



Social Welfare
Appeals Office
Annual Report

2005



SOCIAL WELFARE
A P P E A L S
O F F I C E

Report by the Chief Appeals Officer on the activities of the Social Welfare Appeals Office in 2005

Contents

Foreword	2
Statistical Trends	3
Meetings and Consultations	9
Organisational and Operational Matters	12
Court Proceedings	14
Case Studies	15
Organisation chart	28



SOCIAL WELFARE
APPEALS
OFFICE

Social Welfare Appeals Office
D'Olier House
D'Olier Street
Dublin 2
Telephone: LoCall 1890 74 74 34
Facsimile: 01 671 8391
e-mail: swappeals@welfare.ie



Mr. Seamus Brennan T.D.
Minister for Social and Family Affairs
Áras Mhic Dhiarmada
Dublin 1

June 2006

Dear Minister,

In accordance with the provisions of section 308 (1) of the Social Welfare Consolidation Act 2005, I hereby submit a report on the activities of the Social Welfare Appeals Office for the year ended 31 December 2005.

Yours sincerely,

Brian Flynn
Chief Appeals Officer

Foreword

2

My aim in this annual report is to give an overview of how we in the Social Welfare Appeals Office discharged our responsibilities in 2005. It contains statistical data on the activities of the Office as well as commentary on other issues which arose during the year.

In line with recent reports, it contains a selection of cases determined by Appeals Officers so as to give a sense of the type of questions that gave rise to an appeal and the consideration given to those questions by Appeals Officers.

However, going beyond the statistics, commentary and case studies, I am very much aware that the core of our business continues to be the quality of service we provide at the individual level to the many thousands of appellants who seek our assistance each year. For appellants who exercise their right to appeal, my challenge is to ensure that they are treated fairly, that they get an adequate opportunity to have their say, that their appeals are dealt with promptly and that they get the best possible decisions in the circumstances of each case. Those commitments are very much reflected in our mission statement which is "to provide an independent, accessible and fair appeals service for entitlement to social welfare payments and to deliver that service in a prompt and courteous manner".

I would like to take this opportunity, in reflecting on the year's work, to record my thanks to all the staff of the Office for their support to me in fulfilling my statutory duties and to the Department of Social and Family Affairs and the Health Service Executive for their co-operation with our work. I would also like to pay tribute to the work of my predecessor, Mr. Cyril Havelin, who retired from the public service during the year.

In line with statutory requirements, this annual report is being published in bilingual form.

Brian Flynn

Director and Chief Appeals Officer

Statistical Trends

Statistical information in relation to appeals is provided in Tables 1, 2, 3 and 4 in this section of the Annual Report. That information may be summarised as follows:

Appeals Received

13,797 appeals were received during 2005 compared to 14,083 in 2004 i.e. a 2% decrease in the year. This compared with a 7.5% decrease as between 2003 and 2004. In a period of fluctuating receipts over the past 8 years, this is the second consecutive year in which a decrease was recorded, albeit a marginal one.

Appeals Types

Similar to 2004, there were notable decreases in the number of appeals received in respect of some scheme types. Among the reductions were disability benefit (down 11%), unemployment benefit (down 13%) and one parent family payment (down 19%). Unemployment assistance appeals were up by 16% while the new respite care grant introduced in mid 2005 accounted for 237 appeals.

Workload for 2005

Taking account of the 13,797 appeals received during 2005 and 5,325 appeals on hands at the beginning of 2005, the total workload for the year amounted to 19,122. This was 292 less than the corresponding workload of 19,414 for 2004.

Appeals Finalised

13,419 appeals were finalised in 2005 compared to 14,089 in 2004 i.e. a 5% reduction. This is the first year since 2000 that appeals finalised did not exceed receipts.

Of the 13,419 appeals finalised –

- 8,484 (63%) were determined by Appeals Officers - 8,696 in 2004,
- 3,302 (25%) were resolved by way of revised decisions by Deciding Officers - 3,550 in 2004, and
- 1,633 (12%) were withdrawn or otherwise not pursued - 1,843 in 2004.

Appeals on Hands

Appeals finalised in 2005 fell short of appeals received by 378. Consequently, the number of appeals on hands at the end of 2005 increased to 5,703 which was a 7% increase.

Outcome of All Appeals

Of the 13,419 appeals finalised in 2005 –

- 6,325 (47%) had a favourable outcome for the appellant i.e. fully allowed, partially allowed or resolved by way of a revised decision of a Deciding Officer - 47% in 2004.
- 5,461 (41%) had an unfavourable outcome i.e. disallowed - 40% in 2004
- 1,633 (12%) were withdrawn or otherwise not pursued by the appellant - 13% in 2004.

Determinations by Appeals Officers

During 2005 Appeals Officers determined 8,484 appeals of which 5,645 (67%) were oral hearings. Of those, 2,515 (44.5%) had a favourable outcome for the appellant. The corresponding figures for 2004 were a total of 8,696 appeals of which 6,051 (70%) had oral hearings of which 2,632 (43.5%) had a favourable outcome.

The balance of 2,839 (33%) appeals determined by Appeals Officers in 2005 were dealt with by way of a summary decision. Of those, 508 (18%) had a favourable outcome for the appellant. The corresponding figures for 2004 were 2,645 (30%) summary appeals of which 383 (14.5%) had a favourable outcome.

Appeals by Gender

The proportion of appeals received from men and women in 2005 was 43% and 56% respectively. In this regard, appeals from corporate entities were excluded. In looking at favourable outcomes, 43% of men and 51% of women benefited from such outcomes.

Clearing Times

During 2005 the average time taken to process all appeals was 20 weeks which is identical to the position in 2004. However, if allowance is made for the 25% most protracted cases, the average time falls to 13 weeks, compared to 12 weeks in 2004.

The time taken to complete appeals covers all stages of the procedural process including the Department's submission on the grounds for the appeal, further examinations by the Department's Medical Assessors in certain illness related cases and the making of arrangements for the holding of oral hearings where deemed appropriate. Of the 20 weeks overall average –

- 8 weeks is attributable to work in progress within the Department,
- 2 weeks is due to responses awaited from appellants, and
- 10 weeks is attributable to ongoing processes within the Social Welfare Appeals Office.

Correspondence

During 2005, a total of 2,406 enquiries and representations on behalf of appellants by public representatives were received. This compares to 2,359 in 2004.

Parliamentary Questions

Parliamentary Questions are processed by the Social Welfare Appeals Office where they relate to a case which is currently the subject of an appeal. However, many such Questions are in the nature of an enquiry as to the present status of an appeal and, accordingly, many are withdrawn by the Deputy when the current position is explained following contact with the Deputy.

During 2005, 245 Parliamentary Questions were put down (203 in 2004) of which 211 were dealt with in that manner and replies to the remaining 34 were given in Dáil Éireann.

Freedom of Information

A total of 55 formal requests were received in 2005 (49 in 2004) under the provisions of the Freedom of Information Acts. All of those requests were in respect of personal information.

Staffing

The number of staff serving in the Social Welfare Appeals Office at 31 December 2005 was 53.05. This compares to 55.25 in respect of 2004.

The staffing breakdown is as follows:-

1 Chief Appeals Officer	1.0
1 Deputy Chief Appeals Officer	1.0
1 Office Manager	1.0
17 Appeals Officers (including 6 work-sharers)	15.3
3 Higher Executive Officers	2.8
10 Executive officers (including 4 work-sharers)	8.7
7 Staff Officers (including 4 work-sharers)	5.0
21 Clerical Officers (including 6 work-sharers)	18.25
	<u>53.05</u>

Appendix 1 gives an organisational chart for the Social Welfare Appeals Office as at 31 December 2005.

Table 1. Appeals received and finalised – 2005

	In Progress 01-Jan-05	Receipts	Decided by Appeals Officer	Revised Decision by Deciding Officer	Withdrawn	In Progress 31-Dec-05
Old Age Pensions	138	339	283	27	18	149
Retirement Pensions	15	35	21	7	9	13
Pre-retirement Allowances	10	23	18	0	2	13
Old Age (contributory) Pensions	128	126	98	43	23	90
Disability Benefit	1,068	2,742	885	1,254	674	997
Invalidity Pension	276	443	392	45	22	260
Disability Allowance	803	2,392	921	787	447	1,040
Occupational Injuries Benefits	306	434	374	42	56	268
Treatment Benefit	11	52	29	9	2	23
Unemployment Benefit	360	1,243	1,029	129	55	390
Unemployment Assistance - Payments	468	2,274	1,823	186	65	668
Unemployment Assistance - Means	290	843	615	93	78	347
Widows/Widowers and Orphans Pensions	31	63	49	4	0	41
One-Parent Family Payment	765	1,034	791	275	91	642
Maternity Benefit	4	16	8	1	3	8
Child Benefit	165	357	235	138	13	136
Carers Benefit and Allowances	249	586	352	134	38	311
Respite Care	0	206	63	73	1	69
Family Income Supplement	25	57	39	7	0	36
Farm / Fish Assist	39	114	65	17	6	65
Supplementary Welfare Allowances	65	327	306	10	22	54
Rent Allowance (Private Rented Dwellings Act)	0	0	0	0	0	0
Liabile relatives (contributions)	6	12	3	5	0	10
Insurability of Employment	103	79	85	16	8	73
Totals	5,325	13,797	8,484	3,302	1,633	5,703

Table 2. Appeals received 1998 – 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Old Age (non-contributory) and Blind Pensions	570	503	558	575	433	376	328	339
Retirement Pensions	29	29	23	25	33	46	39	35
Pre-retirement Allowances	81	38	48	32	28	24	21	23
Old Age (contributory) Pensions	98	87	77	106	239	155	104	126
Disability Benefit	3,813	3,917	3,968	3,434	3,284	3,634	3,071	2,742
Invalidity Pension	543	554	626	491	509	529	519	443
Disability Allowance	1,254	1,302	1,750	1,861	1,832	2,257	2,252	2,392
Occupational Injuries Benefits	793	741	806	677	575	503	470	434
Treatment Benefit	1	1	5	3	4	9	50	52
Unemployment Benefit	1,370	1,738	2,481	1,881	1,588	1,626	1,421	1,243
Unemployment Assistance - Payments	1,157	1,865	2,821	2,262	1,983	1,874	1,956	2,274
Unemployment Assistance - Means	2,911	2,246	1,757	1,511	1,511	1,167	907	843
Widows/Widowers and Orphans Pensions	125	103	151	142	106	64	64	63
One-Parent Family Payment	578	597	779	762	840	1,348	1,271	1,034
Maternity Benefit	14	20	16	9	9	10	14	16
Child Benefit	116	85	50	56	46	41	324	357
Carers Benefit and Allowance	285	756	1,009	1,334	1,376	812	598	586
Respite Care	0	0	0	0	0	0	0	206
Family Income Supplement	64	57	63	78	72	43	47	57
Farm / Fish Assist	0	481	298	157	134	127	107	114
Supplementary Welfare Allowances	115	213	239	354	289	433	370	327
Rent Allowance (Private Rented Dwellings Act)	1	2	1	2	0	0	0	0
Liable Relatives (contributions)	0	3	18	117	6	7	5	12
Insurability of Employment	96	127	106	92	120	139	145	79
Totals	14,014	15,465	17,650	15,961	15,017	15,224	14,083	13,797

