



Position Paper

**Impact of the Habitual Residence Condition
(HRC)
on Travellers and Roma**

September 2011

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Introduction and Context

This paper sets out Pavee Point's concerns in relation to the application of the Habitual Residence Condition (HRC) to Travellers and Roma in Ireland. As described here, Travellers and Roma are groups in Irish society who face multiple disadvantage and as such are more likely to rely on social welfare benefits than other groups. Therefore, restrictions to social welfare are of particular concern and exacerbate already difficult living conditions for Travellers and Roma.

In May 2011, the European Commission announced a European Framework for National Roma Integration Strategies.¹ By the end of 2011, Governments will have to submit their National Roma Integration Strategies. At an EU level, the term "Roma" is used as an umbrella term which includes groups of people who have some similar cultural characteristics, including Travellers, whether sedentary or nomadic. The communication states:

"Many of the estimated 10-12 million Roma in Europe face prejudice, intolerance, discrimination and social exclusion in their daily lives. They are marginalised and live in very poor socio-economic conditions. This is not acceptable in the European Union (EU) at the beginning of the 21st century."

About Pavee Point

Pavee Point is a voluntary, or non-governmental, organisation committed to the attainment of human rights for Irish Travellers. The group is comprised of Travellers and members of the majority population working together in partnership to address the needs of Travellers as a minority group experiencing exclusion and marginalisation. The aim of Pavee Point is to contribute to improvement in the quality of life and living circumstances of Irish Travellers, through working for social justice, solidarity, socio-economic development and human rights.

About Travellers

Travellers are an indigenous minority ethnic group, documented as being part of Irish society for centuries. Travellers have a long shared history and value system which make them a distinct group. They have their own language, customs and traditions.² Many Travellers experience disadvantage in terms of health, education, racism and unemployment; as a result, many rely on social welfare assistance; therefore policies relating to social welfare are particularly relevant to Travellers.

About Roma in Ireland

Pavee Point have been working with Roma for a number of years through the Roma Support Group. Pavee Point estimates the population to be 5,000-7,000 people, but there is very little accurate data available. There is a huge diversity within the Roma community regarding religion, education, culture and family background. There are 60 different dialects of the Roma language. Roma in Ireland come mostly from Romania, but also the Czech Republic, Slovakia, Hungary and Bulgaria. Therefore

¹ COM(2011) 173/4

² http://www.paveepoint.ie/pav_culture_a.html

the community is very diverse and even among Roma from Romanian there are different dialects. Many Roma also experience disadvantage in terms of education, unemployment, health, poverty and racism and most Roma have the additional disadvantage of not speaking English.

Roma can fall into 1 of 5 categories according to their status in Ireland:

1. Asylum seekers from the 1990s who have been granted refugee status. Some have been naturalised as Irish. They are generally better-integrated than other Roma groups.
2. 2004 EU citizens from Slovakia, the Czech Republic etc.. They are generally habitually resident and have the right to work and access welfare. They are also generally better integrated.
3. Pre-2007 Romanian and Bulgarian citizens who have been granted under humanitarian leave to remain or residency with an Irish-born child. They have the same entitlements as categories 1 and 2 but sometimes encounter difficulty in proving their status, (for example, FÁS turned away all Romanian and Bulgarian citizens as being unable to work).
4. Pre-2007 Romanian and Bulgarian citizens who were still waiting for a decision on their residency on 1 January 2007 when they became EU citizens. They are in a legal limbo; some have been told they have a right to welfare, others to work, others that they have no rights.
5. Post-2007 Romanian and Bulgarian citizens are the most vulnerable. They need a work permit (which is only granted for certain professions where the salary is at least €30,000) and are not entitled to social welfare.

About the HRC

The Habitual Residence Condition (HRC) is a restriction placed on certain social welfare benefits.³ It was introduced in response to the accession of 10 new countries to the European Union on 1 May 2004. At the time Ireland, the United Kingdom and Sweden were the only three established Member States to provide immediate and complete freedom of movement to the citizens of the Accession States. In response to fears fomented by the British tabloid press that these new EU citizens would engage in “welfare tourism” the UK government imposed a habitual residence test on certain social welfare payments.⁴ Ireland followed with the introduction of the HRC. Sweden, despite possessing one of the most comprehensive and generous social welfare systems in the EU, did not.⁵

Section 246 of the Social Welfare Consolidation Act 2005 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 2 years ending on that date.”

