

## Guide to the Habitual Residence Condition

Since the Habitual Residence Condition was introduced in 2004, there have been a number of changes which have led to confusion among the public and the misapplication of the Condition in some cases. Thus FLAC has produced this document to explain and clarify the law in this area.

### What is the Habitual Residence Condition?

The Habitual Residence Condition (HRC) is a qualifying condition for social welfare payments which was introduced on 1 May 2004 in response to EU enlargement. All persons seeking means-tested social welfare payments and Child Benefit after that date have been required to satisfy this condition.

The HRC applies to Irish citizens as well as non-citizens but it is, of course, usually much easier for Irish citizens to show a sufficient connection to the Irish State in order to satisfy the Condition than for non-citizens.

### Which social welfare schemes are affected by the Habitual Residence Condition?

The Habitual Residence Condition is taken into account when a person applies for any one of the following social welfare schemes:

- ★ Back to Work Family Dividend;
- ★ Blind Pension;
- ★ Carer's Allowance;
- ★ Child Benefit;
- ★ Disability Allowance;
- ★ Domiciliary Care Allowance
- ★ Guardian's Payment (Non-Contributory);
- ★ Jobseekers Allowance and Jobseeker's Allowance Transitional payment;
- ★ One Parent Family Payment;
- ★ State Pension (Non-Contributory);
- ★ Supplementary Welfare Allowance;
- ★ Widow's / Widower's / Surviving Civil Partner's (Non-Contributory) Pension

In cases where the decision-maker queries habitual residence, a claimant will be asked to complete a Habitual Residence Condition form (**the HRC1**) as well as the application form for the particular payment he or she is seeking.

### Who decides if an applicant satisfies the Habitual Residence Condition?

Applications for social welfare payments are processed by Deciding Officers working for the Department of Social Protection or in the case of Supplementary Welfare Allowance, a Department of Social Welfare Representative within your local health office (formerly known as Community Welfare Officer up to October 2011). If the habitual residence of an applicant is at issue, the Deciding Officer or the Department of Social Welfare Representative in the relevant scheme section will review the claim and determine whether the applicant meets the Habitual Residence Condition by using the five criteria outlined overleaf. The decision-maker determines whether a person satisfies HRC on a case-by-case basis.

### What difference does the new 'right to reside' test make to the Habitual Residence Condition?

A 'right to reside' test was introduced in December 2009. Section 15 of the Social Welfare and Pensions (No. 2) Act 2009 amends section 246 of the Social Welfare Consolidation Act 2005 by inserting section 246(5), which provides that a person who does not have a right to reside in the State shall not be regarded as being habitually resident in the State.

- ★ The Habitual Residence Condition is a **question of fact**, which seeks to ascertain whether the claimant has established his or her 'centre of interest' in the host state by examining family connections, length of stay, employment history etc. In practice, however, the Department of Social Protection has tended to treat it as also a test of the claimant's legal status in the State, holding that asylum seekers cannot satisfy the HRC because of their status.
- ★ The right to reside test is a **question of law**, which seeks to ascertain whether the claimant has a lawful right to reside in the host state. The right to reside test does not replace the HRC. It is an additional test which all claimants of social welfare payments subject to the HRC are required to satisfy. It puts on a formal legal basis the test of the claimant's status which the Department of Social Protection has been using in connection with the HRC.

## What about the 'two-year rule'?

The Social Welfare Consolidation Act, 2005 (the Principal Act) introduced a presumption that claimants could not be habitually resident unless they had been present in the State for two years (the so-called 'Two-Year Rule').

However, the Court of Justice of the European Union had held in the *Swaddling* case in 1999 that states could not specify a minimum period of residence and the 2005 Act was amended in 2007 to set out five factors from the *Swaddling* judgment that should be taken into account in deciding whether someone satisfied the Habitual Residence Condition.

Despite this, the reference to two years residence remained in the Principal Act and caused confusion with some decision-makers wrongly rejecting claims based on the 'Two-Year Rule'. The 2014 Social Welfare and Pensions Act removed any reference to two years minimum residence so this should no longer appear in Deciding Officers' decisions.