Table 3. Outcome of appeals by category – 2005

	Allowed	Partly Allowed	Revised DO Decision	Disallowed	Withdrawn	Total
Old Age (non-contributory) and Blind Pensions	72 22%	20 6%	27 8%	191 58%	18 5%	328
Disability Benefit	481 17.1%	13 0.5%	1,254 44.6%	391 13.9%	674 24.0%	2,813
Invalidity Pension	256 55.8%	2 0.4%	45 9.8%	134 29.2%	22 4.8%	459
Disability Allowance	340 15.8%	28 1.3%	787 36.5%	553 25.7%	447 20.7%	2,155
Occupational Injuries Benefits	157 33.3%	54 11.4%	42 8.9%	163 34.5%	56 11.9%	472
Unemployment Benefit	282 24.3%	27 2.3%	125 10.8%	682 58.7%	46 4.0%	1,162
Unemployment Assistance - Payments	417 19.6%	46 2.2%	190 8.9%	1,398 65.8%	74 3.5%	2,125
Unemployment Assistance - Means	73 9.3%	42 5.3%	93 11.8%	500 63.6%	78 9.9%	786
Widows/Widowers and Orphans pensions	18 34.0%	1 1.9%	4 7.5%	30 56.6%	0 0.0%	53
One-Parent Family Payments	229 19.8%	48 4.1%	275 23.8%	514 44.4%	91 7.9%	1,157
Carers Allowances	109 20.8%	14 2.7%	134 25.6%	229 43.7%	38 7.3%	524
Respite Care	24 17.5%	0 0.0%	73 53.3%	39 28.5%	1 0.7%	137
Family Income Supplement	16 34.8%	0 0.0%	7 15.2%	23 50.0%	0 0.0%	46
Farm / Fish Assist	8 9.1%	14 15.9%	17 19.3%	43 48.9%	6 6.8%	88
Supplementary Welfare Allowances	75 22.2%	17 5.0%	10 3.0%	214 63.3%	22 6.5%	338
Insurability of Employment	29 26.6%	7 6.4%	16 14.7%	49 45.0%	8 7.3%	109
Other Appeals [OA(C)P, Pre-retirement Allowances, Treatment Benefit, etc.]	94 14.1%	10 1.5%	203 30.4%	308 46.2%	52 7.8%	667
Totals	2,680 20.0%	343 2.6%	3,302 24.6%	5,461 40.7%	1,633 12.2%	13,419

Table 4. Appeals in progress at 31st December 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Old Age (non-con) and Blind Pensions	229	275	263	332	212	139	138	149
Retirement Pensions	13	10	12	13	18	13	15	13
Pre-retirement Allowances	23	21	36	14	4	5	10	13
Old Age (con) Pensions	30	43	47	72	179	117	128	90
Disability Benefit	1,696	1,770	1,676	1,522	1,374	1,272	1,068	997
Invalidity Pension	231	254	352	272	227	234	276	260
Disability Allowance	625	695	946	852	857	802	803	1,040
Occupational Injuries Benefits	521	522	489	429	358	259	306	268
Treatment Benefit	1	1	4	0	2	2	11	23
Unemployment Benefit	448	618	682	582	432	388	360	390
Unemployment Assistance - Payments	387	686	719	607	541	318	468	668
Unemployment Assistance - Means	950	644	593	392	405	268	290	347
Widows and Orphans Pensions	58	64	113	86	62	29	31	41
One-Parent Family Payment	340	379	568	722	658	950	765	642
Maternity Benefit	8	7	5	3	6	4	4	8
Child Benefit	41	33	18	25	23	14	165	136
Carers Allowances	133	449	691	749	514	275	249	311
Respite Care	0	0	0	0	0	0	0	69
Family Income Supplement	46	19	40	43	31	26	25	36
Farm / Fish Assist	0	301	116	52	57	61	39	65
Supplementary Welfare Allowance	14	34	50	44	42	38	65	54
Rent Allowance	1	0	0	0	0	0	0	0
Liable relatives (contributions)	0	2	7	58	28	6	6	10
Insurability of Employment	84	120	110	104	126	111	103	73
Totals	5,879	6,947	7,537	6,973	6,156	5,331	5,325	5,703

Meetings and Consultations

Meetings of Appeals Officers

In accordance with my statutory obligations, meetings of Appeal Officers were convened in March 2005 and October 2005. The main purpose of those meetings was to identify best practice and consistency in decision making among Appeals Officers and to discuss the latest developments in administrative law with particular regard to recent court judgements. There is a continuing need for Appeals Officers to keep up-to-date on the requirements of administrative law with a view to ensuring that the service we offer remains responsive to the needs of appellants and others who use the appeals service. The following is a summary of some of the issues discussed at those meetings.

Unemployment Payments - School Term Time Breaks

In last year's report, concern was expressed about the implications of a change in policy introduced by the Department of Social and Family Affairs whereby days of "accrued holiday entitlement" were not treated as days of unemployment for the purposes of unemployment benefit. Those affected were mainly school-related employees such as school traffic wardens and canteen workers who are laid off for mid-term breaks, etc. I am pleased to note that in 2005 the Department revised its policy in this regard and that the disallowance is now imposed only in respect of days of paid holidays.

One Parent Family Payment - Earnings from Employment

One Parent Family Payment is a payment for men and women who are bringing up a family without the support of a partner. It is a means tested payment and earnings from employment is one of the items taken into account in assessing means. An earnings limit of €293 per week applies and lone parents earning in excess of that amount are not entitled to payment. Previous annual reports of my Office drew attention to the substantial overpayments which had been assessed against lone parents arising from the special earnings review projects initiated by the Department and the difficulties that situation created for Appeals Officers hearing appeals against such overpayments.

I am pleased to say that in 2005 the Department has improved previous arrangements through -

- the provision of better targeted information about the weekly earnings threshold which is now explicitly stated on the payment book, and
- the discontinuance of the practice of calculating average weekly earnings on the basis of annual earnings divided by 52. The current practice, apart from complying with the legislative provisions, is more accurate in that it can take account of fluctuations in earnings levels.

I note the increase in the weekly earnings threshold from €293 to €375 as announced in Budget 2006.

However, I remain concerned that a more pro-active approach to conducting regular and systematic earnings reviews in respect of

the Department's lone parent customers is needed. Relevant earnings data for that recipient category is already available to the Department through its links with Revenue. Such an approach would have the obvious effect of minimising or preventing overpayments arising in the first instance.

Habitual Residence Condition

The habitual residence condition was introduced in May 2004 as a qualifying requirement for all social assistance payments and child benefit. It is framed in terms of a presumption that a person is not habitually resident if they are living in the state of the common travel area for less than two years. A person is required to rebut that presumption if they are to satisfy the habitual residence condition.

The annual report for 2004 highlighted concerns about the application of this condition to certain categories of migrant workers who are nationals of the European Economic Area. In particular, attention was drawn to a possible conflict with relevant EU legislation which provides that such migrant workers should have unrestricted access to family benefits such as child benefit and one parent family payment. I note that the introduction of new EU legislation in May 2005 (Regulation 647/2005 which amends Regulation 1408/71) has had the effect of excluding those categories of migrant workers from the operation of the habitual residence condition in respect of recognised family benefits. These new provisions have been implemented by the Department of Social and Family Affairs with a consequential reduction in the number of cases coming to my Office on appeal.

While welcoming this change, Appeals Officers continue to express concern about the adequacy of the safeguards adopted by the Department of Social and Family Affairs to ensure consistency in the decision making process for habitual residence condition cases. Cases have come to my Office on appeal where the grounds for disallowance were weak and unsupported or where the condition was satisfied for supplementary welfare allowance purposes but not for unemployment assistance. A number of habitual residence condition cases are included in the case studies section of this report.

I understand that the Department has initiated a review of the administration of the habitual residence condition which, at the time of writing, is nearly completed. I hope that the outcome of that review may address some of the concerns of my Office and lead to improvements in the administration of this condition.

Widows Pensions - Foreign Divorce

A number of appeals arose during the year where the question at issue was the recognition or otherwise of a foreign divorce which may have been granted a number of years ago i.e. prior to the enactment of the Domicile and Recognition of Foreign Divorces Act, 1986. The legal position is that foreign divorces granted prior to 2 October 1986 are recognised in Ireland only if one or both of the parties to the proceedings were domiciled in the country granting the divorce. In some cases, widow's pensions have been disallowed on the grounds that the

applicant was not the legal wife/widow of the deceased. Typically, this situation might arise where it was found that one of the parties to the marriage had a previous marriage dissolved by way of a foreign divorce during the 1970s or 1980s. I believe that an increasing number of cases may arise on appeal in the future having regard to the age profile of the couples concerned. A case study on this issue is included in the case studies section of this report.

It should be noted that the issue highlighted here concerns divorces granted prior to 2 October 1986. EU Regulation 1347/00 of March 2001 provides for further changes relating to the recognition of foreign divorces.

Orphan's Pension - Definition of "Orphan"

During 2005, Appeals Officers noted a change in the definition of "orphan", as provided for under the Social Welfare and Pensions Act 2005, for the purposes of qualifying for orphan's pension. The new definition requires the parents to have "abandoned and failed to provide for their child" whereas the former definition required the parents to have "abandoned or failed to provide for their child". In the former situation either of the two requirements could be sufficient to qualify as an orphan while the new situation requires that both requirements be satisfied at the time of the claim. Appeals Officers have encountered situations where a child's only surviving parent is unable to care for the child (due, for example, to serious social problems such as drug addiction) and places the child in the care of grandparents. In that event, Deciding Officers of the Department of Social and Family Affairs tend to disallow applications on the grounds that the child has not been abandoned (although failure to provide is not in doubt) and, consequently, the orphan's allowance/pension is not payable. The situation will be kept under review.

Respite Care Grant

In June 2005 the scope of the respite care grant was extended to cater for all carers providing full time care and attention to an elderly person or a person with a disability regardless of their means. The grant amounts to €1,000 and is paid annually. As with all new statutory provisions, there was discussion among Appeals Officers on the best approach for dealing with appeals against decisions to disallow the Grant. It was considered that in most cases appeals could be decided by way of summary decision. In coming to this view, Appeals Officers had regard to the one-off nature of the payment, the age profile of the appellants many of whom were elderly, and the need to avoid putting appellants to the inconvenience of attending an oral hearing. The number of appeals received in this category in 2005 was 237.

Decisions Advisory Office

The Decisions Advisory Office provides the main forum through which the operational relationship with the Department of Social and Family Affairs is maintained and developed. Regular meetings with the Director of the Decisions Advisory Office and his staff continued in 2005. It is at those meetings that feedback is provided to the Department on legislative issues or administrative practices that have arisen during the course of appeal cases.

The role of the Decisions Advisory Office can have a crucial influence on the flow of work coming to my Office. Training of Deciding Officers from the basic requirement of giving reasons for every adverse decision right through to the proper administration of formal review procedures (so that a speedy review of the decision and a possible remedy can be achieved without the need to have recourse to the formal appeals process) can contribute significantly to a reduction in the number of appeals coming to my Office.

Previous annual reports of my Office have referred to delays - sometimes serious delays - being experienced in getting relevant files and submissions from certain scheme areas of the Department in order to commence the appeal process. Needless to say, delays of that nature can adversely impact on our ability to provide a quality customer service as well as unduly prolonging appeal processing times. My Office acknowledges the support provided by the Decisions Advisory Office in keeping that situation under review.

Among the issues discussed with the Decisions Advisory Office during the year were the following.

