

## Direct Provision and the Habitual Residence Condition

### FLAC – the Free Legal Advice Centres



## What is FLAC?

- an independent human rights organisation
- campaigning for equal access to justice for all
- to contribute to the eradication of social and economic exclusion
- valuing the use of law as a way to achieve change



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## Direct Provision

- Scheme was introduced as a pilot scheme in November 1999
- Became official government policy in April 2000
- Introduced on an administrative basis rather than a legislative basis
- Asylum seekers allocated accommodation on a full board basis by RIA



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## Dispersal

- Policy to complement Direct Provision
- Asylum seekers were dispersed to various parts of the country
- No needs assessment carried out before deciding where to place an individual asylum seeker
- No consultation with local communities, NGOs or asylum seekers themselves



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## Direct Provision Circulars

- SWA Circular 04/00
  - Reception centre before dispersal
  - Direct Provision Allowance
  - Rent supplement given only in exceptional cases
- SWA Circular 05/00
  - Person without 'justification' who refuses direct provision to be referred to the Directorate of Asylum Seeker Services
  - Will only receive basic direct provision allowance
  - Exceptions made in certain circumstances



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## Current Position of People Living in Direct Provision

- "Direct provision accommodation is assessed at 178.70 euro per week for the person claiming, 112.20 euro for a qualified adult dependant and 14.40 per week for each dependant child." ([www.citizensinformation.ie](http://www.citizensinformation.ie))
- Direct Provision allowance is €19.10 per adult and €9.60 per child – the only social welfare payment not to have increased in 8 years
- Entitled to Exceptional Needs Payments (ENPs)
  - Usually granted 2 payments per year for clothing



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## Habitual Residence Condition (HRC)

- Introduced on 1 May 2004
  - EU enlargement
  - To prevent 'welfare tourism'
  - British government introducing residency condition
- Applied to:
  - All means tested allowances
  - Child Benefit

## Introduction of HRC

- Social Welfare (Miscellaneous Provisions) Act, 2004 (Section 17)(Commencement) Order, 2004
  - Presumption that person is not habitually resident if present in the State or Common Travel Area for a "substantial continuous period" less than 2 years
  - Onus is on applicant to rebut presumption

## Guidelines for Deciding Officers and Community Welfare Officers

- SWA Circular No. 02/04 dated 30 April 2004
  - Contains the five *Swaddling* criteria
  - States that although the term habitual residence is "not defined in EU Regulations it is intended to convey a degree of permanence and is intended to refer to a regular physical presence enduring for some time, usually (but not always) beginning at a date in the past and intended to continue for a period into the foreseeable future" (Heading F – Habitual Residence)

## EU Concerns about HRC

- 22 December 2004 the EU issued infringement proceedings against the Irish government
  - Prohibited freedom of movement
  - Indirect discrimination based on nationality
- Proceedings dropped in April 2006

## 2 Year Residency Requirement

- Officials from DSFA met with members of the Commission in May 2005
  - "2 year presumption contained in national legislation is not a determining factor" (Review of the HRC carried out by the DSFA in 2006)
  - Considered other factors set down by European Court of Justice

## Irish Legislation

- Section 246 of the Social Welfare Consolidation Act 2005 (Principal Act)
  - 2 year residency requirement originally included
  - No definition of the term "habitual residence condition" provided
- Amended by s. 30 of the Social Welfare and Pensions Act 2007
  - Swaddling criteria put on statutory footing

## Swaddling Criteria

- Case C-90/97 *Swaddling v. Adjudication Officer*
  - (a) length and continuity of residence in the State or in any other particular country;
  - (b) length and purpose of any absence from the State;
  - (c) nature and pattern of the person's employment;
  - (d) person's main centre of interest; and
  - (e) future intentions of the person concerned as they appear from all the circumstances

## Impact of HRC on Asylum Seekers

Under the current system three different categories of people emerge:

- Those who were in receipt of payments prior to the introduction of the HRC and who continue to receive these payments
- Those who are refused any social assistance payment including Child Benefit as they are not deemed to satisfy the HRC.
- A small number of people who have been granted a payment despite having made their application subsequent to the introduction of the HRC. In these cases the payment has usually been granted on appeal.

