The Habitual Residence Condition in Irish Social Welfare Law

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This article examines the recently introduced habitual residence clause in Irish social welfare law. Part 1 sets out the background to the significant change. Part 2 outlines the legislation. Part 3 discusses the meaning of the term “habitual residence” while Part 4 looks at possible issues under EU law, in particular Council Regulations 1408/71 and 1612/68.¹ Part 5 considers the possible impact of other international legal instruments.

BACKGROUND

Prior to May 1, 2004, and unlike some other European countries, there was no long-term “residence” requirement in Irish social welfare law. Persons had to be resident in the country to be entitled to certain benefits, in particular means tested payments, but one day’s residence was sufficient to satisfy this requirement so persons moving from another country qualified for benefit more or less immediately (subject to satisfying the other relevant conditions).² The greatly increased numbers of both asylum seekers and migrant workers had raised concerns among certain policy makers about

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1. Council Regulation 1408/71 ([1971] OJ L 149) on co-ordination of social security (as last amended by Council Regulation 647/2005 [2005] OJ L 117/1); Council Regulation 1612/68 on free movement of workers ([1968] OJ L 257). Readers should note that Regulation 1408/71 is to be replaced by Regulation 883/2004 [2004] OJ L 200/1. At the time of writing the ‘new’ Regulation is ‘in force’ but “not applicable” and no rights are to be acquired until it becomes applicable. This will occur when a further ‘implementing’ regulation is agreed by the Member States which should take several years. The “new” Regulation makes no substantial change in the legal position discussed here.

2. For example, in order to qualify for jobseeker’s allowance it is necessary to be available for and genuinely seeking work. A migrant worker with very limited English might not satisfy these requirements.
this issue. In the run-up to the accession of the eight new Member States from Central and Eastern Europe (in addition to Malta and Cyprus), a number of EU countries exercised their rights under the Accession treaties to impose restrictions on the immigration of workers from the new Member States for a period of up to seven years. Ireland did not do so and remains one of the few “old” Member States which allow full free movement to workers from the new Member States. However, in the Social Welfare (Miscellaneous Provisions) Act 2004, Ireland introduced a new habitual residence condition (HRC) in relation to all means tested allowances and child benefit (social insurance benefits remain payable without any such restrictions).

THE LEGISLATION

Section 246 of the Social Welfare (Consolidation) Act 2005 and its relevant chapters set out the provisions concerning the payments affected. The provisions require that to be entitled to the various allowances, a person must be “habitually resident in the State at the date of making the application”. The payments affected are

- Jobseeker’s Allowance.\(^5\)
- State Pension (non-contributory).\(^6\)
- Blind Pension.\(^7\)
- Widow(er)s Pension and Guardians Payment (non-contributory).\(^8\)
- One Parent Family Payment.\(^9\)

3. In 2003, asylum seekers were disqualified for entitlement to rent supplement under the supplementary welfare allowance scheme being provided with non-statutory ‘direct provision’ (i.e. accommodation and meals with a small weekly cash payment) as an alternative: Social Welfare (Miscellaneous Provisions) Act 2003 s.13 (now the Social Welfare (Consolidation) Act 2005, s.98(4)).
4. The requirement of a certain minimum number of contributions to qualify for insurance benefits may mean that migrants will not immediately qualify for benefits although persons covered by EU Regulation 1408/71 may be able to aggregate contributions paid in other States in order to qualify.
6. Ibid., s.153(c) as inserted by the Social Welfare Law Reform and Pensions Act 2006.
8. Ibid., ss 163(3) and 168(5).
9. Ibid., s.173(6).
• Carer’s Allowance.\textsuperscript{10}
• Disability Allowance.\textsuperscript{11}
• Supplementary Welfare Allowance (except exceptional needs payments and urgent needs payments).\textsuperscript{12}
• Child Benefit.\textsuperscript{13}

Section 246 provides that

“… it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless he has been present in the State or any other part of the Common Travel Area for a continuous period of two years ending on that date.”\textsuperscript{14}

The provisions became effective from May 1, 2004. All claims for the relevant payments are initially screened by the Department of Social and Family Affairs and about 80 per cent are considered to satisfy the HRC without detailed investigation. As of May 31, 2006, 36,200 claims had been decided by a central unit in relation to the habitual residence condition. The largest schemes affected were unemployment assistance (now renamed jobseeker’s allowance) (51 per cent) and child benefit (33 per cent). Of these, 76 per cent were found to satisfy the HRC. In the period from May 2004 to the end of March 2006, 832 appeals were decided concerning the HRC. Again the largest number of appeals concerned unemployment assistance (43 per cent) and child benefit (32 per cent). Thirty eight per cent of appeals were allowed.