## What are the five criteria used to determine habitual residence?

The five criteria used by the Department of Social Protection to determine whether a person satisfies the Habitual Residence Condition are:

1. The length and continuity of living in the State or another country;
2. The length and reasons for any absence from the State;
3. The nature and pattern of the person's employment;
4. The person's main centre of interest;
5. The future intentions of the person applying for social welfare.

It is important to note that no single factor of the five is more important than the others. Each decision has to be made on the individual circumstances of the case. These five factors are set out in Section 30 of the Social Welfare and Pensions Act 2007 which amended Section 246 of the Social Welfare Consolidation Act 2005, also known as the Principal Act.

## Where did these five criteria come from?

The five criteria contained in the current social welfare legislation were first outlined in a decision by the Court of Justice of the European Union (the EU Court) in the case of *Robin Swaddling v Adjudication Officer, C-90/97*.

Although the criteria are taken from an EU case, as they are contained in domestic legislation they are used to determine the habitual residence of both EU nationals and third-country nationals. However, decisions of the EU Court of Justice can only be relied upon in cases where EU law applies.

## How will the length of time spent in the State affect habitual residence?

The decision-maker will look at how long the applicant has spent in the State or in any other country or countries. The longer a person spends in any particular country, the more likely it is that he or she will develop a connection to that place and lose his or her connection to any prior country of residence.

However, there is no set time limit on when a person may become habitually resident. Depending on the applicant's individual circumstances, he or she may establish habitual residency after a short period of time. The decision-maker will also take into account the reason why an applicant has moved to the State as this may be relevant to the length of time he or she will spend here (such as for a student, seasonal worker, posted worker or holiday-maker).

## Is a claimant habitually resident if he or she has lived in the Common Travel Area?

The Common Travel Area consists of the **Republic of Ireland, Northern Ireland, England, Scotland, Wales**, the **Channel Islands** and the **Isle of Man**.

Firstly, if a person has lived within the Common Travel Area (whether an Irish, UK or EU national) and then returns / comes to Ireland, they have a **right to reside** under the Common Travel Area Agreement.

## What type of absence from the State will lead to a loss of habitual residence?

A holiday or relatively short period of time spent outside the State should not lead to a loss of habitual residence.

If an Irish person engages in 'stable employment' in another country, then he or she may lose habitual residence in Ireland while they are away. However a person who has established habitual residence in the State may retain his or her centre of interest in Ireland through family connections, retention of a home in the State and / or regular visits.

A non-Irish person who returns to his or her country of origin or moves to a third country on a more permanent basis will lose habitual residence here. An EU worker who finishes work and moves to another country will lose habitual residence for the purposes of claiming social welfare payments that are subject to the Habitual Residence Condition.

## Will a returning Irish emigrant satisfy the Habitual Residence Condition?

A person who has spent a longer period of time abroad may encounter more difficulties in proving that he or she is resuming habitual residence. However, a returning Irish emigrant can satisfy the Habitual Residence Condition (HRC) immediately after arrival in the State provided that he or she satisfies the decision-maker in relation to the five factors.

To help determine habitual residence, the decision-maker will look at the length of time spent in the other country and how long the person lived in Ireland before he or she emigrated. Other factors which may be taken into consideration include the length of time a person intended to stay abroad, whether property was retained during the absence, whether immediate family joined the emigrant abroad, and the reasons for leaving and returning to Ireland, as well as any connections kept with the State.

In the EU Court of Justice decision in *Swaddling*, the Advocate General said “...*certain effects must follow from the fact that, usually, citizens who return to their own country after definitively ceasing work in another State and who do not maintain either a residence or particularly close relationships in that State, do so with the intention of remaining there [i.e. their country of origin] on a settled basis...*”.

According to the Department of Social Protection’s operational guidelines, if the claimant can show that he or she has returned to the State on a long-term or permanent basis, then he or she may be regarded as habitually resident immediately upon return.