³ A person must be habitually resident in the State at the time of making the application for the following: Blind Pension, Carer's Allowance, Child Benefit, Disability Allowance, Domiciliary Care Allowance, Guardian's Payment (Non Contributory), Jobseeker's Allowance, One Parent Family Payment, State Pension (Non Contributory), Supplementary Welfare Allowance (other than once off exceptional and urgent needs payments) and Widow(er)'s Non Contributory Pension.

⁴ NCCRI, August 2006, p 7; NCCRI, February 2005, p 2.

⁵ NCCRI, August 2006, p 22; NCCRI, December 2004, p 6; EU Observer, 28 April 2004.

Therefore, a two-year 'rule of thumb' was initially used in assessing whether someone was habitually resident in the State. However, this was amended following infringement proceedings against the Irish Government by the EU on the basis that the HRC prohibited freedom of movement and was indirectly discriminatory on the basis of nationality.

However, Section 30 of the Social Welfare and Pensions Act 2007 amended this section 246 of the Social Welfare Consolidation Act 2005 by inserting sub-section (5) which provides that a social welfare decision-maker should have regard to all the circumstances of an applicant's case in assessing habitual residence including:

- (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; and
- (e) the future intentions of the person concerned as they appear from all the circumstances.

This change was introduced to bring Irish law more in line with the requirements of EU law as set out in the *Swaddling*⁶ decision where it was held that any definition of habitual residence which requires that the applicant be resident in the State for a particular length of time (even if this length of time may vary from case to case), violates EU law. It is understood that this is because it violates the right of EU citizens to exercise freedom of movement within the EU.⁷ This approach could be of great benefit to Travellers if applied correctly; any restriction which reduces the possibility for Travellers to freely move between Ireland and other EU countries would be prohibited by EU law, which takes precedence over Irish law.⁸ Unfortunately, this has not proven to be the case.

Difficulties the HRC Causes for Travellers

Until 2009, people who were from, or had lived in, the Common Travel Area⁹ (CTA) prior to seeking social assistance in the Republic of Ireland were treated as having automatically met the HRC. Section 246 of the Social Welfare Consolidation Act 2005, as stated above, 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 2 years ending on that date." (Emphasis added).

⁶ *Robin Swaddling v Adjudication Officer* (Case C-90/97)

⁷ See Opinion of Mr Advocate General Saggio in *Robin Swaddling v Adjudication Officer*, 29 September 1998.

⁸ This element of EU law in relation to the HRC would be less relevant to Roma in Ireland however, as the majority of them are Romanian and Bulgarian citizens; Ireland chose to impose transitional restrictions on the freedom of movement of these citizens, as permitted by EU law, when Romania and Bulgaria joined the EU on 1 January 2007. FLAC October 2010, p.3; and www.inis.gov.ie/en/INIS/Pages/PB07000130.

⁹ The Common Travel Area includes Ireland and the UK (including Northern Ireland, the Channel Islands and the Isle of Man).

Therefore, there appeared to be a presumption of residency linked to the CTA and in practice, the HRC was not applied to people from, or having lived in, the CTA. It was treated as one and the same as the Republic of Ireland. However, in 2009 Traveller organisations, especially in counties bordering Northern Ireland, such as Donegal, noted an increase in queries from Travellers whose claims for social assistance have been rejected on the basis of the HRC, despite the fact that they have lived in Northern Ireland or elsewhere in the UK. Many were also denied protection under supplementary welfare.