WHAT IS HABITUAL RESIDENCE?

Habitual residence is a term used in Community law, in particular in Council Regulation 1408/71. Although not defined in Community legislation, it has been interpreted on a number of occasions by the European Court of

\textsuperscript{10} Ibid., s.180(2).
\textsuperscript{11} Ibid., s.210(9).
\textsuperscript{12} Ibid., s.192 which specifically excludes payments under s.201 (exceptional needs) and s.202 (urgency).
\textsuperscript{13} Ibid., s.220(3).
\textsuperscript{14} The “other part of” the Common Travel Area means the United Kingdom of Great Britain and Northern Ireland, the Channel Islands and the Isle of Man.
Justice (discussed in more detail below). However, the Irish habitual residence clause (outlined above) was not introduced in furtherance of the implementation of Community law and there is no requirement to give the term its Community definition. Habitual residence is a term also known, albeit little used, in Irish law. This has led to the somewhat ludicrous situation in United Kingdom social security law that there are two definitions of habitual residence: the United Kingdom definition and the Community definition (the latter applicable where a person has rights under Community law). While there are clear legal justifications for such a position, it would frankly be ridiculous to follow this approach particularly as it would appear that in a significant number of cases both tests lead to the same result. Indeed, the Irish Department of Social and Family Affairs appears to have operated on the basis that the Community test was the only applicable one.

Council Regulation 1408/71 defines “residence” as “habitual residence”. In Case C-90/97 Swaddling, the Court of Justice stated that this was “where the habitual centre of their interests is to be found”. The Court also stated that:

“account should be taken in particular of the employed person’s family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances”.

15. Although, as will be seen, it is necessary to do so where a person has rights under Community law.
17. The national definition is set out in Nessa v. Chief Adjudication Officer [1999] 4 All E.R. 677. In Gingi v. Secretary of State for Work and Pensions [2001] E.W.C.A. Civ. 1685 the Court of Appeal rejected an argument that the Community definition should be applied in all cases. For a more coherent rationale for this position, see the Social Security Commissioner’s decision: CIS 1304/97 and CJSA 5394/98. All decisions of the Social Security Commissioners are accessible at www.ossscss.gov.uk
19. Art.1(h) of Regulation 1408/71.
The Court ruled that for the purposes of that assessment, the length of residence in the Member State in which payment of the benefit is sought cannot be regarded as an *intrinsic* element of the concept of residence.

The approach adopted by the European Court of Justice has been applied in a number of cases by the United Kingdom Social Security Commissioners. In case R(IS) 3/00, the claimant, an Italian national, had previously resided in England between 1973 and 1986. Between 1986 and 1990, there were two periods when the claimant lived and worked in England. She subsequently lived in Spain but after her marriage broke down, she arrived in England with her baby in December 1995 intending to find her own accommodation and employment. She claimed income support on December 18, 1995. The United Kingdom authorities decided that she was not habitually resident in the United Kingdom and therefore not entitled to benefit. However, on appeal, the Social Security Commissioner decided that on the facts of the case, the claimant was habitually resident in the United Kingdom on the date of the claim. In considering the European Court of Justice’s decision in *Swaddling*, he considered that while the length of residence was not an *essential* condition of the concept of habitual residence, length of residence remained a *relevant* factor to be considered. In contrast, in *Collins v. Secretary of State for Work and Pensions*, Mr Collins was born in the United States and possessed dual Irish and American nationality. He had studied in the United Kingdom in 1978 and returned there for about 10 months in 1980 and 1981 during which he did part-time and casual work. He subsequently worked in the United States and in Africa and returned to the United Kingdom on May 31, 1998 to find work. In June 1998, he claimed jobseeker’s allowance which was refused on the grounds that he was not habitually resident. On appeal, the Social Security Commissioner upheld that decision on the basis of his short length of residence and lack of strong connections with the United Kingdom.