The question then is, are they **habitually resident**? Under the Principal Act 2005, residence in the Common Travel Area was seen as equivalent to residence in the State. Section 246 of the 2005 Act (Principal Act) stated that unless someone had been resident in the State or another part of the Common Travel Area for a continuous period of two years, it would be presumed that they were not habitually resident.

However, the Social Welfare & Pensions Act 2014 removed all references to the Common Travel Area. As a result, time spent residing in the Common Travel Area is no longer treated in the same way as a period of residence in the State. Applicants from the Common Travel Area must satisfy the five criteria used to determine habitual residence like all other applicants.

## Will a claimant lose habitual residence status if he or she goes abroad for a fixed period of time?

A claimant who goes away for a specific period of time (e.g. on a one-year work visa) should be able to resume habitual residence status, assuming he / she kept a connection to the State during his or her absence (as described in more detail under the five different factors) and taking into consideration the reason(s) for return and the person’s stated future intentions.

If a person has returned from a period of time spent abroad and it is clear from all the evidence that he or she intends to resettle in the State, then the decision-maker should consider that person to have resumed habitual residence.

## Will an Irish person returning to the State to care for a relative satisfy the Habitual Residence Condition to receive Carer’s Allowance?

The Department of Social Protection’s position on a person returning to care for a relative is that he or she will not be entitled to Carer’s Allowance if the stay is indefinite or temporary and the person retains his or her centre of interest in another country whether through family ties, employment, financial accounts or property.

If it is a claimant’s stated intention to return to his or her former country of residence after the period of care is over, then he or she may be refused the payment on the basis that he or she does not satisfy the Habitual Residence Condition.

The Department states that Irish nationals in this situation cannot be exempted from having to satisfy the HRC as it “*would be contrary to the equality principles that Ireland has adopted in equality legislation. It would also be contrary to EU law to exempt Irish nationals from the HRC and not exempt other EU nationals on the same basis.*”

## What if the claimant is returning from working in another EU Member State?

The same factors will be taken into account to determine habitual residence, but the person may be entitled to transfer an unemployment benefit based on tax contributions from the former country of employment to the State on his or her return.

## Do nationals from other EU Member States have to satisfy the Habitual Residence Condition?

According to EU law, an EU migrant worker has the same right to Family Benefits as an Irish national living in Ireland. Therefore he or she does not have to satisfy the Habitual Residence Condition in order to receive these benefits, which include Child Benefit, One Parent Family Payment, Domiciliary Care Allowance and Guardian's Payment (non-contributory). The State's responsibility for paying Family Benefits is based on the fact that the worker has made valid PRSI contributions and is subject to the Irish tax system.

An EU migrant worker who enters employment but subsequently becomes involuntarily unemployed or incapacitated is entitled to Supplementary Welfare Allowance which is treated as a social advantage payment under EU law. If the employment lasted less than twelve months, then he or she is entitled to SWA for six months or if the employment lasted more than a year then payment will continue indefinitely while the claimant continues to actively seek employment.

Under the EU Citizen's Directive, an EU national legally residing in another EU State for five years or more acquires a permanent right of residence in that state, regardless of whether he or she is working or accessing social assistance. However, if he or she leaves the State for two years or more then the right will be lost.

Other EU nationals who come to the State as job-seekers or do not take up work are entitled to remain in the State for up to three months as long as they do not become a 'burden' on the social welfare system. If the EU national is not a job-seeker, does not take up employment or become self-employed or show that he or she is self-sufficient, then they will not have a legal right of residence and therefore will not meet the HRC. In any event, a right of residence does not presuppose habitual residence; the five factors must still be considered.

## If a claimant is refused a payment because he or she is deemed not to satisfy the Habitual Residence Condition, what can he or she do?

A claimant is entitled to seek a review of the decision if the decision maker made an obvious mistake or there is some new evidence that was not considered. Otherwise the claimant can appeal a negative decision to the Social Welfare Appeals Office.

(See our *Factsheet on the Appeals Process* for further information on how to make an appeal.)

the claimant's spouse and / or children are living, if this is applicable, and whether she or he has retained property, bank accounts etc. in the former country of residence.