New operational guidelines of the then Department of Social and Family Affairs in 2010 which replaced the 2008 guidelines and removed the following direction: “In general, however, an applicant who is now living in Ireland, and has lived here or in other parts of the Common Travel Area all of his/her life will probably satisfy the Habitual Residence Condition.”¹⁰

Due to the movement of Travellers across the border from Northern Ireland or elsewhere in the UK, the policy also indirectly discriminates against Travellers.¹¹ Indirect discrimination occurs when apparently neutral provision puts persons from a particular group at a particular disadvantage. For Travellers living a nomadic lifestyle, movement between the UK and Ireland can be a common occurrence, so application of the HRC to the CTA will have a disproportionate negative impact on Travellers.

Even new guidelines on the HRC designed to minimise unintended consequences, may continue to disadvantage (or fail to benefit) Travellers. In July 2011 the Department of Social Protection issued new operational guidelines directing staff that: “Returned emigrants or retired missionaries who have chosen to resettle in Ireland should be considered to have their main centre of interest here.”¹²

These guidelines do not appear to be of benefit to returning Travellers due to the reference to the intention to “resettle in Ireland” as demonstrating a main centre of interest in the State. This is because the defining feature of Traveller culture is nomadism, which distinguishes Travellers as a minority ethnic group from the majority settled community.

The Traveller concepts of “place” and “home” are different from those of the settled community; the “place” where a Traveller’s family originated is generally regarded as “home” by the Traveller, even if they have spent very little of their life there. Many Travellers are buried in the home of their ancestors having never lived there. Most Travellers would therefore regard their Irish home as a main centre of interest, while many members of the settled community would have no such sense towards a place where they had spent little if any of their life. There is therefore a risk and indeed

¹⁰ <http://www.itmtrav.ie/keyissues/myview/85>.

¹¹ In the Equality Tribunal decision of *Donovan v Donnellan* (17 October 2001, DEC-S2001-011) it was held that certain State services, including social welfare services, are subject to the Equal Status Acts which prohibit discrimination in services on nine grounds, including membership of the Traveller community. Therefore, the legislation may breach Irish equality legislation, as well as the EU ‘Race’ Directive which the equality legislation seeks to implement.

¹² Irish Times, 4 July 2011.

evidence that this settled concept of “centre of interest” is applied with no consideration of its different understanding in Traveller culture.

Difficulties the HRC Causes for Roma

As described above, there are many different nationality and “category” of Roma in Ireland with different immigration statuses and different entitlements (if any). This complexity alone means that there is no straightforward “rule of thumb” as to whether each Roma person will qualify under the HRC. This has led to confusion for deciding officers and other decision-makers, for example:

- The website of the Rotunda Hospital suggests that if a Romanian or Bulgarian patient does not have a current valid work permit, a current valid GNIB card or a valid Medical Card, they must pay a non-refundable fee of €1,212 on their first visit to the hospital; a self-employed Romanian citizen is unlikely to have any of these.¹³
- Following reports of a FÁS office turning away all Romanian and Bulgarian citizens, it was discovered by Pavee Point that an internal circular had instructed officers that no Romanian or Bulgarian citizens were entitled to access FÁS services.

Another general issue is the fact that Roma are often marginalised with a lack of access to information or advocacy groups and due to experiences of persecution in the past often mistrust officials and those perceived to be in authority. These cultural factors combine to make it much more likely that Roma will be denied access to social welfare entitlements due to the HRC in comparison to the general population

Section 15 of the Social Welfare and Pensions (No 2) Act 2009 amended section 246 of the Social Welfare Consolidation Act 2005 by adding a new condition required on top of the HRC in order to qualify for HRC-dependent social welfare payments: in addition to demonstrating that they are habitually resident in the manner previously outlined, applicants must also have a right of residence in the State. This change was made in response to a series of decisions made by the former Chief Social Welfare Appeals Officer which held that there was no blanket prohibition on asylum seekers and other persons within the leave to remain or subsidiary protection processes receiving social welfare payments.¹⁴

A distinction now exists between those already granted a right of residence (who were possibly entitled to social welfare payments while waiting a determination of their status) and those currently waiting for such a determination, who are expressly not entitled to social welfare payments as they are not regarded as having a right to reside. While the Roma population are now mostly EU citizens and therefore no longer able to seek asylum in Ireland, they are still affected by this new restriction as they are mostly Romanian and Bulgarian citizens. The State is currently applying transitional measures to immigrants from these two new EU Member States.¹⁵ They are only permitted to take up insurable employment if they hold a valid work permit (usually valid for a continuous period of at least 12 months) or if, before 1 January

¹³ <http://www.rotunda.ie/default.asp?p=np>.