The Irish Social Welfare Appeals Officers have now considered a large number of cases concerning the application of the habitual residence

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22. See also R(IS) 6/00 and the Northern Ireland decision in C1/04-05(IS).
23. There are a significant number of decisions of the UK courts and Social Security Commissioners in relation to the interpretation of habitual residence applying the UK definition of this term. However while these are informative, e.g., on issues such as resumption of habitual residence (e.g. CIS 1304/97 and CJSA 5394/98), given the differences in approach it would be unwise to rely on the detail of these decisions in relation to the Community definition.
condition. The fact that such decisions are not generally published limits what we know about the approach which has been taken to date. However the Chief Appeals Officer’s annual reports for 2004 and 2005 and the website of the Social Welfare Appeals Office do provide summaries of the outcomes of some such appeals. A number of decisions of the Social Welfare Appeals Office have concerned EU nationals. In one case a Slovak worker had been denied benefits on the basis that he was not habitually resident. He stated that he had been employed in Ireland but his case was successful on the basis that he was in fact habitually resident.25 In another case, a Czech national claimed child benefit in June 2004 but her claim was rejected as she was not habitually resident in Ireland. However, her partner had been employed in Ireland since October 2004. The Appeals Officer noted that child benefit was a family benefit for the purposes of the Regulation and that, therefore, the HRC did not apply to EU nationals working in Ireland. Accordingly child benefit was payable from October 2004.26 The Chief Appeals Officer has expressed his concern about the adequacy of the safeguards adopted by the Department to ensure consistency in the decision making process for HRC cases and refers to cases on appeal where the grounds for disallowance were weak and unsupported or where the HRC was satisfied for one benefit but not for another.27

The presumption

It should be noted that the presumption set out in section 246 of the Social Welfare (Consolidation) Act, 2005 simply presumes that a person who has not been resident for a continuous period of two years is not habitually resident “until the contrary is shown”. It does not mean that a person must be resident for two years before they can be considered to be habitually resident: it simply puts the onus on the claimant to show that they are in fact habitually resident in the circumstances of the case.28 Clearly the decision in Swaddling means that, in certain circumstances, a person may be considered to be habitually resident from day one.29 It appears that the

28. Nor is there a presumption that a person who has been resident for more than two years is habitually resident although one would imagine that the vast majority of such persons will be habitually resident.
29. The many cases before the Social Security Commissioners indicate that persons
The purpose of the presumption is to assist in the processing of claims by weeding out the vast majority of claims in which no real question arises in relation to habitual residence. In claims for the allowances set out above, where a person has been resident in Ireland for at least two years, they are normally accepted as being habitually resident without further investigation. Only those claims in which a person does not have two years residence in the Common Travel Area are subject to detailed investigation. This purpose might better have been fulfilled by a positive presumption that all persons after two years of continuous residence were habitually resident. The special treatment of residence in the Common Travel Area must be considered to be somewhat dubious under Community law although there is a longstanding practice of Member States granting specific concessions to certain areas. 30

THE IMPACT OF COMMUNITY LAW

It should first be noted that, insofar as Community law does not apply, there is nothing to stop Ireland applying a habitual residence requirement (or any other residence requirement) to its own nationals and those of other countries. Thus there is no legal doubt about the validity of applying the habitual residence condition (subject to questions about its interpretation) to, for example, an Irish national who has lived and worked in Africa or the United States of America or to a third country national, for example from the Ukraine or Canada, coming to work in Ireland (always assuming that such persons have not worked in other EU countries so as to bring in the application of Community law). However, where Community law does apply, this section looks at whether (and how) it may impose any limitations on the application of the habitual residence condition.

Article 39 of the Treaty provides for the right of free movement of workers and the abolition of discrimination against migrant workers possessing EU citizenship. This article has direct effect in national law, i.e. it creates legal rights which can be relied on by individuals before the national authorities. If there is a conflict between Community law and national law, Community law must, of course, take precedence. Recognising the importance of social security rights for free movement of workers, Article 42 of the Treaty provides that:

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30. The UK habitual residence test has also applied to the Common Travel Area thereby excluding most Irish nationals from its operation.
The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

Council Regulation 1408/71\(^{31}\) set out the very detailed rules necessary to implement freedom of movement for migrant workers through the coordination of the national social security schemes. Its provisions, insofar as they are relevant to the habitual residence condition, are discussed in more detail below.