## How does the nature and pattern of employment affect habitual residence?

The decision-maker will take account of the nature of the person's employment by considering whether he or she has engaged in full-time or part-time work, whether it is short-term or seasonal work and / or the terms of any contract the claimant has with his or her employer. Any or all of these features may indicate the nature of employment.

The pattern of employment is also relevant as the decision maker will consider the claimant's work history in the State when making a decision on habitual residence.

## Can a self-employed person satisfy the Habitual Residence Condition?

In order to be recognised as self-employed, a claimant must register his or her business with the Revenue Commissioners and be able to provide proof of this registration in order for the employment to be considered "bona fide, legal self-employment of an ongoing nature". The claimant must also show that the business is financially workable and complies with any statutory or official requirements for self-employed people generally.

If the claimant is considered to be genuinely self-employed for at least six months and his or her family has joined the worker here, then he or she should satisfy the Habitual Residence Condition.

## What is meant by the "main centre of interest"?

A person's main centre of interest refers to the place in which that person may have close family ties, owns property, holds bank accounts, is registered with a doctor, has enrolled children in the local school, and / or has community involvement such as participation in local sports teams or professional ties. Usually when considering a person's family connections, the decision-maker will look at where

## Is the situation different for Romanian & Bulgarian nationals?

Since July 2013, Romanians and Bulgarians do not require a work permit to work legally in the State. Different arrangements applied to nationals from Romania and Bulgaria before this date, but no longer.

## Will an EU migrant worker lose habitual residence status if he or she becomes unemployed?

If an EU migrant worker is made redundant then he or she should retain worker status if he or she continues to seek work and meets the other qualifying conditions for a payment. If an EU worker is in receipt of Jobseekers Benefit, then he or she should continue to receive family benefits and is not required to satisfy the Habitual Residence Condition.

Worker status is retained for up to six months after a claimant becomes unemployed if he or she has worked for less than a year, registers with the relevant social welfare office as unemployed, and can show that he or she is actively and genuinely seeking work. In the case of a claimant who has worked for more than a year, then he or she should retain worker status indefinitely if the same steps are taken. If worker status is lost then the EU worker may obtain jobseeker status if he or she continues to genuinely seek work.

In the case of an EU migrant worker who may not have sufficient contributions to claim Jobseekers Benefit, he or she may be entitled to Supplementary Welfare Allowance. The duration of payment is also based on retention of worker or jobseeker status as outlined above.

The Department of Social Protection's own guidance states that a person's main centre of interest would normally be in the country in which he or she has lived most of his or her life, and where his or her family and home are located.

## What does the decision-maker take into consideration when assessing a claimant's future intentions?

The decision-maker will look at the initial reason the claimant has come to the State and whether he or she has taken steps to show that his or her intention is to remain or settle in Ireland "for the foreseeable future".

The decision-maker will consider whether a person came to the State on a one-way ticket and made arrangements for accommodation and / or employment before arrival. Other actions taken into consideration include whether a person has transported his or her belongings to the State or if they have been left behind in the former country of residence. Entering into a long-term lease or buying a house rather than staying with friends may also show an intention to become more established in the State. A person's immigration status will also be taken into consideration, including whether or not he or she is permitted to work in terms of his or her permission to remain in the State.

The Department of Social Protection states that the circumstances surrounding a person's residence in the State must be considered in full and that the claimant's actions must be shown to be consistent with any desire expressed by the claimant to remain in the State

## If a claimant is found to be habitually resident for one payment, should this extend to other payments?

Yes, unless the circumstances of the claimant change if his or her habitual residence is determined for one payment this should extend to other payments to ensure consistency between decision-makers.

FLAC is a human rights organisation which exists to promote equal access to justice for all. FLAC's work addresses inequities in the administration of the social welfare system through strategic casework and political lobbying. This information leaflet is aimed at practitioners and advocates working with disadvantaged people who are experiencing difficulties in accessing their social welfare entitlements due to the misapplication of the Habitual Residence Condition. While every effort has been made to ensure the accuracy of this document, it is provided for general information only and is not intended as a substitute for individual advice. Therefore FLAC cannot accept any legal liability for its contents.

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