¹⁴ FLAC, October 2010, p 5.

¹⁵ FLAC, September 2010, p 3; <http://www.inis.gov.ie/en/INIS/Pages/PB07000130>; http://www.citizensinformation.ie/en/employment/migrant_workers/employment_permits/work_permits.html.

2007, they were working in the State on a work permit which was valid for at least 12 months or on an immigration Stamp 4 for at least 12 months.¹⁶ They may also become self-employed, apparently without the need for a work permit, since 1 January 2007.¹⁷

Under EU law non-Irish EU citizens only have a right of residence in the State if they satisfy one of the following criteria:

- (a) they are legally employed or self-employed;
- (b) they have sufficient resources and sickness insurance to ensure that they do not become a burden on the State;
- (c) they are enrolled as a student (including on a vocational training course) in the State; or
- (d) they are a family member of an EU citizen who satisfies one of the above criteria.¹⁸

Roma are most likely to fall under the employment category. However, as a marginalised group, it is possible that they will end up in informal and undocumented work. It appears possible to maintain a right of residence in these circumstances by becoming self-employed. It might then be argued by the State, however, that any such right ceases to exist once the self-employed person is no longer engaged in work, even if this is due to circumstances beyond their control such as economic conditions. This argument is currently being challenged in the High Court by Petru Solovastru, a formerly self-employed Romanian man who argues that he is involuntarily unemployed due to the downturn and therefore retains his right of residence as a self-employed EU citizen.¹⁹ He claims that he and his family are close to destitution as a result of the refusal of the State to continue paying social welfare payments.²⁰

Even in cases where the right of residence of a Roma of Romanian or Bulgarian citizenship is not in question, there are reports of State institutions misunderstanding and misapplying the condition in practice. For example, some institutions insist that Romanian and Bulgarian citizens present an Immigration Certificate of Registration (GNIB card). However, as they are now EU citizens, the State no longer issues GNIB cards to Romanian and Bulgarian citizens so many of these applicants do not have them.²¹

¹⁶ FLAC, September 2010, p 3; <http://www.inis.gov.ie/en/INIS/Pages/PB07000130>; http://www.citizensinformation.ie/en/employment/migrant_workers/employment_permits/work_permits.html.

¹⁷ Irish Immigration Blog brophysolicitorsimmigration.blogspot.com/2011/03/high-court-challenge-in-romanian-case.

¹⁸ <http://www.inis.gov.ie/en/INIS/Pages/PB07000130>; http://www.citizensinformation.ie/en/moving_country/moving_to_ireland/rights_of_residence_in_ireland/residence_rights_eu_national.html; <http://brophysolicitorsimmigration.blogspot.com/2011/03/high-court-challenge-in-romanian-case.html>.

¹⁹ Irish Times, 3 March 2011.

²⁰ Irish Times, 3 March 2011.

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http://www.citizensinformation.ie/en/moving_country/moving_to_ireland/rights_of_residence_in_ireland/residence_rights_eu_national.html.