Council Regulation 1612/68\(^{32}\) is also of relevance in this area. This Regulation, adopted under article 39 of the Treaty, relates to access to employment. However, it also extends to social advantages linked to employment and can be relevant in the area of social security payments. Again its detailed provisions are discussed in more detail below insofar as they are relevant to habitual residence.

Article 39 of the Treaty and Council Regulation 1408/71 specifically prohibit discrimination against migrant workers on grounds of nationality. Habitual residence provisions, while not explicitly distinguishing on grounds of nationality, are clearly much more likely to impact negatively on non-nationals and it might be thought that the imposition of habitual residence conditions would be inconsistent with the provisions of Article 39 of the Treaty. However, Council Regulation 1408/71 specifically envisages that certain benefits may be paid only on the basis of residence, defined as habitual residence.\(^{33}\) And indeed a number of Member States,


\(^{33}\) The somewhat schizophrenic nature of the Regulation is illustrated by the fact that it provides that special non-contributory benefits shall be provided exclusively in the Member State in which the person concerned resides and residence is defined as the place where a person habitually resides (art.10a(1) of Regulation 1408/71 as replaced by Regulation 647/2005). On the other hand, the Regulation also provides that a Member State whose legislation makes access to benefits conditional upon the completion of periods of residence must take into account
in particular the United Kingdom, have had habitual residence conditions in their social security legislation for a number of years.

In Case C-138/02 Collins v. Secretary of State for Work and Pensions, the European Court of Justice was asked whether the habitual residence provisions in the United Kingdom social security law were compatible with the EU law. The Court replied that the right to equal treatment laid down in article 39 of the EEC Treaty, read in conjunction with Articles 12 and 17, did not preclude national legislation which made entitlement to a jobseeker’s allowance conditional on a residence requirement in so far as that requirement could be justified on the basis of objective considerations that were independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

Council Regulation 1408/71

Family benefits

The Irish child benefit payment falls within the material scope of Council Regulation 1408/71 and is classified as a family benefit. In addition, one parent family payment and guardian’s payment (non-contributory) have also recently been reclassified as family benefits. Under the Regulation, family benefits must be paid where Ireland is the ‘competent state’, for example, where the parent is employed in Ireland. This cannot be made subject to a habitual residence test and this position is accepted by the Department of Social and Family Affairs which points out that the habitual residence test is not applicable where child benefit is payable under Community law.

Special non-contributory benefits

Most of the other means tested payments to which the habitual residence

periods of residence completed under the legislation of any other Member State (art.10a(2)). Thus while Member States are entitled to require a person to be habitually resident in the state, if state are to require a certain minimum period of residence it would appear that the Regulation would require periods spent in other Member States to be taken into account.

35. The detail of this case is discussed below.
clause now applies are classified as special non-contributory benefits under Regulation 1408/71. A different regime applies to such benefits. In accordance with Article 10a(1) such benefits are to be provided exclusively in the Member State in which the person resides in accordance with its legislation. The normal provisions in relation to exportability of benefits do not apply in relation to these particular benefits. Residence is defined as “the place where a person habitually resides”. Thus there would appear to be nothing in Regulation 1408/71 itself that is inconsistent with the Irish provisions concerning habitual residence.

**Article 39 and Council Regulation 1612/68 – Free Movement of Workers**

Article 39 EC requires the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment. It also provides that freedom of movement for workers entails the right, subject to limitations justified on grounds of public policy, public security or public health:

“(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose; ....”.

Article 39 is implemented by Council Regulation 1612/68. Insofar as it is relevant to the application of the habitual residence clause, this Regulation provides in article 2 that a national of a Member State and an employer may exchange their applications and offers of employment and conclude and perform contracts of employment without any discrimination. Article

38. All of the means tested payments (listed above) were declared as special non-contributory benefits by Ireland (other than supplementary welfare allowance which does not fall within the scope of Regulation 1408 as it does not provide protection against one of the specific risks listed at art.4 of the Regulation). However, as a result of a recent review of this classification – unrelated to the habitual residence issue – one parent family payment and guardian’s payment (non-contributory) were reclassified as family benefits while carer’s allowance was considered to fall outside the scope of the Regulation (a somewhat strange decision as carer’s benefit is classified as a sickness benefit). Jobseeker’s allowance, State pension and blind (non-contributory) pension, widow and widower’s (non-contributory) pension and disability allowance all remain classified as special non-contributory benefits (Annex IIa as amended by Regulation 647/2005).

