attending full-time education or was incapable of self-support by reason of mental infirmity. In both cases, the appeal was allowed on the basis that the appellants had met the threshold under the 2005 Act and the 2007 Regulations.

D. Backdating: See Thematic Notes on Backdating Claims (**Thematic Note G0114**)

Observations on appeal outcomes:

As there is no definition or test for qualifying as ordinarily resident, clear evidence establishing when a qualified person or child was resident in the State greatly impacted the success of appeals. The majority of ordinarily resident appeals were rejected due to the lack of the appellants' ability to establish when the child left and/or returned to the State. Out of four cases, the appeal in **Case 2012/03** was the exception, as the appellant successfully demonstrated the child was ordinarily resident in the state by way of an Irish Court Order in 2010, which granted the appellant full custodial rights in 2010. The loose assessment of 183 days in a year, or six months, was applied by Appeal Officers to determine those ordinarily resident in the state, with **Case 2019/03** being disallowed as a 6 month absence meant that it could not be said that the children were ordinarily resident. Appeals Officers tended to be particularly strict in this regard, as appeals where explanations such as holidays or visiting family were used for absences from the State were disallowed.

Decisions in appeals of normal place of residence included a Section 318 review, **Case 2020/318/57**. Section 220(2)(a) states that Ministers may make rules to determine with whom a qualified child is normally residing. Despite the child residing with a guardian in the State rather than their parents outside of the State, Rule 4 of the Ministerial Rules provides that that the mother's legal custody of the child overrode guardianship. The review concluded that this Rule 4 applied notwithstanding that the child's mother was resident outside of Ireland.

Finally, these reports indicate that Appeals Officers were willing to allow appeals when evidence could be provided that a child between the ages of 16 and 18 years was being home-schooled or is incapable of continuing in an institution of full time education due to severe mental health issues. Evidence was also key in these cases.

Relevant Case Studies of the SWAO Annual Reports 2009-2020

A.	**2009**	
	N/A	
B.	**2010**	
1.	2010/01 Child Benefit – oral hearing	Question at issue: Habitual Residence Condition
C.	**2011**	
1.	2011/04 Child Benefit – summary Decision	Question at issue: Habitual Residence Condition
2.	2011/06 Child Benefit – summary decision	Question at issue: Habitual Residence Condition
3.	2011/10 Child Benefit – oral hearing	Question at issue: Habitual Residence Condition
4.	2011/12 Child Benefit – oral hearing	Question at issue: Habitual Residence Condition
5.	2011/13 Child Benefit – oral hearing	Question at issue: Habitual Residence Condition
6.	2011/15Child Benefit – oral hearing	Question at issue: Habitual Residence Condition

7.	2011/16 Child Benefit – oral hearing	Question at issue: Habitual Residence Condition
D.	**2012**	
1.	2012/03 - Child Benefit – oral hearing	Question at issue: Date of Award / Qualified Child – ordinarily resident
2.	2012/04 - Child Benefit – summary decision	Question at issue: Qualified Child – ordinarily resident
E-F.	**2013-2014**	
	N/A	
G.	**2015**	
1.	2015/01 Child Benefit – oral hearing	Question at issue: Habitual Residence Condition
H.	**2016**	
1.	2016/01 Child Benefit – oral hearing	Question at issue: Normal residence of qualified child
2.	2016/02 Child Benefit – summary decision	Question at issue: Habitual residence
I.	**2017**	
1.	2017/01 Child Benefit – oral hearing	Question at issue: Habitual residence condition
2.	2017/02 Child Benefit – summary decision	Question at issue: Backdating of payment
3.	2017/03 Child Benefit – oral hearing	Question at issue: Extended payment of Child Benefit / Whether the child is in full-time education
4.	2017/04 Child Benefit – summary decision	Question at issue: Extended payment of Child Benefit / Whether the child is in full-time education
5.	2017/318/59 Child Benefit – Section 318 Review	Question at issue: Habitual residence
6.	2017/318/60 Child Benefit – Section 318 Review	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.	2018/02 Child Benefit summary decision	Question at issue: Normal residence of qualified child
K.	**2019**	
1.	2019/01 Child Benefit – summary decision	Question at issue: Backdating
2.	2019/02 Child Benefit – summary decision	Question at issue: Backdating (Habitual Residence Condition)
3.	2019/03 Child Benefit – summary decision	Question at issue: Qualified Child – ordinarily resident
L.	**2020**	
1.	2020/01 Child Benefit – summary decision	Question at issue: Qualified Person – normal residence
2.	2020/02 Child Benefit – summary decision	Question at issue: Eligibility (habitual residence condition)

3.	2020/318/57 Child Benefit – Section 318 Review	Question at issue: Eligibility (qualified child and resident in the State)
M.	**2021**	
1.	2021/01 Child Benefit – summary decision	Question at issue: Qualified child – normal residence
2.	2021/02 Child Benefit – summary decision	Question at issue: Habitual residence; backdating

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 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. 2011/04 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 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.