Additional Difficulties

- Travellers and Roma may be less likely to have the documentary evidence required to satisfy the HRC.
 - Travellers and Roma both experience low literacy levels, with many Roma having the additional difficulty of not speaking English. This can mean that they are less likely to keep paperwork, correspondence and records and may not respond promptly (or at all) to letters from the Department of Social Protection, CWOs etc..
 - Due to their culture of extended family, many Roma stay with family and friends upon arrival to Ireland and therefore find it difficult to prove residence.
 - Due to the marginalisation and disadvantage they face upon arrival in Ireland, many Roma have no choice but to engage in informal or illegal work and therefore do not have documentation from their employer as proof of their employment.
- More generally, the HRC now contains vague concepts such as “centre of interest” and “future intentions.” Its application is therefore highly dependent on the perceptions of each individual decision-maker; it is impossible to predict in advance whether an applicant will satisfy the test. This has led to numerous inconsistencies, not just how it is applied to different applicants, but also in how it is applied to the same applicant. Pavee Point has encountered cases in which an individual has been granted one social welfare payment but refused another both on HRC grounds.
- It appears that many decision-makers continue to misapply the HRC with some continuing to use a “2 year rule.” This problem is most common among Community Welfare Officers (CWOs), who decide whether an applicant is entitled to Supplementary Welfare Allowance (SWA). This is of great concern as the SWA is supposed to provide immediate and urgent assistance to individuals who are waiting for decisions on other more permanent social welfare applications or appeals. Appeals to all social welfare decisions can take months and sometimes years to process. They are unfortunately often necessary due to the complex nature of the HRC. By the end of September 2010, almost 19% of appeals of decisions based on the HRC had been upheld fully or in part.²² In these circumstances, there is a strong case for the removal of a habitual residence requirement for Supplementary Welfare Allowance, to prevent destitution and even homelessness which a denial of social welfare payments can create. There is also an urgent need to repeal section 246(1) of the Social Welfare Consolidation Act 2005 as its reference to a continual 2 year period of residence is clearly still causing great confusion among decision-makers.²³

Impact on Travellers

- Travellers who do stay in Ireland risk homelessness and destitution.
- In these circumstances they are vulnerable and may have to seek funding from loan sharks. Many have accumulated high levels of debt by borrowing from family or by moving around the private rental sector but being unable to

²² FLAC, October 2010, p 2.

²³ FLAC, October 2010, p 8; CMP, October 2010, pp 2, 4, 8.

pay rent. Others rely on charitable organisations, such as the St Vincent de Paul.

- Some of them report feeling a sense of powerlessness, as their level of education may make them feel unable to articulate an appeal in the complicated HRC procedure.
- Many Traveller organisations (such as Donegal Traveller Project), provide support to Travellers in appealing the decision. To date, all appeals have been successful for the Travellers; however, as precedents are not held to be relevant to administrative decisions, the organisations and the Travellers must tackle each and every case individually, even though it is clear that there is a need to review the policy.
- Travellers who were born in or lived in Northern Ireland also feel as though they are being denied their national identity and classed as “Not Irish” if they are refused a social welfare payment for not being habitually resident in the State. Many also feel persecuted because of their nomadic way of life.
- The application of the HRC to Travellers means that some of them decide not to return home to Ireland. This has led to families being separated. In some cases it has put individuals in danger who are forced to remain in the UK after trying to flee a conflict or threat there.
- In other cases, Traveller families are relying on their wider family networks for food and accommodation; placing additional strain on families who are themselves struggling.
- Traveller organisations also report that the situation is leading to mental health problems such as depression and substance abuse and that the strain on families has in some cases led to relationship problems and separations.
- There are other health implications, for example, in one case, a pregnant woman felt she had to leave the State in order to protect her unborn child after she was admitted to Limerick General Hospital as an emergency case; she had been unable to afford essential iron injections.
- Decisions given in July 2009 are only being held on appeal since January 2011; therefore people are left in inhumane conditions for unacceptably long periods of time.
- The HRC also greatly hinders the ability of Traveller women to escape from violent relationships. Due to close living arrangements with their extended family, many Traveller women in abusive relationships are not able to rely on family support; they may be surrounded by their husband’s family or they may risk bringing trouble on their family or friends if they try to stay with them. The only option open to many Traveller women in these situations is to seek shelter in a Women’s Refuge. If they are unable to afford to pay for this service, they must be able to satisfy the HRC in order to have access to it. Even if they are able to rely on family support, they may not be able to access it if they have to cross a border to reach them. Coming into Ireland they may not qualify for social welfare support due to the HRC. Leaving Ireland they may risk losing social welfare payments under the HRC. Traveller women in abusive relationships may feel pressure to remain for the sake of their children, especially if a social welfare application or appeal is currently being processed.
- There is serious concern about the fact that children are denied child benefit if they do not meet the HRC. There are examples of Traveller children who

were born in Ireland but have been denied child benefit as their parents had previously spent time in Northern Ireland or England. As described above, these cases may be ongoing for over two years.