39. Art.1(h) of Regulation 1408/71.
5 provides that “a national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that state to their own nationals seeking employment”.

Article 7(2) of the Regulation provides that a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantages as national workers. The concept of “social advantages” had been interpreted quite widely by the European Court of Justice to include a wide range of social security payments broadly linked to employment. Council Regulation 1612/68 had been called in aid to assist migrant workers to obtain entitlement to benefits where this had not been possible under Regulation 1408/71. Thus a worker (for the purposes of the relevant provisions of Regulation 1612) is entitled, under Community law, to social advantages without any discrimination on grounds of nationality. And, while there has been no specific decision concerning Irish benefits, it would seem clear from the caselaw of the Court that the benefits to which the HRC applies would be considered to be social advantages.

However, it had previously been considered that Articles 2 and 5 of Regulation 1612/68 did not apply to benefits of a financial nature. The implications of this Regulation for habitual residence were considered in the Collins case. This case concerned the United Kingdom jobseeker’s allowance, entitlement to which is subject to the condition that the person

41. In Case 65/81 Reina v. Landescreditbank Baden-Württemberg [1982] E.C.R. 33, the Court held that ‘social advantage’ included all advantages which, whether or not linked to a contract of employment, were generally granted to workers because of their status as such, including discretionary benefits. For example, in Case C-258/04 Office National de l’Emploi v. Ioannidis [2006] E.C.R. I-000 a social allowance for students was held to be a social advantage.

42. On the concept of worker, see Case 316/85 Centre public d’aide sociale v. Lebon [1987] E.C.R. 2811; Case C-138/02 Collins v. Secretary of State for Work and Pensions [2004] E.C.R. I-2703. The Court has held that any person who pursues activities which are real and genuine economic activity, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker.


be habitually resident in the United Kingdom. As seen above, Mr Collins was not considered to be habitually resident. On appeal to the Social Security Commissioner, the case was referred to the European Court of Justice. The Court was asked whether any provisions or principles of European community law required the payment of a social security benefit with conditions of entitlement such as those for jobseeker’s allowance to a person in the circumstances of Mr Collins.46

Mr Collins was a national of a Member State (Ireland) and was lawfully in the United Kingdom. He argued, on the basis of the court’s decision in Grzelczyk,47 that payment of a non-contributory means tested benefit to a national of a Member State other than the host Member State cannot be made conditional on the satisfaction of a condition when such a condition is not applied to nationals of the host Member State. Mr Collins acknowledged that the habitual residence test was applied to United Kingdom nationals but argued that it was well established that a provision of national law is to be regarded as discriminatory under Community law if it is more likely to be satisfied by the nationals of the Member State concerned. The United Kingdom government, in contrast, argued that there were relevant objective justifications for not making jobseeker’s allowance available to persons who are not habitually resident. It argued that the habitual residence test did not go beyond what was necessary to attain the objective pursued; and that it represented a proportionate and hence permissible method of ensuring that there was a real link between the claimant and the geographical employment market. It argued that in the absence of such a test, persons who had little or no link with the United Kingdom employment market would be able to claim jobseeker’s allowance. The Court’s answer to this question was unfortunately neither particularly clearly stated nor coherent.

The Court recalled that nationals of Member States seeking employment in another Member State fell within the scope of article 39 of the Treaty and, therefore, enjoyed the right in article 39(2) to equal treatment.48 It

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46. Questions were also referred in relation to Mr Collins’ status as a worker under EU law and the legal basis for his residence in the UK However, as these are not directly relevant to the question of habitual residence, they will not be discussed here.