Overpayments

In addition to deciding appeals against decisions of Deciding Officers of the Department of Social and Family Affairs, Appeals Officers also adjudicate on revised decisions made by Deciding Officers. Such revised decisions are made in cases where a person was in receipt of a payment to which they were not entitled or were only entitled to at a reduced rate. Typically, revised decisions have a retrospective effect and usually involve the setting up of overpayments which are recoverable by the Department. In dealing with appeals involving revised decisions, Appeals Officers must firstly address the substantive issue as to whether or not the decision to disallow or reduce the payment was correct. If correct, Appeals Officers then proceed to determine the date from which the decision should take effect. In determining the effective date, Appeals Officers may have regard to legislative provisions which allow them to reduce or even eliminate overpayments having regard to "new facts or evidence and the circumstances of the case" (s. 319 of Social Welfare Consolidation Act 2005).

During 2005, the Decisions Advisory Office voiced concerns expressed by Departmental officials as to the manner in which those legislative provisions were being applied by Appeals Officers. The Department accepted that Appeals Officers have the right to make decisions effective from whatever date they

consider appropriate in the circumstances of each case but felt that that function should more appropriately be exercised by recovery officers appointed under the recovery of overpayments provisions in the legislation. The Appeals Office holds to the view, however, that the setting up of an overpayment is intrinsically linked to the decisions and appeals process.

Bereavement Grant

For the purposes of entitlement to bereavement grant, the relevant legislation provides that a qualified child between the ages of 18 and 23 years must be "receiving full time education, the circumstances of which will be specified in regulations" [S.134(3) of the Social Welfare Consolidation Act 2005]. However, no regulations have been made under this provision. While this is a significant omission which could potentially militate against claimants in certain situations, it does provide an element of discretion to Deciding Officers and to Appeals officers in determining what constitutes full time education for the purposes of entitlement to bereavement grant.

This situation came to notice in the context of a specific appeal case. It is understood that the issue of regulations is under consideration by the Department.

Administrative Issues

During the course of the year, concerns were expressed to the Decisions Advisory Office about a range of administrative shortcomings in the processing of files by the Department prior to being submitted to the Appeals Office. Among the issues identified were -

- Failure on the part of some Deciding Officers to address the appeal contentions, as required by the legislation, when submitting files to the Appeals Office,
- Deciding Officer decisions which did not appear to have been based on any proper investigation or assessment of the available evidence,
- Requests from appellants for information or clarification on decisions of Deciding Officers being ignored.

I am pleased to note that the Department proposes to provide additional Deciding Officer training courses with a particular emphasis on improving the quality of decision making and the quality of submissions in respect of decisions appealed. While the Appeals Office will continue to monitor the situation, it will also consider introducing a stricter code of practice for appeal files and submissions.

Health Service Executive Appeals Officers

The Health Services Executive (HSE) administers the Supplementary Welfare Allowance Scheme on behalf of the Department of Social and Family Affairs. Any person who is dissatisfied with a decision from the HSE in relation to Supplementary Welfare Allowance may appeal in the first instance to an Appeals Officer of the HSE. Where the person

is still dissatisfied with the determination of the HSE Appeals Officer, there is a further right of appeals to the Social Welfare Appeals Office. During the year, my predecessor met with HSE Appeals Officers from different regions to discuss issues arising and a summary of some of those issues follows.

Habitual Residence Condition

The concerns of Appeals Officers in relation to inconsistency in the application of the habitual residence condition, as already referred to above, were discussed with HSE Appeals Officers.

Multiple Identity Clients

HSE Appeals Officers drew attention to the issue of multiple identities among the cases they deal with, typically working under one name while drawing supplementary welfare allowance under a different name. Following discussion on the experience of Social Welfare Appeals Officers in that regard, it was agreed that identity fraud, including the use of false passports, was a criminal matter and as such was a matter for investigation by the Garda authorities. It was not an issue for determination under the social welfare code.

Revolving Door Cases

The issue of certain clients being required to make repeat claims for social welfare payments was raised with HSE Appeals Officers. It was noted that the conditions for receipt of supplementary welfare allowance require that a claimant must first apply for any social welfare payment to which they may be entitled. Where a social welfare claim is disallowed, the claimant should not be required to make repeat claims i.e. put through a continuous process of claiming and appealing. Such a process is wasteful of time and resources and should be avoided.

Administrative Issues

The opportunity was taken to raise and discuss with HSE Appeals Officers a number of administrative and procedural issues concerning functions which are not appealable to the Social Welfare Appeals Office. Those include the following -

- Administrative functions of the HSE in respect of the acceptance or otherwise of a claim for supplementary welfare allowance,
- Functions relating to the suspension of payment of supplementary welfare allowance,
- Exceptional needs payments under the supplementary welfare allowance scheme,
- Certain supplement type payments that are made on an administrative basis,
- The direct provision allowance which is payable to asylum seekers who are in direct provision accommodation under the scheme administered by the Department of Justice, Equality and Law Reform.

Organisational and Operational Matters

Resources

The Organisation Chart at Appendix 1 sets out the structure of the Office at 31 December 2005. Staff numbers were down slightly on 2004. At the year's end there were 17 Appeals Officers serving (full-time equivalent 15.3), along with 41 administrative staff (full-time equivalent 34.75). The Chief Appeals Officer, Deputy Chief Appeals Officer and Office Manager bring the full staffing complement up to 61 persons. This compares with 63 at the end of 2004.

During the year Billy Murphy, Appeals Officer, retired after 20 years service in the Office. I would like to take this opportunity to thank him for his contribution to the work of the Office during his time here.

Customer Service

The Social Welfare Appeals Office is committed to delivering a quality customer service to all our customers and also to ensuring the continuous improvement in the standard of service we provide. During 2005 we continued in this endeavour and some of the areas involved are listed below.

Information

To ensure ease of understanding, the Social Welfare Appeals Office information leaflets have now been updated by applying the plain English standard.

LoCall

The LoCall service, 1890 74 74 34, which enables customers to contact the Office at local call rates continues to be monitored to ensure that their needs are met in this regard.

Hearing Venues

Appeal hearings for the Dublin area, which accounts for almost one third of appeals received, are held in the Office's headquarters in D'Olier House, Dublin 2. Appeal hearings outside of Dublin are held at venues convenient to appellants. Hotels are normally used and these are monitored to ensure that they meet a standard appropriate to both privacy and comfort for the hearing of the appeal.

Of the 8,484 appeals determined during 2005 by Appeals Officers 5,645 (67%) required an oral hearing.

Interpreters

The number appeals involving foreign nationals is continually increasing. In response to this situation the Office makes every effort to have an interpreter in attendance, where required, at the appeal hearing.

Assessors

There were no changes in 2004 to the arrangements for the attendance of assessors at oral hearings. Assessors are required to be present at oral hearings where particular questions relating to unemployment benefit and unemployment assistance

are at issue. The purpose of assessors who are drawn from area-based panels nominated by trade union and employer interests is to provide an insight into local employment situations.

The annual report for 2004 expressed concern at the frequent failure of assessors to attend appeal hearings. That trend has continued in 2005 and in some instances can give rise to considerable difficulty in bringing the appeal process to a conclusion. Under current legislation, it is a matter for the Chief Appeals Officer to decide the type of appeals, if any, that require the assistance of assessors at appeal hearings. Consequently, in the light of the ongoing trend, I am reviewing the necessity for the attendance of assessors at oral appeal hearings.

Decentralisation

The Social Welfare Appeals Office is Dublin based occupying office accommodation in D'Olier House, D'Olier Street. It is scheduled for relocation to Drogheda under the Government's decentralisation programme. The head office of the Department of Social and Family Affairs is also scheduled for relocation to Drogheda. In the context of planning for the new location, my Office's accommodation requirements have been notified to the Department with particular emphasis on the need to preserve and develop its independence as an office outside of the remit of the Department.

In addition to selecting new accommodation, the ongoing task of preparing and planning for relocation continued in 2005 with particular reference to the need for knowledge management and business process mapping. That task will be further developed as further information becomes available from the central level. Without doubt, there are major challenges ahead in terms of achieving an effective decentralisation of what is essentially a front-line service based around a central Dublin based hub.

Website (www.socialwelfareappeals.ie)

A website for the Appeals Office was constructed during 2005 and went live in December. Prior to that, web-based information relating to the Social Welfare Appeals Office was included in the website of the Department of Social and Family Affairs at www.welfare.ie. That arrangement did not well serve the perception of the independence of the Office and, consequently, arrangements were made to provide a separate website for the appeals service.

A major advantage of the new website is that it allows a good cross section of appeal case studies to be published on the site. This will facilitate interested parties, including aspiring appellants, in gaining insights into the considerations that come before Appeals Officers in determining cases. It also allows a significantly larger number of cases and decisions to be published than has been possible in the past in the context of the annual report in which a relatively small number of case studies feature. To date, the appeals website contains 70 cases. Obviously, cases studies are reported in a way that excludes personal information so as to preserve the anonymity of appellants.

Northside Community Law Centre

In November 2005 the Northside Community Law Centre published a research report on the social welfare appeals system. Entitled "The Social Welfare Appeals System: Accessible and Fair?", the report highlighted the need for a fair and impartial appeals system for citizens as regards their social welfare entitlements and raised a number of issues in relation to the effectiveness of the current service.

I welcome the report as a positive contribution to the future planning and development of the social welfare appeals system so as to ensure it continues to command the confidence of our clients. A number of the recommendations made have already been implemented or are in the process of being implemented, mostly as a result of a recent major review of the Appeals Office. The report contained a number of positive findings for the Appeals Office. The voluntary and community organisations surveyed during the study felt that Appeals Officers acted in a fair and impartial manner and put people at ease during appeal hearings which could be stressful events for many people. In addition, some 94% of survey respondents felt they had been given an opportunity to put their case and respond to issues raised during their appeal hearing.

The Appeals Office will continue to take account of the report's recommendations in the context of the future development of the appeals service.

Independence

The Social Welfare Appeals Office, operating as an independent entity, shares a common objective with the Department of Social and Family Affairs in terms of ensuring that its customers receive the best possible service from every perspective.

Notwithstanding the day-to-day relationship, however, my Office is separate from and operates independently of the Department. Its Appeals Officers are statutory officers who undertake their function of determining appeal cases in an independent manner, a concept which has been endorsed by the courts over the years. However, while the independence of its statutory officers is not in doubt, there is still no legal recognition of the Social Welfare Appeals Office as a statutory entity in its own right.

Those using the appeals service must have confidence in its independence and its ability to carry out its role independently. If that confidence is lacking, the role of the appeals service is diminished and weakened. For that reason, I believe consideration needs to be given at this stage to providing statutory independence for the Social Welfare Appeals Office.

The Year Ahead

2006 will be no less challenging a year for the Social Welfare Appeals Office than 2005.

Meeting the ongoing requirements as regards planning for decentralisation will continue apace in 2006 and that task has already been referred to above.

The decision to transfer the Community Welfare Service and associated income support schemes from the Department of Health and Children to the Department of Social and Family Affairs will have implications in terms of additional work arising for the Social Welfare Appeals Office and necessary planning will be required to meet those needs.

Court Proceedings

Judgments in 2005

There were no High Court or Supreme Court judgements delivered in 2005 in respect of decisions of Social Welfare Appeals Officers.

Court Cases Pending

PRSI status of contract meter readers

An Appeals Officer decided that contract meter readers engaged by the Electricity Supply Board were employed under a contract of service and that the class A rate of PRSI applied. The Board appealed that decision to the High Court on the grounds that the meter readers were self-employed contractors. Following a three day hearing in October 2005, judgement was reserved. (At the time of writing, judgement has been delivered affirming the decision of the Appeals Officer and an appeal to the Supreme Court has been lodged by the Board. Further details will be provided in next year's report.)