2. 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.

3. 2011/10 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) indicted 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.

4. 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 29 (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.

5. 2011/13 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 21/03/2011from 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 2011for 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 31 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.

6. 2011/15Child 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 33 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.

7. 2011/16 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 34 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 here 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 permit.

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.

D. 2012

1. Case 2012/03 Child Benefit – oral hearing

Decision under appeal: refusal of request to award payment from an earlier date - reason(s) stated:- On the basis of the additional information received, I regret to inform you that I am unable to revise the original decision to award Child Benefit for [C] from [specified date] 2010.

Issue: Date of Award.

Background: A claim for Child Benefit was made by the appellant in respect of his son, who came to reside with him. He sought to have the claim backdated to an earlier date, at which point he had been awarded sole care and custody of his son. He submitted copies of Court Orders (from another jurisdiction) in support of this claim. He pointed out that an earlier Order had removed from his estranged wife her legal rights to their son's care and custody, vesting them in her parents instead. He advised that as the child's grandparents had not assumed their legal responsibilities, a second Order was issued, overriding the original one and giving the appellant sole custody. The appellant travelled to take custody of his son pending finalization of 20 court proceedings. He continued, on approval, to be entitled to Supplementary Welfare Allowance (Rent Supplement) throughout the period at issue

At oral hearing: the appellant's main contention related to the status of his son during the period where he stated the child had been unlawfully abducted from his country of ordinary and habitual residence to another State.

The appellant advised that his marriage had ended in 2006, while the family lived in Ireland, and that his son lived initially with his former wife. He sought, and was granted, access rights in 2007. He stated that the child's mother thereafter unlawfully abducted him to another state. He reported that he pursued a process (through the Hague Convention) to establish sole legal guardianship of his son and to return him to this State.

Comment/Conclusion: The Appeals Officer referred to the Social Welfare (Consolidation) Act, 2005, Section 219 (c), which provides that a child shall be a qualified child for the purposes of Child Benefit where he or she is ordinarily resident in the State. Section 220 of the Act provides that a person with whom a qualified child normally resides shall be entitled to Child Benefit in respect of that child.

The Appeals Officer noted that the primary intention of the Hague Convention is to preserve whatever child custody arrangement existed immediately before an alleged wrongful removal or retention of a child. The Convention mandates return of any child who was habitually resident in a contracting nation immediately before an action that constitutes a breach of custody or access rights. Its purpose is to discourage unilateral removal of a child from that place in which the child lived when removed or retained, which should generally be understood as the child's ordinary residence. He concluded that the evidence established that the child was wrongfully removed from this State and that, until the time of abduction, he was ordinarily resident here.

He considered that the evidence indicated that the appellant was not a 'qualified person' for the purposes of Child Benefit in the period leading up to the Court Order which had allowed for the handing over of his son into his care. He noted that the appellant, whilst pursuing finalization of court proceedings in another State, was treated as continuing to be habitually resident in Ireland for social welfare purposes. A Court Order of [specified date] brought into effect the appellant's sole entitlement to parental rights and the Appeals Officer determined that to be the effective date from which the appellant was a 'qualified person' for the purposes of Child Benefit. He considered that the child was not at any stage 'ordinarily' resident in the other State and observed that court proceedings, pursued under the Hague Convention, had subsequently established fact in this matter. Accordingly, he concluded that the child could be considered as having re-established his ordinary residence in the State from at least the [specified date] in 2010, following the Order of the Court. He concluded that, with effect from that same date, the appellant was a qualified person for the purposes of Child Benefit.

Decision of the Appeals Officer: The appeal is allowed.

Note on reason(s) for decision: In order that Child Benefit may be paid, the child in question must be ordinarily resident in the State. Having examined the evidence carefully in this case, I have concluded that the child [C] may be considered to have resumed his ordinary residence in the State at least from [specified date] 2010. On this basis the appeal succeeds.