Impact on Roma

- The Roma population are already largely isolated and excluded from Irish society. The HRC operates in a manner which compounds this problem. For the reasons outlined above, many Roma families are unable to engage with State institutions. This leads to numerous irregularities in and denials of social welfare payments.
- Applications may be dormant or payments may be suspended due to a breakdown in communications between the applicant and the decision-maker. For example, foreign nationals in receipt of Child Benefit are required to fill out a DSP form every 3 months in order to continue payments. The same obligation is imposed on Irish citizens. Recipients of social welfare are sometimes not in the appropriate scheme. There have been reports of families only receiving the SWA despite being granted a right of residence and living in the State for over 10 years.
- A vicious cycle is being created. If vulnerable communities are not supported with social welfare payments when they are unable to work within the legal constraints imposed on them by the State, they have no choice but to engage in informal work. This type of employment makes them very vulnerable to exploitation by their employers, who often do not provide them with any record of their employment or income. As a result they remain unable to claim social welfare entitlements as they cannot provide any assessable income.
- This vulnerable situation might lead some to engage in criminal activity. Even after being convicted and serving their sentences, the HRC continues to exclude Roma by denying many of them access to the Youthreach programmes of the Irish Probation Service. This makes it more likely that young offenders will be unable to reintegrate into society and continue engaging in criminal activity.
- There is confusion in relation to social welfare entitlements for Roma given the number of categories described in this document. For example, many reunited Roma families are even more uncertain as to their entitlements as some members of the family were resident in Ireland before 2007 while others joined them after the new rules came into effect.
- From Pavee Point's experience of working with the Roma community, it appears that applications by Roma for medical cards take much longer to process than applications by Travellers. During this time many Roma cannot access medical services from a GP as they cannot afford the charges.
- There are reports of Roma being unable to access children's vaccinations and pregnant women being unable to register with a GP in order to access standard prenatal and antenatal care.
- The health risks of not having a medical card drive some Roma to use a friend's or family member's card. This is a serious problem that may lead to life-threatening situations if the individual has a different blood type or different allergies to those recorded on the card. Due to these obstacles, Temple Street Hospital, which generally treats all patients regardless of ability

to pay, is being overused by members of the Roma community in cases where hospital care is inappropriate.

- While all children are legally required to attend school, it can be very difficult for some Roma families to afford it if they are denied social welfare payments.
- As is the case with Traveller women, Roma women can face difficulty if they try to leave an abusive relationship as HRC-dependent allowances are required to pay for a bed in Women's Refuges. In a case encountered by Pavee Point, a young Roma woman had no choice but to accept repatriation to Romania as she was unable to access social welfare payments to pay for a Refuge; while waiting for her repatriation she had to stay in a Department of Justice hostel very near the home of her abusive husband.
- Repatriation seems to be the only choice offered by the HSE's New Communities Unit to Romanian and Bulgarian citizens for whom the social welfare system is unwilling to provide accommodation. This worsens what is already a very precarious situation for Roma living in Ireland.
- Due to their marginalisation and low incomes, they are often exposed to the volatile low-quality private rented accommodation sector. They often live in poor quality housing that is overcrowded and unhealthy. In one case encountered by Pavee Point, a family of two parents and six children were forced to live in a friend's bedsit after being evicted. They were then evicted from the bedsit and offered no other choice but repatriation even though they had lived in Ireland for several years and the children were attending school here. This near total lack of support for Roma families from the State makes them very vulnerable to exploitation from landlords, who may violate their rights as tenants and threaten them with illegal evictions.