Unemployment Assistance

Judicial review proceedings have been taken against the Minister for Social and Family Affairs by an appellant whose claim for unemployment assistance was disallowed on the grounds that he was not unemployed while attending a course of education. The appeals process in the case was not finalised when proceedings were initiated. The proceedings are being taken on a number of grounds (mainly procedural) including allegations that the oral hearing proceedings were unfair. The proceedings are being contested and a full defence has been filed. No date has been fixed yet for the hearing of the case. (It has been brought to notice that the description of this case included in the printed 2004 Annual Report was inaccurate; any inconvenience caused as a result is regretted.)

Case studies of Appeals Officers' Decisions

The objective in selecting cases for inclusion in this section of the report is to clarify the process by which appeals are determined, whether by way of a summary decision or following an oral hearing. The basis for the Appeals Officer's decision in each case is outlined, as are questions raised in relation to current legislative provision or to the requirements of natural justice and fair procedures.

Old Age (Non-Contributory) Pension

Question at issue: Assessment of savings as 'unreported capital' following the death of a pensioner, resulting in an overpayment of some €34,000 which the Department of Social and Family Affairs sought to recover from his estate.

Background: The pensioner was 93 years of age when he died. He had been awarded the maximum rate of pension in 1976 and a Living Alone Allowance in 1997. After his death in 2003, solicitors contacted the Department in connection with the administration of his estate. Following detailed correspondence between the executor (the pensioner's nephew), the solicitors in the case and the Deciding Officer, a revised decision was made in relation to the late pensioner's entitlement. The Deciding Officer concluded that pension of some €34,000 had been overpaid on the basis of 'unreported capital'.

Oral Hearing: The appellant (the late pensioner's nephew and his executor) was accompanied by a relative at the oral hearing. The Deciding Officer and the Social Welfare Inspector attended at the request of the Appeals Officer. A manager from the Department's Pension Services Office was present with the agreement of the Appeals Officer and the appellant.

The appellant outlined the late pensioner's family background and poor circumstances, contributing to his low standard of education and lack of literacy skills. He asserted that he had always helped him with his financial affairs and that he had personal knowledge of those financial affairs for almost 40 years. He stated that this was always done in an open and transparent manner, with absolutely no knowledge that the amount of his means-tested pension savings would have implications afterwards.

In disputing the amount of the overpayment determined by the Deciding Officer, the appellant made particular reference to the period during which his late uncle was in a nursing home, in the care of his local Health Board. He pointed out that, at the time, his pension book had been held by the Health Board authorities in a practice since ruled to have been illegal.

The appellant read from a written submission and spoke at length on a number of points. He argued that there had been a lack of transparency in relation to the legislative provisions relied upon in this case. In particular, he contended that the Department of Social and Family Affairs and Comhairle, the agency charged with responsibility for providing information to citizens, did not provide information about the rules in question.

He referred to the principles of proportionality and equality before the law and argued that, where rigid adherence to the letter of the law results in manifestly inequitable treatment, then steps should be taken to mitigate the consequent effect on citizens.

The appellant asserted that there was administrative bias in dealing with the case. He referred to a statement made by the Department to the Joint Oireachtas Committee in May 2005¹ in relation to its policy on overpayments in cases such as this. It had been stated to be the Department's policy to adopt a flexible approach, so as to take account of funeral and legal expenses for which the estate is liable. He argued that in the case of his late uncle, no such flexibility had been afforded. He provided an outline of his late uncle's frugal lifestyle, in a two-roomed house without running water and only a turf fire for heat. In conclusion, the appellant submitted that there was no deliberate wrongdoing by his late uncle and he sought to have the overpayment cancelled.

In response, the Pensions Services Office manager stated that savings are assessable for pension purposes and that such savings may be attributed to a number of sources. He argued that the claim form, signed by the late pensioner in 1976, had set out clearly the relevance of cash income and property as means for pension purposes. He said also that a newsletter issued by the Department in 1999 had indicated that it was required under law that increases in means be notified. The appellant, in response, contended that the Department was categorising in the same way both those who conceal means and those who save from pension and do not consider that they have increased means. He argued that this policy contributes to elderly people hiding money in shoeboxes and under mattresses.

Consideration of the Appeals Officer: The Appeals Officer noted the appellant's reference to the Department's statement to the Joint Oireachtas Committee. He found that there was no evidence of consideration having been given in this case to the matter of funeral and legal expenses. He considered the appellant's contention regarding the difficulty he had in finding the information that would have made clear that pension savings are assessable as means. While he accepted the Department's point that the legislation does not distinguish between the types of capital to be assessed, and that savings may come from a number of sources, he took account also of the appellant's assertion that the late pensioner's savings were from pension only. He referred to the appellant's contention that his late uncle was not literate and was infirm, and noted

¹ Joint Committee On Social and Family Affairs. 17 May, 2005. Pension Overpayments.

that no officer of the Department had visited the late pensioner in the period between January 1977 and July 2003.

In terms of the appellant's assertion as to proportionality and equality, the Appeals Officer examined the legislative provisions under which the decision to revise entitlement had been made (Section 249(b) of the Social Welfare (Consolidation) Act, 1993). He referred, in particular, to the provision which states that where new evidence comes to light, a decision with regard to that evidence should be made with reference to the new facts 'and the circumstances of the case'. He did not find any significant reference by the Deciding Officer to the appellant's submissions regarding the special circumstances of the case.

The Appeals Officer examined the question, which was also addressed by the Deciding Officer, as to whether the capital did indeed represent savings from pension only or whether it might be attributed to a variety of sources. He noted that the kernel of the appeal was that the appellant's late uncle had saved his pension. The appellant had argued that this had been done in order to make some provision for his care in extreme old age and so that his sister would have the benefit of the money after his death. On balance, the Appeals Officer concluded that the appellant's firmly held conviction that the pension was the source of the savings could be taken as the factual reality. Having assessed all of the evidence, he concluded that the decision was made principally and solely on the discovery of the new facts. He found that there was no evidence that consideration had been given to the circumstances of the case. He was satisfied that consideration must be given to the source of the savings, and the reason such savings were made, as well as to the circumstances of the case. He regarded as noteworthy the fact that the late pensioner's neighbour, who had provided him with fuel, was rewarded with the transfer of land, and that it was the intention that his sister, who had provided him with care, was due to receive capital from the estate. He concluded in relation to the issues raised that there were very reasonable grounds, having regard to the new facts and to the circumstances of the case, that the decision should take effect from the date of the late pensioner's death, with the effect that the overpayment was not refundable.

Outcome: Appeal allowed.

Survivor's (Widow's) Pension

Question at issue: Decision to reject the appellant's claim to a Widow's (Contributory) Pension on grounds that she was not regarded as the legal wife of a person who had been divorced in the United Kingdom prior to their marriage.

Background: The appellant was in her sixties and working on a part-time basis. She claimed a Widow's (Contributory) Pension in 2003 but her claim was rejected on grounds that she was not regarded as the legal wife of the late (*person named*) under the provisions of Irish legislation.

Oral Hearing: The appellant was unable to attend the oral hearing and submitted medical evidence to this effect. A solicitor acting on her behalf was present. The Deciding Officer attended at the request of the Appeals Officer.

The Deciding Officer outlined the reasons for her decision. She stated that the late (*person named*) had been married previously. She reported that he had been granted a divorce in the United Kingdom in June 1975 and that his then wife had been domiciled in Ireland at the time the divorce proceedings were initiated. Later that year, he had married the appellant in the United Kingdom. The Deciding Officer referred to the Domicile and Recognition of Foreign Divorces Act, 1986, under which a divorce is recognised in this state only if one of the parties to the marriage was domiciled in the country in which the divorce proceedings were initiated. She submitted that, based on the social insurance records held by the Department of Social and Family Affairs, the late (*person named*) was insurably employed and domiciled in Ireland at the time divorce proceedings were initiated, and that his first wife had also been living in Ireland. She referred to EC Regulation 1347/00² which deals with the recognition of divorces. She stated that it came into effect on 1 March 2001 and that it did not apply to divorces obtained before that date.

The appellant's solicitor reported that she was having great difficulty in accepting that after nearly thirty years of marriage, questions were being asked as to the validity of the marriage. He argued that, despite the EU Regulation, women in a position similar to that of the appellant were in a limbo-type situation when it came to entitlement to Widow's Pension.

Consideration of the Appeals Officer: The Appeals Officer referred to Section 5 of the Domicile and Recognition of Foreign Divorces Act, 1986, which provides that either party to a divorce must be domiciled in the country granting the divorce. He noted that no evidence had been submitted to indicate that either the late (*person named*) or his first wife had been domiciled in the United Kingdom. He considered that the fact that the late (*person named*) had obtained a divorce in the United Kingdom did not establish that he was domiciled there. He concluded that there was no evidence that he or his first wife had been domiciled there for any length of time. He noted the reference made in the written appeal submission to EU Regulation 1347/00 but concluded, as had been indicated at the oral hearing, that the provisions of the Regulation applied only to proceedings entered into after 1 March, 2001. He concluded that it was not relevant, therefore, in the consideration of this case. As a consequence, and having considered all the available evidence, he was not satisfied that the appellant could be regarded as the legal wife of the late (*person named*) and concluded that she was not, therefore, entitled to a Widow's (Contributory) Pension.

Outcome: Appeal disallowed.

One Parent Family Payment

Question at issue: Decision to revise the appellant's entitlement to payment from a date in 1998 and to terminate payment with effect from a date in 1999, on grounds that she had weekly earnings in excess of the statutory limit. As a consequence, an overpayment of some €28,000 was assessed.

Background: The appellant had been in receipt of a Lone Parent's Allowance (subsequently One Parent Family Payment)

² Council Regulation (EC) No. 1347/00 of 29 May 2001

since 1992. She commenced employment in 1996. In 2004, her entitlement was reviewed with reference to earnings data held by the Department of Social and Family Affairs. On this basis, it was determined that she was entitled to a lower rate of payment for a period between 1998 and 1999, and that she had no entitlement with effect from a date in 1999. As a consequence, an overpayment of some €28,000 was assessed.

Oral hearing: The appellant attended, accompanied by a relative, and the Deciding Officer attended at the request of the Appeals Officer.

The Deciding Officer submitted that the appellant had had no entitlement with effect from the date specified as her earnings had exceeded the limit of £12,000 per annum.³ She contended that there was an onus on the appellant to notify any increase in means and stated that a notice to that effect had been issued in 1997, with similar advice being printed on all the payable order books. She argued that the appellant's employment had changed in 1999, with significantly higher earnings, and that this event should have prompted her to contact the Department. The Deciding Officer made the point that fraud was not alleged but that the overpayment was a consequence of non-entitlement and that the Department was obliged to seek recovery.

It was argued by the appellant's relative, on her behalf, that the overpayment had arisen because of a failure by the Department to co-relate income records with payment records. He noted that this had been done in arriving at the decision to assess the overpayment and argued that it should have been done much sooner when various exchanges between the appellant and the Department should have alerted them to the situation. He argued that the appellant did not fully understand the process at hand and that it was unreasonable, therefore, to have expected her to comply with the changing regulations. He contended that the appellant had a legitimate expectation that the Department would have continued to monitor and regulate her entitlement, as had been the case at the outset.

The appellant stated that she had notified the Department and the local Health Centre when she had started work in 1996. She reported that her payment had then been reduced and that she lost her rent supplement and medical card subsequently, having moved to a better-paid job in 1999. She stated that she had been in contact with the Department in 2001 when she had applied for local authority housing under the shared ownership scheme. The Deciding Officer accepted that the appellant did correspond with the Department in 2001 but did not accept that this fulfilled her obligation to notify increased earnings. She acknowledged that the earnings limit was not listed in any correspondence but contended that the appellant should have advised the Department as to the substantial increase in her earnings as she was in receipt of a means-tested payment. In response, the appellant argued that she had understood that the Department was monitoring her earnings as she was paying Pay-Related Social Insurance (PRSI).