2. Case 2012/04 Child Benefit – summary decision

Decision under appeal: revised decision as to entitlement - reason(s) stated:- When [M] left this State, you were no longer entitled to claim Child Benefit payment for her. As a result of this revised decision under Section 302 (b) of the Social Welfare (Consolidation) Act, 2005, you have been overpaid Child Benefit for the period September 2010 to December 2010 inclusive amounting to €600.

Background: The appellant, a Lithuanian national, made a Child Benefit claim in respect of his sister. The Deciding Officer considered the appellant to be the 'qualified person' with whom the child normally resided in Ireland, under the provisions of the Social Welfare Consolidation Act, 2005, Section 220 (1) (a) and held that the child could be regarded as 'ordinarily resident' in the State with reference to the provisions of Section 219 (1) (c). On this basis, Child Benefit was deemed to be payable under domestic legislation. When the child returned to live in Lithuania, however, it was held that she ceased to be ordinarily resident in the State and that the appellant ceased to be a qualified person.

Comment/Conclusion: The Appeals Officer noted that in his letter of appeal, the appellant had submitted that he was the child's legal guardian and had argued that as he was sending the Child Benefit payments to Lithuania, he should remain entitled to payment.

Decision of the Appeals Officer: The appeal is disallowed. I decide that the appellant is not entitled to payment of Child Benefit for the period September 2010 to December 2010.

Note on reason(s) for decision: Social welfare legislation prescribes that the Minister may make rules for determining with whom a qualified child may be regarded as normally residing [Section 220 (2) (a) of the Social Welfare Consolidation Act 2005]. These rules are prescribed in the Social Welfare (Consolidated Claims, Payment and Control) Regulations, 2007, as follows.

Article 159

For the purposes of Part 4, the person with whom a qualified child shall be regarded as normally residing shall be determined in accordance with the following Rules:

1. Subject to Rule 2, a qualified child, who is resident with more than one of the following persons, his or her - mother, step-mother, father, step-father, shall be regarded as normally residing with the person first so mentioned and with no other person.

4. A qualified child, who is resident elsewhere than with a parent or a step-parent and whose mother is alive, shall, where his or her mother is entitled to his or her custody whether solely or jointly with any other person, be regarded as normally residing with his or her mother and with no other person.

While I note that the appellant has power of attorney to represent the child's mother in certain circumstances, I do not consider that this gives him legal custody. As her mother is entitled to her custody, the child must be regarded as normally residing with her and with no other person. Therefore, I must decide that the appellant is not entitled to payment of Child Benefit.

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. 2016/01 Child Benefit – oral hearing

Question at issue: Normal residence of qualified child

Background: The appellant had been in receipt of Child Benefit in respect of her child with effect from a date in 1999. Following an application from the child's sister for payment in respect of that child, her entitlement was reviewed and the claim referred to a Social Welfare Inspector for investigation. Ultimately, it was determined that the child was residing with her sister for the majority of the time and the appellant's claim for Child Benefit was disallowed.

Oral hearing: The appellant was accompanied by legal representatives from Community Law & Mediation (formerly Northside Community Law and Mediation Centre). The Social Welfare Inspector attended at the request of the Appeals Officer. The child's sister had been called to the hearing but had failed to attend.

The Appeals Officer noted that the child was deemed to be a qualified child for the purpose of Child Benefit. Therefore, the question at issue concerned the child's normal residence as provided for in legislation. The Social Welfare Inspector outlined the details of the investigation and advised that a social worker had been assigned to the child's case. The appellant confirmed that her primary social welfare payment continued to include an increase in respect of the child. She indicated that she had sole custody of the child, while the Inspector advised that she was not aware of any Court Order in relation to custody. The question of abandonment was discussed and the Inspector confirmed that she had no evidence which might suggest that the child had been abandoned by the appellant. The appellant stated that she maintains responsibility for the child's primary care; she retains the child's medical card and takes responsibility for medical matters; she is responsible for the school uniform and school expenses, and she submitted proofs of expenditure. It was also confirmed that the child had not been placed in foster care or placed with a relative

under Section 36 of the Child Care Act, 1991. On the question as to residence, the appellant stated that the child had returned to her home some four weeks previously as her sister had become homeless.