48. The Court considered that Mr Collins was not a “worker” for the purposes of art.7(2) of Regulation 1612/68 and thus could only rely on rights as a person seeking employment.
reiterated its previous rulings that Member State nationals in search of employment qualify for equal treatment only as regards access to employment in accordance with article 39 of the Treaty and articles 2 and 5 of Regulation 1612/68 but not with regard to social and tax advantages within the meaning of article 7 (2) of that Regulation. Neither article 2 nor article 5 of the Regulation expressly referred to benefits of a financial nature. However, the Court decided that in determining the scope of the right to equal treatment for persons seeking employment, this should be interpreted in the light of other provisions of community law, in particular, article 12 of the Treaty which prohibits any discrimination on grounds of nationality. The Court ruled that:

“In view of the establishment of citizenship of the Union and the interpretation in the case law of the right to equal treatment enjoyed by citizens of the union, it is no longer possible to exclude from the scope of Article [39(2)] of the Treaty - which expresses the fundamental principle of equal treatment, guaranteed by Article [12] of the Treaty - a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.”

This is a significant development in the Court’s approach to this area and now brings benefits to jobseekers of a financial nature within the scope of Regulation 1612/68. This means that any apparent discrimination must be justified.

The Court went on to consider the implications of this for the habitual residence test. It pointed out that as the habitual residence requirement was capable of being met more easily by the State’s own nationals, it placed at a disadvantage Member State nationals who exercise the right of movement in order to seek employment in the territory of another Member State. It ruled that such a requirement could only be justified “if it is based on objective considerations that are independent of the nationality of the persons concerned and proportional to the legitimate aims of the national provisions”. However, the Court held that it was legitimate for the national legislature to wish to ensure that there was a genuine link between an applicant for an allowance in the nature of social advantage within the meaning of article 7 (2) of Regulation 1612/68 and the geographic

50. At para.63.
51. Para.66.
employment market in question.\textsuperscript{52} It ruled that it may be regarded as legitimate for a Member State to grant an allowance, such as jobseeker’s allowance, only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that state. The existence of such a link might be determined, in particular, by establishing that the person concerned had, for a reasonable period, genuinely sought work in the Member State in question.

In a critical passage, the Court went on to say that:

“while a residence requirement is, in principle, appropriate for the purpose of ensuring such connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State”\textsuperscript{53}

Accordingly, the Court ruled that Community law did not preclude national legislation which made entitlement to an allowance conditional on a residence requirement insofar as that requirement could be justified on the basis of objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

The leap which the Court made between its statement that a Member State might grant an allowance only after it had been possible to establish that a genuine link existed between the person seeking work and the employment market of that state, and its statement that a residence requirement was appropriate for the purposes of establishing such a connection, creates considerable difficulties in interpreting the judgment. The Court’s clear statement that a residence requirement was, in principle, appropriate for the purpose of establishing such a connection must be taken as a statement of law by the highest EU court. However, as a statement of fact, this is simply incorrect. On the one hand, many persons who are


\textsuperscript{53} Para.72.
habitually resident in a Member State have no current link whatsoever with the labour market.\textsuperscript{54} On the other, given developments in teleworking and air transport, many persons who are not habitually resident in a Member State do have close connections with its employment market.\textsuperscript{55}

The European Court of Justice set out the general principles to be applied by the national court in deciding whether the habitual residence test was compatible with Community law. However, the implications of its judgment were somewhat unclear and it fell to the Social Security Commissioner to decide whether or not the habitual residence condition could be objectively justified. Counsel for Mr Collins argued that, as jobseeker’s allowance already contained a requirement that a person be genuinely seeking work, there was no justifiable role left for a habitual residence test. Alternatively, if this was not accepted, the habitual residence test did not satisfy the conditions set out in the judgment of the European Court of Justice, in particular, that its application must rest on clear criteria known in advance or, if this was not accepted, the habitual residence test should only be applied in a way that disregarded factors that did not help to answer the sole legitimate question, i.e., was the claimant’s search for work genuine? However, the Commissioner did not accept these arguments. Referring to the Court’s statement that a residence requirement was in principle appropriate for the purpose of ensuring a connection between the person and the employment market in question, he pointed out that this:

“necessarily entails that a residence test can be allowed, within limits, to act as a proxy for the test of whether or not there is a genuine or real link to the geographical employment market”.\textsuperscript{56}

Accordingly the sole legitimate question to be asked was not whether the claimant was genuinely seeking work on a particular day but rather to ensure that there was a genuine link between the claimant and the United Kingdom employment market. The Commissioner believed that the Court’s judgment must be interpreted in the sense that it must be legitimate for the national authorities to say that they are not able to satisfy themselves about the

\textsuperscript{54} Such as, for example, children or retired persons.