It was argued on the appellant's behalf that compliance with the regulations should have been easier for the appellant and that safeguards should have been put in place to prevent such a

large overpayment arising. The Deciding Officer did not accept this argument, pointing to what she described as a 'contract' that the appellant had entered into when she applied originally for payment as a lone parent, arguing that the appellant had undertaken to notify the Department of any change in her means.

In conclusion, it was submitted on behalf of the appellant that the onus rested with the various sections of the Department to exchange relevant information. The appellant stated that she believed she had made a full disclosure of her means and that, in any case, she could not repay the amount assessed as an overpayment.

Consideration of the Appeals Officer: The Appeals Officer considered that the appellant had a responsibility to declare an increase in her earnings and he noted, in particular, the change in employment that resulted in a significant increase in earnings. He referred to the objective of the earnings limit as being one intended to ease the means test and so to serve as an incentive for lone parents to re-enter the workforce. He noted that the correspondence issued to the appellant in February 1997 failed to mention the introduction of the earnings limit and he regarded this as a significant omission. He considered it unreasonable to attempt to hold the appellant to the terms of a 'contract' when the terms of any such contract had been changed without her knowledge.

The Appeals Officer concluded that the failure in this case to comply with the statutory provisions could be considered only with reference to the means test set out in the Third Schedule of the Social Welfare (Consolidation) Act, 1993. He referred to the recent Supreme Court Judgment in the matter of the Health (Amendment) (No.2) Bill, 2004 in relation to nursing home charges, in which the Court warned against applying retrospective provisions. He considered that this prevented him from considering the case under Section 158 (3), as the Deciding Officer had, on the basis that the appellant had not been alerted to the introduction of an earnings limit under that section.

He considered that account must be taken of the implications of such a substantial overpayment for the appellant, who was of relatively modest means, and that the doctrine of proportionality must apply. He was satisfied that it was a fair assumption by the appellant that the Department would continue to monitor her entitlement as it had done initially. He considered it an equally reasonable expectation that the Department would have advised the appellant of the earnings limit put in place. He referred again to the Judgment on nursing home charges and noted the following statement. 'The property of persons of modest means must necessarily, in accordance of those principles [of social justice, guaranteed under the Constitution], be deserving of particular attention, since any abridgement of the rights of such persons will normally be proportionately more severe in its effects' – Murray C.J. [2005] IESC 7. The Appeals Officer did not consider it safe to apply the provisions of Section 158 (3) (the earnings limit) as he was satisfied that the appellant was unaware of the legislation and

³ An annual income limit of £12,000 gross earnings applied under the provisions of Section 158 (3) of the Social Welfare (Consolidation) Act, 1993. This was amended to a weekly amount (£230.76 or €293.00) in Section 31 of the Social Welfare Act, 1999.

that the Department had failed to advise her as to the statutory conditions governing entitlement.

The Appeals Officer considered that the appellant was not without obligation to notify the Department of the substantial increase in her earnings in 1999 but accepted, as submitted, that the Department had a duty to act and to review entitlement when it became aware of the increase in her means. He took the view that the Department was aware in February 2001 when the appellant made contact and sought a statement of the payment being made to her. He noted that the Department was made aware again of her earnings in 2002 when she applied for Disability Benefit, a payment regulated by receipt of a One Parent Family Payment. He concluded that the appellant had failed in her obligation to notify the Department of an increase in her means for a period between April 1998 and February 2001. He was satisfied that he could consider the assessment of an overpayment for that period only, and with reference to the social welfare provisions governing means. He noted that the effect of this determination would be to reduce significantly the amount of the overpayment, to a level that he considered was sustainable, applying principles of fair procedure and natural justice.

Outcome: Appeal partially allowed.

One Parent Family Payment

Question at issue: Cohabitation.

Background: The appellant's entitlement was reviewed in light of a newspaper report of a civil action she had taken against her former partner for a portion of the equity of a house which they had shared. Following investigation, a revised decision was made in relation to her entitlement to payment during a period between 1982 and 1999. The Deciding Officer determined that she was not entitled to payment during the period in question on grounds of cohabitation. As a consequence an overpayment of some €78,000 was assessed.

Oral Hearing: The appellant attended, accompanied by her daughter. She was represented by a solicitor and by counsel. The two Social Welfare Inspectors involved in the case attended at the request of the Appeals Officer, as did the Deciding Officer.

The Appeals Officer outlined the question at issue and referred to her solicitor's written submission on the appellant's behalf. He advised that no specific grounds of appeal had been put forward and explained that there was a statutory obligation to outline such grounds of appeal as the Deciding Officer was required to comment on an appellant's contentions before a case was submitted to the Chief Appeals Officer. The appellant's legal representatives apologised in this regard. The Appeals Officer advised that he had decided not to call as a witness the person with whom the appellant was alleged to have cohabited as he wanted to avoid any possible confrontation. He noted that a statement made by that person to the Social Welfare Inspector was on the appellant's file and he advised that it would be referred to, as appropriate, during the hearing.

The Social Welfare Inspector outlined details of her investigation

of the case. She referred to the two cautioned statements made by the appellant, as set out in the documents on file. She reported that she had put to the appellant the allegation that she had made false declarations for the purpose of receiving a social welfare payment on grounds that she and (*person named*) had been living together as man and wife. The Social Welfare Inspector reported that the appellant, in response, had made a statement in which she referred to difficulties she had encountered in relation to drinking, gambling and drug abuse by the person concerned. She reported that the appellant had denied ever having been in a proper relationship with that person and had told her that she had simply shared a house with him, as nothing else was available. She said that the appellant had stated she had done the best she could, in all the circumstances, for the sake of their daughter.

Counsel for the appellant sought to clarify the details of the cautioned interviews. He asked whether the appellant had been questioned on those points outlined in the Guidelines⁴ in relation to cohabitation, including finances; co-residence; sexual relationship; household duties; ownership of property; arrangements for child rearing; whether the relationship was stable; and if the parties involved were known as a couple. In reply, the Inspector said that the details of the cautioned statements were as outlined in the documents on file. She conceded that she had not specifically dealt with all of the criteria outlined in the Guidelines in assessing cohabitation but asserted that she had addressed the major issues, in relation to co-residence and ownership of the various properties in which the appellant and (*person named*) had lived.

Counsel for the appellant submitted that the relationship at issue was a very volatile one. He argued that the appellant, while admitting to cohabitation for specific periods in 1987, 1996 and 1998, was essentially co-resident with separate living and sleeping arrangements in the various houses and flats in which she and (*person named*) had shared over the years. He stated that she had not owned any property during the period 1982 to 1999. He submitted that the appellant had volunteered information in Court about her social welfare payment. The appellant stated that she had sought a barring order in 1998/99 but had been refused as her name was not on the deeds of the house. She reported that she had, however, been granted a protection order.

The Deciding Officer referred to the lack of any grounds of appeal, arguing that this placed her at a disadvantage. She stated that she considered that the appellant had presented a different scenario at the oral hearing to the one she had put forward in Court. She referred to the Guidelines on cohabitation and said that, in making her decision, she had not relied solely on the main issue of co-residence. She said that she had taken into account a number of factors, including the cautioned statements made to the Inspector, details of the Court action the appellant had taken against her former partner and, in that context, her sworn evidence that she had continued to claim One Parent Family Payment during the period at issue. In this regard, she referred to the appellant's admission of co-residence and to one of cohabitation by (*person named*). She said that she

⁴ Department of Social and Family Affairs Internal Guidelines, available at www.welfare.ie.

had also taken account of the appellant's statements in Court regarding shared finances and contributions to household bills, as well as to money contributed by her parents towards the cost of purchasing and renovating a particular house. She argued that there was a proven relationship in that the couple had a daughter. She stated that the appellant had changed address on numerous occasions and had failed to notify the Department, in line with requirements for continued receipt of payment. She said that there had been difficulties in carrying out reviews of the appellant's claim as it had been difficult to locate her. In conclusion, she said that it had been accepted by the Court that the appellant had cohabited and had shared an interest in the various properties at issue in the case.

In response, counsel submitted that the Deciding Officer had referred to Court proceedings and sworn evidence as reported in the newspapers. He argued that such reports did not reflect what actually transpired and that transcripts of the Court hearings should have been sought; if these were not available, the solicitors on both sides should have been contacted for notes on their version of events. The Deciding Officer said that she had sought transcripts but without success. She argued that her decision had not been made on the basis of newspaper reports alone but had taken account of the cautioned statements made to the Social Welfare Inspectors and to the other aspects of their investigation of the case. She stated that she considered it relevant that neither party had denied the content of the newspaper reports when interviewed by Social Welfare Inspectors. Counsel argued that the statements made by the appellant and her former partner were not the same and contended that the Court had not accepted that the evidence of (*person named*) was credible. He argued that the Court action related to the question of the appellant's beneficial interest in the various properties over the years and that the proceedings and tests used were not the same as those applied in establishing cohabitation. In conclusion, he submitted that the appellant, while admitting co-residence, denied cohabitation.

Consideration of the Appeals Officer: The Appeals Officer noted that the hearing had been lengthy, detailed, and had addressed complex issues. In a detailed determination (summarised here), he assessed the contentions advanced by the Deciding Officer in support of her decision, the details of the investigation outlined by the Social Welfare Inspectors, the arguments advanced by the appellant's counsel and the appellant's own testimony, as well as the documentary evidence in the case. He accepted that it had been established that the appellant's relationship with her former partner had been a volatile one. He examined closely the question as to the Social Welfare Inspectors and the Deciding Officer having taken account of the newspaper reports of the appellant's civil action and concluded that they were entitled to do so. He was satisfied that the reports did not prejudice the Deciding Officer's decision in any way. He considered that, while it might have been more appropriate for the Department of Social and Family Affairs to have addressed all aspects of its own Guidelines on cohabitation, he was satisfied that co-residence would embrace a lot of the criteria used in establishing cohabitation. In this regard, he was

satisfied that there was sufficient evidence for him to accept that the appellant was cohabiting during the period at issue. He was satisfied, on the weight of evidence, that the appellant and (*person named*) were living together as husband and wife during the period from 1982 to 1999.

Outcome: Appeal disallowed.

Farm Assist

Question at issue: Assessment of means derived from the annual profit of a holding.

Background: The appellant was in receipt of a Farm Assist payment. Following a review, he was assessed with means of €168 per week derived from the annual profit (€12,700) from a holding. In line with this assessment, his payment was reduced from €226 to €96 per week. The appellant contested the severity of the reduction in his payment.

Oral Hearing: The appellant's wife accompanied him and the Social Welfare Inspector attended at the request of the Appeals Officer.

The Social Welfare Inspector outlined the details of the report she had made following an investigation of the appellant's means. The appellant took issue with the number of cattle she had reported and argued that his son owned half of the cattle on the holding. He reported that his son, who worked for a construction company, had bought 6 acres some years ago but had not applied for his own herd number. The appellant stated that they had about 90 cattle between them. The appellant indicated that his son had not declared the holding as additional income for tax purposes. While the Social Welfare Inspector did not argue the point as to the acreage which the appellant contended his son had bought, she insisted that the stock was held under one herd number and that all headage payments and subsidies were paid to the appellant. The Appeals Officer asked the appellant how his son could keep some 40 cattle, as he contended was the case, on 6 acres. In reply, the appellant stated that his son rented pieces of land.