The appellant's legal representatives submitted that, as payment was being withdrawn, the burden of proof lay with the Deciding Officer to establish the case for disallowance. The point was made also that the claim had been suspended from a date which preceded the Social Welfare Inspector's report. It was submitted that there was no evidence available prior to that report which would provide a basis to disallow payment. In addition, it was 45 asserted that the appellant had not been given an opportunity to comment on the information available to the Department prior to the decision, in line with the requirements of natural justice. Reference was made to a Freedom of Information (FOI) request, where some of the information provided had been redacted. It was asserted that, as a consequence, the appellant had been unable to address all of the details on which the Deciding Officer had relied in making the decision. In conclusion, it was stated that an internal review had been sought under the FOI provisions and that an appeal would be made to the Information Commissioner.

Consideration: The Appeals Officer noted that the governing legislation provides that the person with whom a child normally resides is qualified to receive Child Benefit. Article 159 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) outlines rules for determining the person with whom a child may be regarded as 'normally residing' (outlined at the end of this case study).

The Appeals Officer noted that the Deciding Officer appeared to have relied solely on Rule 1 and Rule 2. She observed that, where a child is living with more than one of the following: mother, step-mother, father or step-father, he or she is regarded as normally residing with the person with whom they reside for the majority of the time. She concluded that there was no evidence to suggest that the appellant did not have custody of the child and, even if the child was residing elsewhere, that her mother would remain the person entitled to receive Child Benefit under Rule 4. She observed that the only circumstances where the normal residency of a qualified child would fall to be determined in a manner not in accordance with Rule 4 would be those provided for in Rule 7, where the qualified child has been abandoned or deserted. She was satisfied that the evidence available indicated that the child had not been abandoned or deserted. She noted that the provisions of Rule 8 did not apply in this case; they refer to circumstances in which a child is placed in foster care, or with a relative, under Section 36 of the Child Care Act, 1991.

The Appeals Officer noted the points made in the submission regarding the burden of proof, as well as those in relation to the retrospective aspect of the decision. She noted that there is an onus on the Department to make a satisfactory case for disallowance where an existing payment is being reviewed, and she regarded as valid the point made concerning the fact that the appellant's Child Benefit had been suspended prior to receipt of the Social Welfare Inspector's report. While noting the points made with reference to the release of documents under the FOI provisions, the Appeals Officer pointed out that she has no role in the matter. The Appeals Officer concluded that the appellant was the qualified person to receive Child Benefit in respect of the child and that this decision should take effect from the date on which the payment had been suspended.

Outcome: Appeal allowed.

2. 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 48 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.

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 patternof 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. 2017/02 Child Benefit – summary decision

Question at issue: Backdating of payment

Background: The appellant had been in receipt of Child Benefit up to 2013 when she temporarily moved to Australia. She returned to Ireland in June 2014 but only submitted an application for Child Benefit in February 2017. She was awarded Child Benefit from March 2017 and requested that her payment be back-dated to cover the period June 2014 to February 2017.

Consideration: Social Welfare legislation provides that a person who fails to make a claim for Child Benefit within the prescribed time shall be disqualified for payment in respect of any day before the date on which the claim is made. This legislation, however, does allow for the backdating of a Child Benefit claim where it is accepted that there was good cause for the delay in making the claim and where entitlement throughout the period in question is established.

The appellant stated that the reasons for the delay in submission of her claim was the volume of information and paperwork requested for both the Child Benefit form and the habitual residency questionnaire she had to complete. She stated that she experienced difficulty in gathering specific information and documents which were both valid and up to date. She also stated that she and her husband had a number of significant life events that contributed to the difficulty in obtaining all of the requested information for the application including: settling into new jobs, transitioning their child into school, renewing passports, renewing immigration stamps and negotiating the terms of her husband's uncertain short term employment contracts. She said that the application required some form of document for each of these events and it was difficult to have these ready and up to date at the same time.

The Appeals Officer concluded that, while noting these reasons, he must also take into account the fact that the form for application Child Benefit itself includes an information page and guidance on how to complete the form. It clearly informs all potential claimants that they could lose out on the benefit unless they complete and return the application within 12 months of the month in which the family either came to live in Ireland or the date either a claimant or a claimant's spouse commenced employment in Ireland.
The appellant became a qualified person for the receipt of Child Benefit in June 2014, the date she returned to live in Ireland. She would have seen the guidance on the application form and this would have given her sufficient time to source the documentation required to support her application. She had previously been in receipt of Child Benefit up to the date she temporarily moved to live in Australia in 2013, so she was therefore aware of the existence of the payment and her potential entitlement. Although she stated that she experienced difficulty in gathering supporting documentation, there is no evidence that she contacted the Child Benefit section of the Department to discuss this difficulty as a cause of delay and sought any advice/guidance prior to the date she formally submitted her application in February 2017.