\textsuperscript{55} It should be noted that on the facts of the case, the question of aggregation of periods of residence did not arise (para.52). However, it would appear inconsistent with the Court’s emphasis on a Member State’s entitlement to require a link to its employment market, if aggregation of periods of residence in other Member States was to be allowed to satisfy a habitual residence condition.

\textsuperscript{56} Para.31 of the decision.
genuineness of search for work in the national labour market until a search had been continued for some period of time. However the condition of proportionality implied that a residence requirement could not be applied to deny entitlement to benefit beyond the date at which the relevant national authority has become satisfied of the genuineness of the claimant’s search for work in the national labour market.57

The Commissioner also rejected the argument that the application of the habitual residence test did not rest on clear criteria, drawing a distinction between having clear criteria known in advance and being able to predict the outcome of the application of the test. The Commissioner was satisfied that the essential criteria were clearly established, albeit that their application in individual cases could be difficult to predict.

The Commissioner held that the proportionality of the habitual residence test should not be given effect by taking certain factors out of the equation on the grounds that they were not relevant to the genuineness of a link to the United Kingdom employment market.58 Rather he argued that the appropriate habitual residence test should be applied in the ordinary way. But if the result on any day is against the claimant, there should then be a check against the answer to the question “has the point been reached on that day that the relevant national authority has become satisfied of the genuineness of the claimant’s search for work”?59 If the answer to that question is yes, then the result of the ordinary application of the habitual residence test could not be applied against the claimant under Community law. Accordingly the Commissioner held that the habitual residence requirement was justified by objective considerations independent of the nationality of the claimant and proportionate to the legitimate aim of the legislation but subject to the proviso that the national authority must keep under review the genuineness of the claimant’s search for work.

However, on appeal, the Court of Appeal, while broadly agreeing with the Commissioner’s conclusions, found that the habitual residence test was justified without any need to consider further its proportionality in a particular case (i.e. without the proviso concerning the need to keep the genuineness of the claimant’s search for work under review). The Court stated that as a residence requirement was ‘conceptually at odds’ with EU

57. Para.34 of the decision.
58. On the basis that he had some difficulty in working out exactly what factors would be excluded and, more importantly, that there was a risk of making the test itself rather incoherent if too many versions of the test operated in different legal circumstances.
59. Para. 45 of the decision.
citizenship, any consideration of such a requirement called for an approach tending towards restricting its scope.\textsuperscript{60} Parker L.J., with considerable justification, pointed to the lack of any ‘logical connection’ between a residence requirement and an actual link with the national labour market.\textsuperscript{61} Accordingly, he viewed the residence requirement as a ‘free standing concept’ and not merely a method of establishing that a person was actually seeking work in a particular labour market. The Court, therefore, rejected the argument that the sole issue to be considered was the genuineness of Mr Collins’ search for work. The Court also rejected the Commissioner’s proviso (as to the test of a genuine link being established in some other manner than by habitual residence) stating that it could see no basis in EU law for this approach.\textsuperscript{62}

The decision of the European Court of Justice appears to be a somewhat unhappy attempt to arrive at a compromise between Member States’ understandable desire to limit access to unemployment benefits to persons genuinely linked to the state’s own labour market and the EU objective of ensuring freedom of movement. In particular, the Court’s establishment of a legal link between such a connection with the labour market and residence creates significant difficulties in interpreting its decision. Given that the Social Security Commissioner’s decision appears to be a well-considered and persuasive interpretation of the Court’s decision, albeit one which might be difficult to apply in administrative terms in that it would require, in addition to the habitual residence test itself, a further test of the applicant’s links to the national labour market. The Court of Appeal, in contrast, simply accepted that there was no ‘logical connection’ between the habitual residence test and looking for work in a national employment market and allowed the resident test to stand on its own. The Commissioner tried to make some sense of the Court of Justice’s factually inaccurate linkage of residence and employment market, while the Court of Appeal did not.\textsuperscript{63}