The appellant confirmed that the total current stock was as follows: 16 cows; 8 heifers in calf; 10 heifers to go into calf; 28 weanlings; 27 one year olds and 17 lambs. He stated that he had no other receipts to produce. He referred to loan repayments but the Social Welfare Inspector advised that an allowance had been made for bank interest paid in the assessment of means. In conclusion, the appellant reported that he had lost his medical card and said that this presented a problem for him as there were medicines he needed to use on a long-term basis.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant's stock had increased since the Social Welfare Inspector had completed her report. He noted also that the holding was farmed as a single unit, with one herd number and all grants and subsidies being paid to the appellant under that number. He considered that shares of the holding should be apportioned, noting that if the appellant's son were to apply for a social welfare means-tested payment in his own right a share of the holding would be assessed against him. The Appeals

Officer did not accept that the appellant's son had built up his stock to over 40 cattle from 6 acres. He concluded that, if the appellant's son was renting land, there was no reason why he could not obtain a herd number of his own.

The Appeals Officer considered that it was difficult to exactly apportion the respective values of the holding as between the appellant and his son. He noted that no allowance had been made for land rented and concluded that the fairest method was to apply a ratio on the basis of land held, assuming that the appellant's son held 6 of the total 110 acres. On this basis, he reckoned the appellant's share at €11,950 and his son's share at €750. He concluded that it was appropriate to reduce the value of the holding assessed against appellant by €750. Accordingly, he estimated the appellant's share of the holding at €11,950 (assessable at 70% for Farm Assist), so that his means were €8,365 or €161 per week.

Outcome: Appeal partially allowed.

Orphan's (Contributory) Allowance

Question at issue: Whether an Orphan's (Contributory) Allowance is payable to the appellant in respect of her granddaughter.

Background: The appellant's son and his former partner had a child who lived with the appellant since she was born. The appellant made a claim for an Orphan's Allowance when her granddaughter was 10 years old. That claim was rejected on grounds that the child's mother was willing to have the child living with her as she then had the care of other children.

Oral hearing: The appellant attended the hearing accompanied by her husband and two representatives of her local Citizen's Information Centre (CIC). The child's mother attended at the request of the Appeals Officer and was accompanied by her aunt. The Social Welfare Inspector involved in the case was called but unable to attend.

In the absence of the Social Welfare Inspector, the Appeals Officer read from her report outlining details of the investigation in the case. The report stated that, following the child's birth, she and her parents had all lived with the appellant. The family situation was unstable and difficulties emerged as a result of the parents' addiction problems. Ultimately, the appellant and her son obtained joint custody of the child. Having obtained custody, the appellant did not allow contact between mother and child. In her report, the Inspector stated that she saw no reason to prevent the child's mother from caring for her as she had since had two other children, both of whom lived with her. The Inspector stated that her mother was prepared to have the child living with her if she so wished and that she hoped the child would do so when she was old enough to decide.

The child's mother submitted that the Inspector's report did not reflect fully what she had said. She stated that she would welcome regular contact with her daughter, if and when the child agreed, but that she had not meant that the child could come to live with her. She stated that she was not in a position

to support the child, as her only income was the One Parent Family Payment, and that she suffered from depression as a result of the stress of looking after her other two children.

The appellant stated that, when her granddaughter was born, both her parents were drug addicts. She reported that, during the first six months of her life, the child lived mainly with her due to the unstable nature of her parents' lives. After six months, the child came to live with her full time and she obtained joint custody with her son who was living with her at that time, struggling to overcome his addiction. She stated that the child's mother was in irregular contact with her at that stage and that she was living an unstable life as a consequence of her addiction. She contended that she did not keep appointments in relation to custody hearings and that contact faded away eventually.

The appellant reported that her son was the father of another child who lived with his maternal grandmother and that a Foster Care Allowance was being paid in respect of his care. The representative from CIC stated that an Orphan's (Non-Contributory) Pension had been paid to the other grandmother while that pension was payable with the Foster Care Allowance.⁵ She reported that both grandmothers were keen to ensure that the children kept in contact and, to this end, they had arranged regular visits and holidays for them.

It was reported that there had been no contact between the appellant's household and that of the child's mother over the previous nine years. The appellant stated that there had been an occasional chance meeting but no more than that. She asserted that the child would refuse to meet her mother. The child's mother confirmed the account given by the appellant and said that there were no plans to commence any formal contact.

The appellant stated that her son had recommenced drug abuse and that he had not supported the child since, having visited only once in the previous four years. She stated that he had been paid Child Benefit in respect of his daughter up to a year ago but, in view of his addiction problems, payment was now being made to the appellant. In support of her appeal, the appellant submitted a letter stating that her son was participating in a drug treatment programme, a letter from him confirming that he does not support his daughter, a letter of support from the family doctor, and a letter from a social worker confirming that the other grandmother had been paid an Orphan's Pension in respect of the child's brother and that, to the best of the social worker's knowledge, there was no contact or support between the child and her mother.

Consideration of the Appeals Officer: The Appeals Officer referred to the amendment of the definition of a qualified child for purposes of an Orphan's payment, outlined in the Social Welfare (Consolidation) Act, 2005, to one that provides that both parents have abandoned and failed to provide for the child. He noted that the application for an Orphan's Allowance in this case had been motivated by the deteriorating financial position of her guardians. He considered, however, that the events critical to determining whether the child could be deemed to be an orphan, in line with the legislative definition,

⁵ Orphans' payments are not made where a Foster Care Allowance is paid (Article 14 of the Child Care (Placement of Children in Foster Care) or (Placement of Children with Relatives) Regulations, 1995.)

had occurred earlier in her life. He noted that, at the time of her birth, both parents were drug addicts and as such were unable to care and provide for their child so that she lived with and was cared for by her grandmother. He noted also that the evidence confirmed that the child's father had a role in her life in her early years but that, following his relapse into addiction, he was no longer supporting or providing for her.

He considered that the reason for the decision to reject the claim related to the position of the child's mother in that it was held that there were no circumstances which prevented her from caring for the child as she was already caring for two other children and that the child was free to come to live with her if so wished. The testimony of the child's mother, however, was that she was not supporting the child nor was she in a position to do so. Accordingly, the Appeals Officer considered that the issue to be determined was whether the child's mother had abandoned her. He noted that the evidence presented at the oral hearing indicated that she had never supported her daughter, that she had not been involved in the child's life nor had there been any contact between them for many years. He referred to the statement made at the oral hearing that the child's mother would like to establish regular contact with her but considered that this was purely aspirational and that the evidence indicated that the child did not wish that to happen. He considered that the fact that the child's mother was caring for two other children was not of itself indicative that she had not abandoned her older child in earlier years. He concluded that the child had been abandoned by her mother when she was an infant and that nothing had been done to repair that abandonment. He was satisfied, therefore, that the child could be regarded as an orphan for purposes of social welfare legislation.

Outcome: Appeal allowed.

Disability Allowance

Question at issue: Retrospective decision assessing means derived from employment, resulting in an overpayment of some €9,500.

Background: The appellant was assessed with means derived from employment of €103.10 per week from a date in 2003 and €91.29 from a date in 2004.

Oral Hearing: The appellant attended accompanied by a friend.

The appellant submitted that he understood from enquiries he had made with the Department of Social and Family Affairs and with FÁS that he was allowed to work up to 20 hours per week without his Disability Allowance being affected. He stated that, following an accident in 2000, his arm had been badly injured. He said that he was anxious to get back to work and that, as soon as he had recovered sufficiently, he began looking for alternative work as the nature of the injury prevented a return to his former employment. He reported that he had approached FÁS and the Jobs Facilitator of the Department of Social and Family Affairs and that he had secured funding to do a training course. He denied that an earnings limit of €120 per week was

ever mentioned to him but was adamant that he was informed by staff in FÁS and in the Social Welfare Local Office that he could work for up to 20 hours per week without affecting his Disability Allowance payment. He reported that he found it difficult to get work initially but that he started work eventually, in February 2003. He stated that the only work available was for 20 hours, as the company operated short shifts in the dispatch area where he was employed. He said also that, at that time, he would not have been able to work for any longer. He stated that he was still employed by the same company for 20 hours per week.

The appellant stated that he went to the Office of the Revenue Commissioners to register and that he had informed that Office that he was in receipt of Disability Allowance. He stated that he was assured by a Revenue official that his affairs were in order. Accordingly, and in addition to the information he had obtained previously from the Department of Social and Family Affairs and from FÁS, he concluded that everything was in order and he continued to cash the orders in his Disability Allowance book.

On the appellant's behalf, his friend argued that there was some confusion surrounding the conditions applying where people in receipt of social welfare payments returned to the workforce, particularly in relation to disability payments. He stated that 20 hours per week was the rule applied in a number of social welfare schemes and that this was the threshold which applied also in relation to the Community Employment Scheme. He contended that this may have led to the appellant misunderstanding the rules governing Disability Allowance. He argued also that had the appellant wished to conceal his employment from the Department of Social and Family Affairs, he would not have reported it to the Revenue Commissioners. He submitted that the fact that he had done so indicated that he was acting in good faith.

The Appeals Officer asked the appellant whether he had read the list of notifiable events at the back of his payable order book and if he was aware that the list included a reference to taking up a job. The appellant replied that he was not aware of that list and that he had acted on the assumption that he could work for 20 hours per week. The Appeals Officer pointed out that the number of hours available in the job just coincided with the number of hours he had assumed he could work and asked if this was mere coincidence. The appellant replied that this was the only work available from the employer and that he had taken the job on the assumption already stated. He advised that he had returned his payable order book following notification of the decision.

Consideration of the Appeals Officer: The Appeals Officer noted that, while the appellant had suffered an unfortunate accident and was left badly injured, he had shown a willingness to return to the workforce and to undertake training. He accepted that there was a range of conditions applying where people in receipt of disability payments wished to return to the workforce. He regarded it as reasonable to assume that confusion might arise in relation to the conditions which apply to Disability Benefit as against Disability Allowance or Invalidity

Pension. He considered it possible also that some confusion might arise as to the difference between a FÁS Community Employment Scheme and work in the open economy. He noted that a common timeframe mentioned in a number of these areas was 20 hours per week.

The Appeals Officer was satisfied that the appellant genuinely believed that he was entitled to work as he had done and that this conviction resulted from a misapprehension of the conditions governing the scheme rather than from incorrect information provided by the Department of Social and Family Affairs. He considered that it was possible that the relevant provisions were not fully understood within FÁS. He did not accept that registering with the Revenue Commissioners demonstrated good faith as his employer would have required him to do so, although he considered that it was reasonable for the appellant to have accepted assurances that all was in order.

The Appeals Officer noted that while the guidelines in the payable order book refer to notification in the event of taking up employment, they do not specify an earnings limit of €120 per week. He concluded that the appellant acted in accord with his understanding of the rules and, in the circumstances, he determined that the decision should apply from a current date and not with retrospective effect, so that no overpayment arises.

Outcome: Appeal allowed.

Invalidity Pension (Living Alone Allowance)

Question at issue: Whether the appellant is entitled to a Living Alone Allowance from a date in 2001, although he did not apply until a date in 2004.

Background: Social welfare legislation sets out time limits within which a claim must be made. Payment is not made where claims are made after the prescribed time. However, a claim may be backdated (for up to 6 months) where it is accepted that there was good cause for the delay and where entitlement throughout the period in question is established. The appellant in this case was in receipt of Invalidity Pension and living alone. In 2004, he claimed a Living Alone Allowance which was awarded and backdated for a period of six months. He made an appeal against this decision seeking to have payment made from April 2001 when entitlement commenced. In his appeal submission, the Deciding Officer stated that a notice was issued advising as to possible entitlement, following an amendment to the scheme in April 2001, but that no claim had been received until 2004.