The Appeals Officer concluded that the appellant's explanation of her reasons for the delay in applying for Child Benefit did not amount to good cause, as provided for in legislation.

Outcome: Appeal disallowed.

3. 2017/03 Child Benefit – oral hearing

Question at issue: Whether the child is in full-time education

Background: The appellant had been in receipt of Child Benefit from a date in 1999. Following correspondence from the school regarding non-attendance, Child Benefit entitlement was reviewed and disallowed on the grounds that her child was over 16 and was not 'in full-time education'. The appellant contended that her child was being bullied at school. She had tried to get the school to address the issue and made efforts to get him into another school but there were no places available and she notified the Department of Education and Skills that her child was now at home.

Oral hearing: The appellant was accompanied by an NGO advocate and the Home School Liaison Officer from the school. The Deciding Officer also attended at the request of the Appeals Officer. The Appeals Officer noted that the appellant had submitted substantial evidence that her son was being bullied at school. The appellant confirmed that he had not attended school formally since September because of this bullying and was now being home-schooled, although due to some confusion he was not registered with the Department of Education and Skills for approval for home tuition. The Appeals Officer noted that in order to be deemed a qualified child for the purposes of Child Benefit, it was a legislative requirement that once a child reached 16 years, he or she must be in full-time education. As this child was now being home-schooled, the question at issue was whether the child met the condition of being in full-time education as provided for in legislation.

The representative from the Department stated that, in addition to the stated definition of 'full-time education' for those over sixteen years of age, they sometimes accept, on an administrative basis, that this condition is being met where the child is being home-schooled. The Department has to satisfy itself that the child concerned is partaking in a full-time course of study and they usually request a time table, list of subjects studied, information about registration for State Exams etc. The appellant stated that she was a former teacher and that her son works at his studies full-time every day. He is in fifth year, studying eight subjects and will sit his Leaving Cert in June 2019. She said that after he left school in September, she made extensive but unsuccessful efforts to get him a place in another school and that she had now got a place for him, starting the following September.

The Home School Liaison Officer confirmed the child is still registered at their school, that teachers there have been supportive and willing to facilitate study at home including providing him with notes of class lessons every week. He has been submitting exam papers for summer and Christmas exams to the school who correct them. The Department's representative then advised that the situation sounded very akin to home schooling and that, if the appellant provided the requisite information about routine, timetable, registration for exams etc. and a letter from the school, she would be willing to review and reconsider the decision made to disallow the Child Benefit claim. The appellant later provided evidence of same to the Appeals Officer, including confirmation that she had now applied to the Department of Education and Skills for registration on the home school register and of a school place the following September for her son.

Consideration: The governing legislation provides that a child over sixteen must normally be in full-time education in order for Child Benefit to be paid. Article 160 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) outlines the criteria for determining when a child may be regarded as 'receiving full-time education'. This involves 'attending on a full-time basis a course of full-time education by day at an institution of education' or "being on a Department of Education

and Skills register for home-schooling'. The Appeals Officer observed that the 'institutions of education' as defined in legislation under Article 3 did not include a provision for home-schooling. She observed that the case therefore hinges on the meaning of the phrase 'full-time education' as it applies in this context and that the term 'attending a course by day at an institution of education' does not cover the scenario of home schooling.

The Department indicated at the oral hearing, that they were willing to re-consider the additional evidence and to decide it on the basis of an administrative decision, whereby they would apply alternative criteria to the term 'full-time education' if satisfied that the appellant's son was being home-schooled on a full-time basis. The Appeals Officer, whilst acknowledging a positive administrative decision in such cases concluded that the existing legislation does not actually allow for this interpretation.

Nevertheless, the Appeals Officer observed that the appellant had demonstrated that in this instance there was a significant amount of co-operation and interaction with the school. Whilst not physically attending the school, her son was still registered as a pupil there. He worked at home on a full-time rostered basis, was doing eight Leaving Certificate subjects, had notes and grinds organised for these subjects. The school provided ongoing support, supervision and on-line updates to him. In addition, they allowed him to both sit and have end of term exams corrected. The Appeals Officer concluded that, for all intents and purposes, the appellant's son could therefore be considered as attending full-time education at the school, as the school/ pupil role is fulfilled in a similar manner.

Outcome: Appeal allowed.