## First Category

- People who have been in direct provision since before 1 May 2004
  - No exact figures but according to recent Irish Times article on 5<sup>th</sup> May 2008 more than a quarter of the total have been in direct provision for over 3 years
  - "In addition... a number of asylum seekers are in receipt of other allowances such as unemployment assistance, disability, and one parent family allowances" Brian Lenihan, Former Minister of Justice in response to Parliamentary Question on 4<sup>th</sup> March 2008

## Second category

- **People denied benefits based on HRC:**
  - Each individual case should be assessed on its individual circumstances in line with fair procedures
  - DSFA claim that a person cannot be deemed habitually resident while their application for asylum is being processed. Revised guidelines due out.
  - *Goncescu and Others v Minister for Justice, Equality and Law Reform*
  - "Relationships developed during this period and/or other relevant factors that occur during that period may be taken into consideration in the normal way when assessing their centre of interest and future intentions" DAO Bulletin August 2007

## Third Category

- People granted social welfare payments after the introduction of the HRC
- Chief Appeals Officer (CAO) of the Social Welfare Appeals Office (SWAO):
  - "It seems to me therefore, that the failure of the State to provide for the expeditious hearing of asylum appeals, thereby giving rise to the artificial status of entitled to remain pending appeal, should not be used as a reason for penalising appellants who can exercise no control over the timescale within which their artificial status will be finally determined."

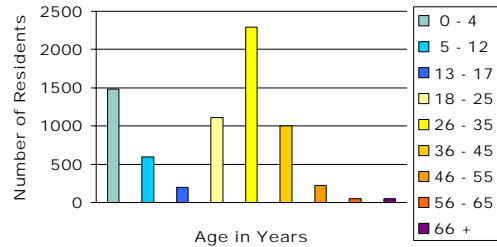
## Definition of Poverty and Social Exclusion

- Definition first adopted by the Government in 1997
  - "People are living in poverty if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living which is regarded as acceptable by Irish society generally. As a result of inadequate income and resources people may be excluded and marginalised from participating in activities which are considered the norm for other people in society".

## Government's Anti-Poverty and Social Inclusion Policies

- National Action Plan for Social Inclusion 2007 – 2016 (NAPinclusion)
- Towards 2016 Ten Year Framework Social Partnership Agreement 2006 – 2015
  - Both documents have adopted the "lifecycle approach" which "places the individual at the centre of policy development and delivery".
  - Key lifecycle groups are: Children, People of Working Age, Older People and People with Disabilities as well as Communities

## Age Profile of Residents in Direct Provision



## Lifecycle Approach

- In terms of the "lifecycle approach" used in government anti poverty strategies:
  - 32.65% residents are children under 18
  - Just under 67% residents are people of working age
  - Less than 1% residents are older people \*
  - All residents are members of a disadvantaged community

\*No date of birth is recorded for 0.08% of residents

## Children

- Goals for children in Ireland:
  - Every child should grow up in a family with access to sufficient resources, supports and services, to nurture and care for the child, and foster the child's development and full and equal participation in society.
  - Every child should have access to world-class health, personal social services and suitable accommodation.

## People of Working Age

- One of the government's high level goals:
  - "Employment has proven to be a **major factor for people exiting poverty** and also influences quality of life and social well-being. Therefore, while **social welfare income support** remains **crucial and must be adequate to meet needs**, passive income support alone is not sufficient if poverty and social exclusion are to be comprehensively addressed."

## Impact of direct provision and the HRC on human rights

- Poverty and deprivation caused by these government policies are intrinsically linked to a number of human rights especially economic, social and cultural rights including:
  - Right to Food
  - Right to Health
  - Right to Adequate Housing
  - Right to Work

## In the Words of Asylum Seekers

- *"I would prefer to work instead of being in direct provision. I have no money and I go to bed hungry"*
- *"If I was allowed to work while in direct provision maybe I would have some dignity and respect as a human being".*

## Recommendations

- That the government employ a policy of inclusion with regard to people living in direct provision who should be recognised as a vulnerable group in anti-poverty and social inclusion strategies
- That people living in direct provision are able to avail of appropriate social welfare supports and are given the right to work
- That direct provision be limited to six months at most with supports made available before that time for integration

## Poverty and Human Rights

- *"Wherever we lift one soul from a life of poverty, we are defending human rights. And whenever we fail in this mission, we are failing human rights."*

Kofi Annan  
Former Secretary General of the United  
Nations