Oral Hearing: The appellant attended the hearing accompanied by his sister.

The Appeals Officer clarified that the period at issue was from April 2001 to the date the claim was made in May 2004. He advised the appellant that in April 2001 the qualifying conditions for receipt of a Living Alone Allowance were amended to include all recipients of Invalidity Pension. Prior to that, the allowance was payable only where a recipient was over 65 years.

The appellant gave evidence of having lived alone most of his adult life in a local authority house. He stated that he was unaware of his entitlement to a Living Alone Allowance until he was advised about it by a friend. He said that he had no recollection of receiving a notification in his pension book outlining the Budget changes in 2001. He reported that he had been getting a Free Fuel Allowance for a good number of years.

The appellant's sister said she was not clear as to the purpose of the oral hearing as the appellant was not competent to explain the issue to her. She stated that her brother's appeal had been submitted for him by the Citizen's Information Centre and that it was staff in the Centre who had advised him about his entitlement. She stated that the appellant had an alcohol problem which could be severe at times. She said that, as a consequence, he had consistently neglected his affairs and had relied on her to sort things out. The appellant submitted that he would not be competent to act on a notification about Budget changes, saying that if he was drinking heavily he would not bring correspondence to anyone's attention nor would he seek help. He reported that his rent was in arrears and that the local authority was seeking to have €30 per week deducted from his Invalidity Pension in order to recover the amount outstanding. The appellant's sister undertook to make available confirmation of arrears of rent. It was submitted that the appellant had no resources as a result of his alcoholism. A letter was submitted subsequently stating that the appellant owed some €500 to the local authority.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant had been in receipt of Free Fuel Allowance since 1995 on the basis that he was living alone and that this had been recorded by the Department of Social and Family Affairs. He considered that continued payment of that allowance was an indication that the Department was satisfied that he remained living alone. He noted that the appellant had allowed his council rent to get into arrears, incurring a debt which the evidence suggested he was not in a position to meet. He accepted that the appellant had a limited capacity to deal with his own affairs and was satisfied that this accounted for his failure to respond to notification of the revised conditions for Living Alone Allowance. He concluded that, as the Department of Social and Family Affairs had information to indicate that the appellant was eligible for payment, he must be deemed eligible for the Living Alone Allowance with effect from April 2001.

Outcome: Appeal allowed.

Child Benefit

Question at issue: Whether to the appellant's claim to Child Benefit may be paid with effect from a date in 1991 when she moved from the United Kingdom to Ireland.

Background: The appellant and her family had moved to Ireland in the early 1990s but continued to draw Child Benefit from the United Kingdom. When the authorities there became aware of the situation, payment was stopped and recovery sought in respect of the period from 1991 to 2000, amounting to some £9,000 sterling. The appellant claimed Child Benefit in

Ireland but the Deciding Officer rejected her request to have payment backdated on grounds that she had not shown good cause for the failure to claim within the prescribed period.

In her written submission, the appellant said that she was under the impression that the United Kingdom paid Child Benefit for children born there and that her residence in Ireland was not intended to have been permanent. She submitted that she continued to claim Child Benefit from the United Kingdom, reasoning that it was payable in either country. She contended that, if she had no entitlement to the Child Benefit she had claimed, then she certainly had entitlement to Irish Child Benefit and, furthermore, that such entitlement should be offset against the overpayment assessed by the social security authorities in the United Kingdom. The appellant submitted also that the family had not moved to Ireland in 1991 but some time in 1992 and she supplied documentary evidence in support of this contention.

The Appeals Officer determined this appeal on a summary basis.

Consideration of the Appeals Officer: The Appeals Officer noted that Child Benefit is a universal payment in both Ireland and the United Kingdom and that the appellant had satisfied the qualifying conditions in both countries. He observed that she was effectively penalised, however, in being denied payment in both countries. He considered that the decision to reject her claim for backdated payment might be tenable were she seeking a simple retrospective award of Child Benefit, provided for under the Social Welfare (Consolidated Payments Provisions) Regulations, 1994. He noted, however, that it is accepted that a claim for benefit in any State, covered by EU Regulations, may be regarded as a claim for a similar type of payment in Ireland.

He considered that, whatever the merits of the appellant's submission as to her failure to claim Child Benefit within the appropriate time, the case was altered by the efforts of the authorities in the United Kingdom, with the assistance of the Department of Social and Family Affairs, to recover the Child Benefit paid by them. He took the view that this marked a departure from the 'proportionality doctrine', provided for in administrative law, which requires an administrative body to maintain a proper balance between any adverse effects which its decision may have and the purpose which it pursues. He considered that, while it was reasonable that the Regulations governing late claims should seek to impose some order on the manner in which a claim may be made, the provisions of that legislation were not intended to support the recovery of an overpayment or over-issue. He noted that the appellant was not seeking to have any retrospective payment made but sought to avoid the overpayment being imposed.

The Appeals Officer noted that the Department of Social and Family Affairs had in place arrangements to refund overlapping payments to the social security authorities in the United Kingdom. He concluded that the only fair course of action was to award Child Benefit as and from 1992, with the specified date to be agreed with the authorities in the United Kingdom as that from which Child Benefit ceased to be payable there. He determined that entitlement to benefit in this State should

be offset against the overpayment assessed by the United Kingdom authorities.

Outcome: Appeal allowed.

Child Benefit

Question at issue: Whether the appellant may be paid Child Benefit in respect of his cousin who is under the care of his local Health Service Executive.

Background: The appellant claimed Child Benefit in respect of his cousin who was 16 years of age and came to live in Ireland in 2001. He was under the care of the Health Services Executive and living in accommodation provided by the Executive. As the appellant was not resident with him, the Deciding Officer concluded that the appellant could not be regarded as head of the household, for Child Benefit purposes, so that he was not entitled to payment.

Oral Hearing: The appellant attended alone. He reported that he had lived in the same residential centre as his cousin when he first came to Ireland and that he had been paid Child Benefit in his own right while he lived there. He submitted that he had previously claimed Child Benefit for two other cousins and had been paid, asserting that he looked after the money on their behalf. He said that, as his cousin was still under age, he could not live with him. He reported, however, that he sees him almost every week and spends time with him at weekends and helps him out financially if he can. He said that he had been paid Child Benefit when he was 16 years old and that he had moved into private rented accommodation when he was 18 years. He reported that there were plans for his cousin to do the same. He stated that his cousin had his meals provided in the residential centre and was given a bus ticket and €19.00 per week. The appellant spoke of his concern to have benefit paid to all of his relatives who should have an entitlement and submitted that he had claimed, and attended the hearing, with a view to helping his cousin to get his benefit.

Consideration of the Appeals Officer: The Appeals Officer noted that, in addition to the circumstances of this particular case, there was a broader issue as to the payment of Child Benefit to separated children who are seeking asylum or unaccompanied minors. The appellant had asserted that, in similar circumstances to those of his cousin, he had been paid Child Benefit in his own right. This assertion had not been raised before the oral hearing so that the Appeals Officer had not been in a position to request a statement or to call a representative from the Department of Social and Family Affairs in order to clarify the matter. After the hearing, she requested clarification from the Department. She was advised that the young persons involved are in 'direct provision' accommodation in the care of the Health Services Executive. Prior to the introduction of the habitual residence condition, some of them would have left this accommodation and gone to live in the private rental sector, being paid Supplementary Welfare Allowance (basic rate and rent supplement). During this time, the Department paid Child Benefit on an administrative basis, taking the view that a young person in this situation could be

regarded as head of his/her own household and, therefore, as a qualified person for purposes of social welfare legislation. In terms of arrangements made to pay Child Benefit to some young persons in circumstances similar to those outlined by the appellant, the Appeals Officer was advised that the Department had made payment until about two years ago. However, a review of those arrangements indicated a disparity in that some young persons were paid Child Benefit while some were not, so that the Department adopted a consistent approach whereby Child Benefit was no longer paid in such circumstances.

The social worker involved with the young person in the case had submitted a letter of support with the appellant's claim. Having obtained a statement of the Department's position as to payment to other young persons resident in the unit where the appellant's cousin lived, the Appeals Officer contacted the social worker for further clarification. The social worker advised that most separated children (unaccompanied minors) are received into the care of the Health Services Executive. Prior to the introduction of 'direct provision', adults and families were placed in hostels and paid full rate Supplementary Welfare Allowance. Project/social workers helped them to claim Child Benefit and it was paid to the young persons themselves. Following the introduction of 'direct provision', payment was made to adults and children under that scheme. The social worker argued that the young persons involved are not receiving the same care as is provided for children in residential care, and that it is appropriate that they would handle money in the same way as children living in a family would. This assists in their acquiring skills associated with independence and allows them to participate in Irish society.

The Appeals Officer noted that the issues examined in her determination of this appeal were not strictly relevant to the question at issue but were examined on grounds that there might be a basis for a claim to be made by the young person himself if, as the appellant had argued, the Department of Social and Family Affairs was in fact making such payment. She concluded that, while it appeared that the Department had done so on an administrative basis until about two years ago, there was no longer such an arrangement in place. She considered that, while the appropriateness of such a practice and the change effected subsequently might well be questioned, those issues did not ultimately have a bearing on the appeal. She concluded that the appellant was not entitled to payment of Child Benefit in respect of his cousin on grounds that he did not meet the criteria outlined in social welfare legislation for a 'qualified person' to whom Child Benefit may be paid, as the young person in respect of whom the claim was made was not ordinarily resident with him.

Outcome: Appeal disallowed.

Child Benefit (Habitual Residence Condition)

Question at issue: Whether the appellant may be deemed to be habitually resident in the State for purposes of her Child Benefit claim.

Background: The appellant came to the State as an unaccompanied minor in September 2002 and joined the rest of her family. The Minister for Justice, Equality and Law Reform granted her permission to remain in the State for a period in line with that granted to her mother and on grounds that she was the dependant of a person who had been granted residency. The appellant got married subsequently and had a child. The Deciding Officer concluded that, as the appellant had formed a separate family unit for the purposes of Child Benefit, her mother's status could not be taken into account and that the appellant could not be deemed to be habitually resident until such time as a final decision has been made on her status in the State. Her residency status was due for review in March 2006.

The Appeals Officer determined this appeal on a summary basis.

Consideration of the Appeals Officer: The Appeals Officer noted that the relevant legislation is framed in such a way that an individual is required to rebut the presumption that they are not habitually resident. In its Guidelines dated 4 March 2005, the Department of Social and Family Affairs states that "habitual residence" 'implies a close association between the applicant and the country from which payment is claimed and relies heavily on fact. The most important factors for habitual residence are the length, continuity and general nature of actual residence rather than intention.'

The Guidelines refer to the European Court of Justice having set down a number of factors which are relevant when considering whether someone may be deemed to be habitually resident. Specific reference is made to Judgments in the *Di Paolo* and *Knoch* cases.⁶ Having examined those Judgments, the Appeals Officer noted that they identified the following points as being relevant in determining habitual residence:

- Close ties with the country where the person has settled and habitually resides
- Where the habitual centre of a person's interests is located
- The family situation
- The reasons which have led a person to move
- The nature of the work
- Length and continuity of residence before the person concerned moved
- Length and purpose of absence
- The nature of the occupation found in the other Member State
- The intention of the person concerned as it appears from all the circumstances

Having examined the provisions of the governing legislation, and the Department's Guidelines on the Habitual Residence Condition in conjunction with the relevant ECJ Judgments, the Appeals Officer concluded that the appellant had rebutted the presumption that she was not habitually resident. She was satisfied that the appellant had established that she had close ties with Ireland. Both her family of origin and the new family which she and her husband had established all live here. The Appeals Officer concluded that the reasons which had led the

⁶ Case 76/76 *Di Paolo* [1977] ECR 315 and Case C-102/91 *Knoch* [1992] ECR I-4341

appellant to come here and the length and continuity of her residence in Ireland all pointed clearly to the fact that her main centre of interest was in the State. She concluded, therefore, that the appellant must be deemed to be habitually resident.