4. 2017/04 Child Benefit – summary decision

Question at issue: Extended payment of Child Benefit

Background: Prior to her son's 16th birthday, the Department advised the appellant that while payment of Child Benefit ceases at age 16 years, it may be extended to age 18 years where a child is in full-time education or is 'physically or mentally disabled'. In order that payment would continue, she was asked to supply certification in respect of her son. In response, she stated that he had mental health issues, and she submitted a National Educational Psychological Service (NEPS) report. She also provided details of correspondence in which a Psychologist had outlined the difficulties he was experiencing, and had made a number of referrals for him. This evidence was referred to the Chief Medical Advisor of the Department, with a request for an opinion as to whether he might be held to meet the definition provided for in the governing legislation. The Medical Assessor indicated that he considered that the medical evidence was not approved, and the appellant was asked if she wished to provide additional medical evidence. In response, she submitted an assessment completed by the Child Adolescent and Mental Health Services (CAMHS), which outlined issues raised during the assessment, and a plan to provide support for the child and his parents. Ultimately, the claim was disallowed on grounds that the medical evidence was not sufficient to establish a basis for extended payment of Child Benefit.

In an appeal against that decision, the appellant stated that her son continued to suffer mental health issues and depression; he did the Leaving Cert Applied (LCA) because he could not be around large numbers of people and there had been six pupils in the LCA

class, and he was not doing a Post Leaving Cert (PLC) course or other training because he was still not stable and not yet ready to interact with people. She referred to the medical evidence provided, and submitted that payment of Child Benefit until his 18th birthday would help her to help him.

Consideration: Social welfare legislation provides for the extended payment of Child Benefit, between 16 and 18 years of age, where a child is in full-time education or is, by reason of physical or mental infirmity, incapable of self-support and likely to remain so for a prolonged period. Accordingly, the question to be determined was whether the appellant's son could be regarded as incapable of self-support 'by reason of physical or mental infirmity', and likely to remain so for a prolonged period.

The Appeals Officer noted the details of the medical evidence submitted and the appellant's assertion that her son continued to experience depression and mental health issues, and that he was not attending a PLC or other course, having completed the LCA, as he felt unable to interact with people. In the circumstances, she concluded that the evidence established that he met the definition of a qualified child provided for in the legislation governing extended entitlement to Child Benefit.

Outcome: Appeal allowed.

5. 2017/318/ 59 Child Benefit – Section 318 Review

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.

6. 2017/318/60 Child Benefit – Section 318 Review

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. 2018/02 Child Benefit – summary decision

Question at issue: Normal residence of qualified child Background: The appellant, an EU national, was employed in the State. His child resided in Poland with the child's mother. The Deciding Officer outlined that the appellant's employment made Ireland the competent State to pay a Child Benefit supplement under EU Regulations. She stated, however, that the child's mother was the qualified person to receive the supplement as the child resided with her.

The appellant appealed the decision on the grounds that he lived and worked in Ireland and the child's mother lived and worked in Poland, he paid maintenance of €200 - € 300 per month and additional life insurance and he needed the Child Benefit payment to continue paying maintenance.

Consideration: Section 220 of the Social Welfare Consolidation Act 2005 provides that a person with whom a qualified child normally resides shall be qualified for child benefit in respect of that child and is in this Part of the Act referred to as "a qualified person". The rules for determining with whom a child shall be regarded as normally residing are contained in Article 159 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007). The Appeals Officer agreed that the appellant's employment in the State rendered Ireland the competent State for the payment of a Child Benefit supplement in respect of his child. However, the Appeals Officer also concluded that, having regard to the rules for determining with whom the child was normally residing, the appellant was not the qualified person to receive the Child Benefit as the child did not reside with him.

Outcome: Appeal disallowed.

K. 2019

1. 2019/01 Child Benefit – summary decision

Question at issue: Backdating

Background: The appellant, a non-EU national, made a claim for Child Benefit in May 2018. Her claim was awarded from June 2018 a month after her claim was received. The appellant in her application form informed the Department that she came to Ireland in December 2016. She then travelled home and was absent from the State from February 2017 to June 2017 and again from October 2017 to January 2018. The appellant requested that her claim be considered from January 2017 the month after she had first arrived in Ireland. However, backdating for the period January 2017 to May 2018 was disallowed by the Department on the grounds that the appellant was held not to have shown 'good cause' for the delay in making the claim. The Department contended that it publishes information leaflets as widely as possible, advertises changes of legislation in the national press and information is available on the Department's website regarding entitlement to payments.