Human Rights Considerations

It cannot be denied that the way the HRC is being applied by some State institutions is creating situations of destitution and homelessness. Ireland is a State Party to the European Convention of Human Rights (ECHR), Article 3 of which prohibits inhuman or degrading treatment in all circumstances. It was held by the UK House of Lords in *R v Secretary of State for the Home Department, Ex parte Adam, Limbuela and Tesema* [2005] UKHL 66 that a deliberate State policy which leaves an individual or class of persons homeless without access to any resources amounts to inhuman and degrading treatment and breaches Article 3. Under section 3(1) of the ECHR Act 2003 "every organ of the State" (which includes social welfare institutions) is obliged to perform its functions in a manner that respects the ECHR. There are therefore cases in which decisions based on the HRC might not be lawful, both in Irish and international law.

There are particular concerns about the application of the HRC to Child Benefit. This payment is not means-tested, meaning that it used to apply universally to all children in the State. The introduction of the HRC has led to a discrimination between children on the basis of whether their parents satisfy the HRC or not. This would appear to violate the United Nations Convention on the Rights of the Child, which Ireland has ratified. Article 2 of the Convention prohibits any discrimination between children on the basis of the status of their parents. Article 3 requires that all decisions (including social welfare decisions) must have as a primary consideration the best

interests of the child. Article 26 recognises the right of all children to benefit from social security and Article 27 guarantees that the State shall provide a standard of living to a child which is sufficient for their development so long as the State has sufficient means to do so. There is a strong argument that the application of the HRC to Child Benefit violates at least one of these rights.

The current application of the HRC may also breach the UN Convention on the Elimination of Racial Discrimination. Article 5 of the convention provides:

“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(e) Economic, social and cultural rights, in particular:

(iv) The right to public health, medical care, social security and social services;”

Finally, by the end of 2011, Governments will have to submit their National Roma Integration Strategies to Europe (to include Travellers in Ireland)²⁴, which must identify targets in a number of areas. For example, in relation to housing, the European Commission communication states:

“This is why Member States should promote non-discriminatory access to housing, including social housing. Action on housing needs to be part of an integrated approach including, in particular, education, health, social affairs, employment and security and desegregation measures. Member States should also address the particular needs of non-sedentary Roma (e.g. provide access to suitable halting sites for non-sedentary Roma). They should actively intervene with targeted programmes involving regional and local authorities.”

These requirements could not currently be met with the application of the HRC.

Conclusion

It is now clear that the fears which led to the habitual residence restriction were unfounded: immigrants from the new EU Member States did not access the social welfare system in any significant way in Sweden despite its lack of restrictions.²⁵ The HRC does not serve the purpose for which it was created.²⁶ It instead indirectly discriminates against already marginalised groups in Irish society, such as Travellers and Roma.²⁷

²⁴ COM(2011) 173/4

²⁵ NCCRI, August 2006; NCCRI, December 2004; EU Observer, 25 August 2004.

²⁶ FLAC, October 2010, p 4.

²⁷ NCCRI, August 2006, p 23; FLAC, October 2010, p 4.

The very notion of habitual residence and the concept of a “centre of interest” is incompatible with nomadism and is therefore inherently discriminatory against Travellers.

HRC assessment is a complex and cumbersome process which leads to delays and inconsistencies in access to social welfare entitlements. This is largely due to the inherently complicated nature of the concept of habitual residence. For Roma, who may fall into one of five categories based on when they came to Ireland and their immigration status, the HRC is even more complex.

Recommendations

- Given the evidence that the phenomenon of “welfare tourism” never materialised and that the HRC has instead deprived certain groups of social welfare whom it never intended to target, there is a strong argument in favour of its discontinuation as a means of determining social welfare entitlements.
- In particular, the HRC should not be applied to child benefit given the risks to children’s welfare and wellbeing as a result.
- If the HRC is to remain, exemptions should be put in place for Travellers and Roma, to avoid indirect discrimination and further hardship for already vulnerable groups. For example, guidance has already been given that returning emigrants and missionaries should meet the HRC; similar guidance could be issued in relation to Travellers.
- Ireland’s National Traveller and Roma Integration Strategy, required to be submitted to the European Commission by December 2011, should specifically address the current difficulties in accessing social welfare assistance for Travellers and Roma.
- Clarification on the current and future application of the HRC to Travellers and Roma is required to ensure consistency among deciding officers and CWOs.

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