



## **Habitual Residence Condition – Briefing Paper.**

### **Roma in Ireland and Access to Social Protection**

The application of the habitual residence condition and the 'right to reside' test is having an extremely negative impact on Roma living in Ireland, whereby many Roma are not entitled to any social protection measures. This is causing huge suffering within the Roma community.

Many Roma in Ireland are in vulnerable positions. The lack of a positive overall strategy for Roma inclusion is hugely problematic.

This submission outlines:

- Details of the habitual residence condition and the right to reside
- Details of the impact of the habitual residence condition on Roma in Ireland
- Pavee Point recommendations

### **What are we calling for?**

Roma live in Ireland and are now a part of Irish society. Ignoring the issues Roma are facing will not make these issues disappear. A response is urgently needed.

- We are calling on the Department of Social Protection to provide a humanitarian response and ensure that Roma are not living without basic food and shelter in Ireland.
- We call on the Department of Social Protection to invest in and conduct a review and impact assessment of the habitual residence condition, in particular in relation to ethnicity and gender. Ireland has a responsibility to ensure policies are in line with human rights commitments. This means ensuring policy is not discriminatory.

### **What is the Habitual Residence Condition?**

Habitual residence is a condition which applicants must satisfy in order to qualify for certain social welfare assistance payments. Habitual residence essentially means an applicant must be able to prove a close link to Ireland. Five factors are considered to determine habitual residence:

- a. the length and continuity of residence in the state or in any other particular country;
- b. the length and purpose of any absence from the state;
- c. the nature and pattern of the person's employment;
- d. the person's main centre of interest;
- e. the future intentions of the person concerned as they appear from all the circumstances.

### **What is the 'right to reside'?**

A 'right to reside' test was introduced in December 2009. A person who does not have a right to reside in the State shall not be regarded as being habitually resident in the State.

### **Who has a right to reside?**

1. Irish nationals have a right of residence in Ireland.
2. UK and EU nationals coming in from the Common Travel Area (CTA) also have a right to reside here under the CTA agreement.
3. EEA nationals who are employed or self employed in Ireland have a right to reside. Also –
  - EEA nationals who have been employed here for over a year and are now unemployed, may continue to reside provided they are registered as jobseekers with this Department and with FÁS,
  - EEA nationals who have been employed here for less than a year and are now unemployed, may remain for a further 6 months provided they are registered as jobseekers with this Department and with FÁS,
  - EEA nationals who have sufficient resources to support themselves, their spouse/civil partner and any accompanying dependents and have comprehensive sickness insurance,
  - EEA nationals may reside here as visitors or jobseekers for up to 3 months provided that they do not become a burden on the social welfare system of the State during that period.

The right to reside is now becoming an issue for many Roma in Ireland.

### **Impact of Habitual Residence Condition for Roma in Ireland**

In a series of seminars held by Pavee Point and the Health Service Executive (HSE) in 2011/2012 on the experiences of Roma children in Ireland, HSE staff noted that the habitual residence condition is resulting in extreme child poverty for Roma children. A recurring issue at the seminars and in the interviews with professionals working with Roma was the extent of the deprivation some Roma families are experiencing as a result of not qualifying for social welfare assistance. Many practitioners expressed shock and concern at the living conditions

of some Roma families, including substandard housing and no food, saying they have never seen such conditions before.

“I’ve been working my whole life and never seen poverty like this before. We need to do something about it.”

This is resulting in extreme poverty, poor health and raising serious child protection issues. Social workers have raised concerns about child poverty, saying they have never seen anything like this before, and that they have to consider taking a child into care in order to access basic services.

The knock-on effect of not meeting the habitual residence condition can also mean a lack of access to a medical card, as a person is unable to prove their means.

For this group of people, the only State response is ‘voluntary repatriation’ where a person will be given a flight ‘home’.

The treatment of Roma across many countries in Europe, raises serious human rights issues, and raises concerns about a State response which is to send people back to the country that they came from.

### **Factors that make it difficult for Roma to meet the Habitual Residence Condition**

Endemic discrimination in education and in the workplace makes it difficult for Roma to demonstrate a strong pattern of employment in the formal workforce. In addition the application of restrictions until July 2012 to labour market access for Roma from Romania and Bulgaria has in practice excluded many Roma from these countries from accessing employment and community employment schemes. This has also negatively affected their work record. Pavee Point also have concerns in relation to the gendered nature of the assessment of the nature and pattern of a person’s employment, as women who perform caring roles are less likely to have been in formal employment. One of the questions considered is ‘does the applicant have realistic prospects of finding work?’ which is judging applicants ability to find work in the future also. This concern is that this element of the assessment for HRC ignores work carried out in the home and caring for children.

Due to low literacy levels and language barriers for Roma, applicants may not have all the documentation needed to prove habitual residency and may face difficulties responding to the Department. They also may not have proof of residence if they are living with extended family. Roma often do not trust authorities, sometimes due to information having been used against them in the past in their home countries. There is little support for applicants in making their applications, in particular the availability of suitable translators.

The content and interpretation of the five factors to determine habitual residency are problematic when applied to Roma, as outlined above. As noted by the Chair of the Human Rights Commission at a seminar on the habitual residence condition in 2012, if a policy has a greater impact on a particular community, it may be considered discriminatory under human rights law.

## **The Application of HRC**

Furthermore, inconsistency in decision-making is a concern. As further noted by the Chair of the Irish Human Rights Commission at a seminar on the Habitual Residence Condition in 2012, this is a highly discretionary test and by its nature the habitual residence condition may thus produce quite arbitrary results. This has been the case as documented in the 'Person or Number' report, which points to the rise in appeals as an indicator in this regard.

while there is no clear breakdown on the number of HRC appeals that are successful, it is reasonable to assume that successful HRC appeals make up a significant proportion of the 42.7% (12,029) of cases that were flagged in the 2010 annual report of the social welfare appeals office as leading to a favourable decision. This in turn could provide further evidence of the poor application of the HRC.

This points to poor application of HRC and the need for comprehensive data to be collected in relation to appeals. Indeed across the social welfare system disaggregated data needs to be collected.

The application of HRC to child benefit is also an issue. The Convention on the Rights of the Child prohibits any discrimination between children on the basis of the status of their parents. It also requires that all decisions (including social welfare decisions) must have as a primary consideration the best interests of the child. However, due the habitual residence condition children are being denied access to child benefit due to the status of their parents. These decisions do not have the best interests of the child as their primary consideration.

There is no safety net for people waiting on a decision with regard to the HRC. People awaiting a decision on HRC cannot access Supplementary Welfare Allowance as this is subject to HRC. Although an urgent needs payment may be issued, this is a discretionary payment and not a sustainable solution if a person has to wait a significant period of time for a decision.

### **Recommendations for Department of Social Protection:**

- Provide a humanitarian response and ensure that Roma are not living without basic food and shelter in Ireland.
- Invest in and conduct a review and impact assessment of the habitual residence condition, in particular in relation to ethnicity and gender.
- Proof and amend the guidelines on the habitual residence condition from an equality and gender perspective and provide resources to train deciding officers in relation to these changes.
- Amend the guidelines to take into account Traveller nomadism.
- Ensure that women experiencing violence are not subject to the habitual residence condition
- Remove child benefit from habitual residence condition requirements.
- Ensure that people awaiting decisions on habitual residence are provided with adequate income supports.
- Provide human resources to support people in making their applications, in particular the availability of suitable translators.
- Collect and make public disaggregated data of applications, refusals, appeals and appeal outcomes in relation to the habitual residence condition.