Outcome: Appeal allowed.

Unemployment Assistance (Habitual Residence Condition)

Question at issue: Whether the appellant may be deemed to be habitually resident in the State for purposes of his Unemployment Assistance claim.

Background: The appellant and his family came to Ireland in May 2004 from Slovakia. When he became unemployed, he claimed Unemployment Assistance and was required to establish that he satisfied the habitual residence condition. The Deciding Officer concluded that he had not been resident in the State for the previous two years, that he did not have a stable pattern of employment in the State and that he had not secured employment prior to his arrival. Accordingly, his claim was rejected on grounds that he had not met the habitual residence condition.

Oral Hearing: The appellant attended, accompanied by his wife and their child. He was supported in his appeal by two members of staff at his local Citizen's Information Centre, and they also attended the hearing.

The appellant stated that, with the enlargement of the European Union in May 2004, he thought that there would be no difficulty in getting work in Ireland. He reported that he and his wife and children had left their country of origin due to lack of work and overcrowding in the family home where they had lived with his mother-in-law. He said that on arrival in Ireland he had rented a house, having raised the money for the deposit by way of loans from friends. He and his wife applied for Supplementary Welfare Allowance and for a rent supplement under that scheme but he said that their claims were rejected as they were not considered to be habitually resident. He stated that they had been awarded Child Benefit in respect of their two children.

The appellant reported that he worked as a hotel porter from July 2004 until February 2005. He said that he and his family were subject to harassment and racial abuse in the area where they were living and so they decided to move to their current accommodation in June 2005. At that stage, the appellant had secured work as a labourer. The appellant's wife was unable to get work due to health problems. She had undergone surgery in November 2005 and continues to receive treatment. They reported that due to a lack of funds they had incurred debts. They produced electricity and other bills in support of this contention. The appellant stated that when he was not working the family had survived by way of help from friends and food parcels from the local St. Vincent de Paul Society.

The appellant reported that the lease on the family's accommodation was for one year, with effect from June 2005, that they had opened a bank account, that they have two

children attending local schools, with the older one registered for secondary school with effect from September 2006. He referred to their involvement in the local parent/teacher association. He stated that he has no family in Slovakia. The appellant and his wife asserted that, once they made the decision to come to Ireland, it was always their intention to remain and to make a life for themselves and their children here.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant had taken whatever work was available to him. He examined the evidence presented by the appellant and his wife in relation to their residence in the State and the arrangements they had made for their children's education. He noted that the appellant was not resident in the State for two years at the date of his claim for Unemployment Assistance but, having examined all of the evidence in the case, he concluded that the appellant and his wife were embedded here and that they were, therefore, habitually resident in the State.

Outcome: Appeal allowed.

Child Benefit (Habitual Residence Condition)

Question at issue: Whether the appellant, whose partner is employed in Ireland, may be regarded as habitually resident in the State for purposes of her Child Benefit claim.

Background: The appellant claimed Child Benefit, from June 2004, in respect of her two children. Her claim was rejected on grounds that she was not habitually resident in Ireland. The Deciding Officer concluded that as she had not resided in the State or Common Travel Area for at least two years and, as no decision had been made on her refugee status, she could not be deemed to be habitually resident in the State.

Oral Hearing: The appellant attended the hearing unaccompanied. She stated that the family was renting an apartment and provided a written statement from the landlord. She submitted a letter from the local housing authority in relation to a joint application she and her partner had made. She also submitted a letter from a construction company stating that her partner had been employed by them since October 2004 and a reference from his supervisor stating that he regarded him as honest and reliable. The appellant also submitted a letter from the teacher at the school her son attends stating that he was making good progress.

The appellant reported that the family had lived in England between April 2002 and March 2003. They came to live in Ireland in April 2004. The appellant reported that she had been a refugee but, following the accession of the Czech Republic to the European Union in 2004, this was no longer the case.

Consideration of the Appeals Officer: The Appeals Officer observed that the appellant was not a refugee with effect from 1 May 2004. He noted that Child Benefit is a 'family benefit' under EU legislation and that this confers rights on 'workers' who are EU nationals, including citizens of new Member States

that joined in May 2004. He referred to the fact that an EU family resident in Ireland may qualify for Child Benefit if one of the parents is a 'worker', which means that the parent is in insurable employment or self-employment in Ireland. On this basis, the habitual residence condition does not apply to EU workers in the context of Child Benefit. As the appellant's partner commenced employment in October 2004, he concluded that the habitual residence condition did not apply from that date and that the appellant was entitled to payment provided the other conditions for entitlement were satisfied. In regard to the earlier period (between June 2004 and October 2004), he concluded that the habitual residence condition applied. He noted that the appellant was a refugee at the time she came to Ireland before her status changed in May 2004. He concluded that the appellant had been in Ireland for only a short time when she made her Child Benefit claim and, for that reason, he did not consider her centre of interest to have been Ireland at that time. Accordingly, he did not consider her to have been habitually resident in the State during the period between June 2004 and October 2004.

Outcome: Appeal partially allowed.

Unemployment Assistance (Habitual Residence Condition)

Question at issue: Whether appellant may be deemed to be habitually resident in the State for purposes of his Unemployment Assistance claim.

Background: The appellant came to live in Ireland in August 2003, with his wife and child. He claimed Unemployment Assistance in July 2004 but was disallowed on grounds that he did not satisfy the habitual residence condition. The Deciding Officer concluded that he had not been resident in the State or other parts of the Common Travel Area for the previous two years and that, in line with details he supplied when he made his claim, his stay was for a brief period only, possibly two to three years.

Oral hearing: The appellant attended alone. He reported that neither he nor his wife had any direct family connections with Ireland. He said that he had not returned to his country of origin since his arrival, having come here on a one-way ticket. He reported that he was living in rented accommodation and that there was no lease on his rented property. He submitted that he had commenced full-time employment since making his claim, that he held a bank account here, that he had joined a local sports club and was involved in coaching, that his employment required a minimum of two years to complete, and that his second child was born here.

The Appeals Officer asked the appellant about his job prior to coming to Ireland. He reported that he had taken a career break to come to Ireland. He said that he was not looking to leave that job but to extend his career break for a further one to two years. In relation to his employment in Ireland, he said that he had no written contract but understood that the job would last for at least two years.

The appellant reported that his extended family continues to live in his country of origin and that his household effects and car were in storage there, awaiting the family's return. He stated that he did not own property there, having always rented. He said that he plans to stay in Ireland for about two years and planned to extend his career break accordingly.

Consideration of the Appeals Officer: The Appeals Officer noted that the appellant was unable to submit any written evidence regarding an employment contract, extending his career break or any other evidence which might support the contention that he intended to stay in Ireland for the foreseeable future. She noted also that the appellant acknowledged that he intended to return to his country of origin to live, that his personal effects were in storage, that he had opted for an extension to his career break and not resignation and that his work permit curtailed the conditions of his residence in this country. In all the circumstances, the Appeals Officer concluded that the appellant did not satisfy the habitual residence condition.

Outcome: Appeal disallowed.

Unemployment Assistance (Habitual Residence Condition)

Question at issue: Whether the appellant may be deemed to be habitually resident in the State for purposes of his Unemployment Assistance claim.

Background: The appellant came to Ireland in April 2004 to join his wife and children. He had been granted a visa under the Family Reunification Scheme. He and his wife separated subsequently. He claimed Unemployment Assistance in March 2005 but his claim was rejected as the Deciding Officer concluded that he was not habitually resident in the State. The grounds cited for that decision were that he had not lived in Ireland or other parts of the Common Travel Area for the previous two years or more, that he did not hold a current valid residency permit to remain in Ireland and that, from the evidence submitted, there was nothing to substantiate that he was habitually resident in the State.

Oral Hearing: The appellant attended and was represented by a solicitor and by counsel. Counsel stated that the appellant's wife was granted refugee status and permission to remain in the State in 2003 and that she had enquired about the family reunification scheme with a view to having the appellant join her. On advice from the Department of Justice, Equality and Law Reform, an application was pursued via the Irish Honorary Consul in Romania and a visa was granted. He reported that the appellant arrived in Ireland in April 2004 and was granted a work permit and permission to remain for one year. Some time later, following the loss of his identification card, confusion arose as to the nature of his status in the State and the application made to the relevant Irish Honorary Consul. These issues had been the subject of a High Court Judgment, and a copy of that Judgment was submitted.

The High Court held the appellant's application to the Irish Honorary Consul was an application under Section 18 of the

Refugee Act, 1996, a provision which refers to applications from members of a refugee's family. The Court held that the appellant was entitled to a decision from the Minister of Justice, Equality and Law Reform and that the Minister was estopped from revisiting the question as to whether the appellant was a member of the family of (*person named*). The Court found also that the Minister was in significant delay in dealing with the application under the relevant provisions of the Refugee Act and that, until such a decision was made, it would be inappropriate to prevent the appellant from remaining in the jurisdiction or from working. Counsel pointed out that the consequence of the High Court Judgment was that the Minister of Justice, Equality and Law Reform was left with very narrow grounds for refusing the application, namely any issue of public interest or an issue of national security. He stated that the appellant's wife had been granted permission to remain in the State indefinitely and as such the same rights now applied to the appellant. He contended that the fact that the couple had separated did not affect the issue and that the appellant was legally in the State. He argued that, as a consequence, one of the grounds for the decision that the appellant could not be deemed to be habitually resident was invalid.

The Appeals Officer referred to the other grounds cited by the Deciding Officer and said that there was a need to address these points also. The appellant submitted that he had been continuously resident in the state since April 2004. He stated that he had made an application for Unemployment Assistance in October 2004 and believed that his claim was successful. He said that before payments commenced, however, he separated from his wife and did not have a permanent address; for that reason, payment was not made. Counsel stated that the relationship between the appellant and his wife remained good and that the appellant was in regular contact with the children. He reported that many members of the appellant's extended family were also living in Ireland. The appellant stated that while he was now free to look for work, he considered that his English was poor and that this was an impediment in his search for work. He stated that he hoped to secure a place on a FÁS course to help improve his language skills.

Consideration of the Appeals Officer: The Appeals Officer noted the Deciding Officer's conclusion that the absence of a valid permit to remain in the State was a basis for determining that the appellant did not fulfil the habitual residence condition. He considered, however, that the effect of the High Court Judgment was to confirm that the appellant was legally in the State and that he was legally permitted to remain. He accepted that the grounds on which that permission could be withdrawn were so limited as to make it unlikely that his status would be altered. He noted also that the appellant had been deemed to have fulfilled the habitual residence condition initially, in relation to his Unemployment Assistance claim, on the basis that he held a valid permit to reside in the State as the spouse of someone who had been granted refugee status. He concluded that the effect of the High Court Judgment was to restore to the appellant his status of being resident in the State and, therefore, all advantages accruing from such status.

Accordingly, he was satisfied that, at the time of making his claim for Unemployment Assistance in October 2004, the appellant's status was such that he met the habitual residence condition and that he continued to do so.

Outcome: Appeal allowed.

Appendix 1: Social Welfare Appeals Office Organisation Chart on 31 December 2005