Consideration: Section 241 of the 2005 Act provides that a claim for Child Benefit must be made within twelve months of a person becoming a qualified person within the meaning of section 220 of the 2005 Act. Where the claim is not made within the prescribed time, a person is disqualified for payment in respect of any day before the date on which the claim is made.

The Appeals Officer concluded that the appellant could not be considered a qualified person for receipt of Child Benefit for the periods that she was absent from the State and that she became a qualified person when she returned to the State in January 2018. The appellant made her claim in May 2018 which was within 12 months of becoming a qualified person. Therefore the Appeals Officer concluded that her claim should be awarded from February 2018 the month after she became a qualified person as laid down in the 2005 Act.

Outcome: Partially allowed.

2. 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.

3. 2019/03 Child Benefit summary decision

Question at issue: Qualified Child – ordinarily resident

Background: The appellant had been in receipt of Child Benefit in respect of her children which was disallowed for a period between September 2018 and April 2019. The family

had left the State in August 2018 and the children were no longer regarded as being ordinarily resident in the State. The Department had not been notified of the intended absences from the State or the likely duration of the absences and consequently payment of the benefit continued during the absences. On revising the decision, the Department relying on Section 302(b) of the 2005 Act, also raised an overpayment which was in excess of €5,000. In her appeal submission the appellant set out the background that gave rise to the family's absences from the State, which included seeking work in another EU State, visiting family in America, participating in a training programme and ultimately leaving Ireland in order to work in another country.

Consideration: Section 219 (1) (c) of the 2005 Act provides that 'a child shall be a qualified child for the purposes of Child Benefit where he or she is ordinarily resident in the State'.

The term 'ordinarily resident' is not defined in legislation and in those circumstances decision makers can apply discretion having regard to the circumstances of the individual case, including the length of the absence.

The Appeals Officer concluded that having regard to the length of the absence, some 6 months, it could not be said that the children in this case were ordinarily resident in the State and in those circumstances found no grounds to allow the appeal. The overpayment as assessed by the Department also stood.

Outcome: Appeal disallowed.

L. 2020

1. 2020/01 Child Benefit – summary decision

Question at issue: Qualified Person

Background: The Department revised its decision in relation to the appellant's entitlement to Child Benefit on foot of information received that the child was in shared care from 2017 and full-time care from November 2018. Payment of Child Benefit was discontinued from November 2018. The effect of the revised decision also resulted in the raising of an overpayment of almost €1,000.

Consideration: Section 220 of the 2005 Act provides that a person with whom a qualified child normally resides shall be qualified for Child Benefit in respect of that child and is referred to as "a qualified person".

The Appeals Officer noted the appeal contentions that throughout the period in question the appellant was in regular contact with her child, he was a weekly visitor to her home, she maintained a home for him, provided food, shelter and clothing for him and that during this period he essentially was in the dual care of the appellant and the relevant state agency. The appellant stated that she was not aware that in collecting Child Benefit for him and providing for him as she did, that she was doing anything untoward.

The Appeals Officer concluded that for the purposes of the governing legislation that the appellant could not be regarded as the "qualified person" to receive Child Benefit, as on the basis of the available evidence, her child could not be regarded as normally residing with her from November 2018.

Outcome: Appeal disallowed.

2. 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.

3. 2020/318/57 Child Benefit – Section 318 Review

Question at issue: Eligibility (qualified child and resident in the State)

Grounds for Review: The appellant contended that the Appeals Officer erred in law in finding that the child in respect of whom Child Benefit was claimed could not be regarded as ordinarily resident in the State and that the appellant could not be considered to be a 'qualified person'.

Background: The appellant applied for Child Benefit in respect of a child who was living with her in the State but whose parents lived outside the State. Evidence presented to the Appeals Officer included a notarised letter to the effect that the child's parents had appointed the appellant guardian of the child and it was asserted that this act should be interpreted as having transferred custody of the child in line with the principles contained in the Guardianship of Infants Act, 1964.

Review: The legislation governing entitlement to Child Benefit is set out in Part 4 of the 2005 Act and certain provisions of the 2007 Regulations.

Section 219 of the 2005 Act provides that a child shall be a 'qualified child' where, among other things, she/he is ordinarily resident in the State.