\textsuperscript{60}. [2006] E.W.C.A. Civ. 376. As is its wont, the Court, of course, did no such thing.
\textsuperscript{62}. At para. 87 of the judgment.
\textsuperscript{63}. While one can hardly criticise it for not trying to impose logic on the European Court of Justice, the Court of Appeal can perhaps be criticised for its somewhat simplistic approach (para.87) to proportionality whereby it appears to assume that the Court of Justice would either uphold or strike down the habitual residence test rather than requiring the national courts to consider its proportionality in differing circumstances (as suggested by the Commissioner).
Given that the European Convention on Human Rights has now been ‘incorporated’ into Irish law by the European Convention on Human Rights Act 2003, the Convention is now, in a certain way, binding in Irish law. It is now clear that the non-contributory social welfare payments which are mainly affected by the HRC would be considered as ‘possessions’ under article 1 of the first protocol of the European Convention on Human Rights so as to bring into play the non-discrimination provisions in article 14 of the Convention. This would allow persons affected to argue that the habitual residence condition infringes the non-discrimination clause. However, as the HRC does not directly discriminate on grounds of nationality it might be difficult to succeed on this point given the wide margin of appreciation allowed by the European Court of Human Rights to national legislatures.

It has also been suggested that the operation of the HRC may be in breach of the UN Convention on the Rights of the Child which has been ratified by Ireland. Article 2 of this Convention provides that State parties must respect and ensure the rights of children (including the right to benefit from social security under article 26 of the Convention) without discrimination, inter alia, on grounds of nationality while article 3 provides that in all actions concerning children, the best interests of the child shall be a primary consideration. The UN Convention does not, of course, form part of the internal law of Ireland. A Social Security Commissioner accepted that courts and tribunals could have regard to international law when applying national law. He ruled that the UN Convention was ‘part of the context of judicial exercise of a discretion’ and that the claim in respect of children was relevant in respect of the overall assessment of their parent’s claim, for example, as to the length of residence required to satisfy the ‘habitual residence’ test.

67. CIS 1972/2003. However, he did not overturn the decision appealed against which had had regard to the circumstances of the children.
The implications of this discussion of Community law in the Irish context appear to be as follows:

(1) Child benefit and other family benefits under Community law (in particular one parent family payment) are payable to persons where Ireland is the competent state for family benefits under Council Regulation 1408/71. This position is accepted by the Department of Social and Family Affairs.

(2) Special non-contributory benefits (i.e. jobseeker’s allowance, disability allowance, State pension, blind pension and widow(er)’s pension) are payable to persons (within the scope of 1408/71) where they are resident in Ireland subject to the application of the habitual residence test (under Community law). Again this is not in dispute.

(3) In the case of workers within the definition of Council Regulation 1612/68, they will be entitled to ‘social advantages’ (within the terms of Regulation 1612/68) subject to the habitual residence condition (under national law) applied in accordance with the principle of proportionality.

(4) In the case of jobseekers entitled to benefits of a financial nature intended to facilitate access to employment in the Irish labour market (which would appear to cover only jobseeker’s allowance), again such persons will be entitled to such benefits subject to the application of the matter of national habitual residence condition applied in accordance with the principle of proportionality.

(5) Although the issue has not come directly before the Court of Justice, the implication of several recent cases concerning EU citizenship would appear to be that EU citizens lawfully resident in Ireland for a certain time (and their families) would similarly be entitled to other benefits subject to the national habitual residence condition applied in accordance with the principle of proportionality.

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68. It has been argued in Part 3 of this article that the national and EU habitual residence tests should be interpreted in the same manner (rather than as in the United Kingdom where two different definitions are applied).

69. Whether this position is affected by articles 14(4) and 24(2) of Council Directive 2004/38 (OJ L 229/35), which came into force on 30 April 2006 and which purports to restrict entitlement to such benefits, remains unclear.
proportionality (although the concept of proportionality might be interpreted in a different manner in such cases). 70

It seems more unlikely that other international provisions will have a significant impact on the interpretation of the HRC although the UN Convention on the Rights of the Child does emphasise the need to have particular regard to the position of children in interpreting the provision.

This review of the law suggests that the legal position on habitual residence is somewhat unclear and that we are likely to see a considerable number of appeals and possibly court cases in the coming years. In this context, it should be noted that Appeals Officers would appear to be “courts or tribunals” within the meaning of Article 234 EC and consequently to have the power to refer preliminary questions to the Court of Justice. 71