Section 220 provides that a person, known as a 'qualified person', with whom a qualified child normally resides shall be qualified for Child Benefit in respect of that child. Section 220 also provides that the Minister may make rules for determining with whom a qualified child shall be regarded as normally residing. Those rules are contained in Article 159 of the 2007 Regulations.

Rule 4 was applicable in this case in determining if the child could be regarded as normally residing with the appellant and provides:

> *Subject to Rule 8, a qualified child, who is resident elsewhere than with a parent or a step-parent and whose mother is alive, shall, where his or her mother is entitled to his*

or her custody whether solely or jointly with any other person, be regarded as normally residing with his or her mother and with no other person.

From my review of the papers that were before the Appeals Officer there was no evidence that the child's mother was not entitled to custody of the child.

I considered that as guardianship and custody are different legal concepts it was not open to the Appeals Officer to conclude based on the evidence presented that the child's mother was not entitled to custody of the child and in those circumstances the Appeals Officer could not exclude the application of Rule 4.

Outcome: Decision not revised

M. 2021

1. 2021/01 Child Benefit – summary decision

Question at Issue: Qualified child – normal residence

Background: The Department disallowed payment of Child Benefit to the appellant from June 2019 on the basis that the child was not ordinarily resident with him. The disallowance resulted in an overpayment for a period of two months.

The appellant and his partner separated in 2017 and each parent had joint custody of the children and the children's mother received Child Benefit. The appellant started receiving Child Benefit for his son from November 2018 when he moved to live with him full-time while his ex-partner received payment for their other two children. From May 2019, under a new arrangement, the appellant's son had only been living with him 50% of the time. Payment of Child Benefit was awarded to the child's mother in accordance with the governing social welfare legislation.

Oral Hearing: At oral hearing the appellant stated that the child lived with him for more than 50% of the time. The appellant agreed that the court order was for custody on a 50/50 basis and stated he had not kept close watch on the exact hours that each parent had custody of the children.

Consideration: A qualifying condition of Child Benefit is that the child must be ordinarily resident with the recipient of such benefit. In this case, the children resided with their mother 50% of the week and with their father 50%. Legislation provides that in situations where custody is shared equally between both parents, Child Benefit is paid to the mother. Section 220(1) and (2) (a) and (b) of the Act and Article 159 (6) and (7) of the 2007 Regulations refer. The Appeals Officer was satisfied that payment of Child Benefit should remain with the mother, noting that custody of all three children was split evenly.

The Appeals Officer concluded that it was more appropriate that the decision in relation to the two-month overpayment be made by reference to Section 302(c) of the Act which meant that the decision was revised from a current date and no overpayment accrued to the appellant.

Outcome: Appeal partially allowed.

2. 2021/02 Child Benefit – summary decision

Question at issue: Habitual residence; backdating

Background: The appellant applied for Child Benefit in September 2018 for her daughter who was born in August 2017. The appellant's application was awarded from September 2018 and disallowed for the period before September 2018 when the appellant was unable to establish habitual residency. Section 220(3) of the Act provides that a person must be habitually resident in the State for the purposes of establishing entitlement to Child Benefit and Section 246 of the Act specifies that, if a person does not have a right to reside, he/she cannot be habitually resident for the purposes of the Act and further provides that when permission to reside is granted to an applicant, he/she cannot be regarded as being habitually resident for any period prior to the permission having been granted. It was submitted in support of the appellant's claim by a HSE case worker that the appellant had a right to reside prior to September 2018. It was also submitted that the Court of Appeal had commented on the unconstitutionality of Section 246(7) and 246(8) of the Act insofar as it prevented the payment of Child Benefit to an Irish citizen child resident in the State solely on the basis of the immigration status of the parent claiming the benefit.

Consideration: The Appeals Officer noted that the Supreme Court ruled that the Court of Appeal should have considered the position of the mother, who was the qualified person to whom Child Benefit would be payable provided that the mother met the eligibility requirements of the Act. The Supreme Court, in this ruling, found that the Court of Appeal had been incorrect in law, rather than Section 246 of the Act being unconstitutional. The Appeals Officer noted it was his /her role to make determinations in accordance with social welfare legislation as enacted and it was for the Supreme Court, and not a quasi-judicial decision-making body such as the Social Welfare Appeals Office, to make rulings on the constitutionality of legislation enacted by the Oireachtas.

The Appeals Officer concluded that as no evidence was presented to establish that the appellant had a right to reside prior to September 2018, she could not be regarded as being habitually resident prior to that date in accordance with the governing legislation.

Outcome: Appeal disallowed.