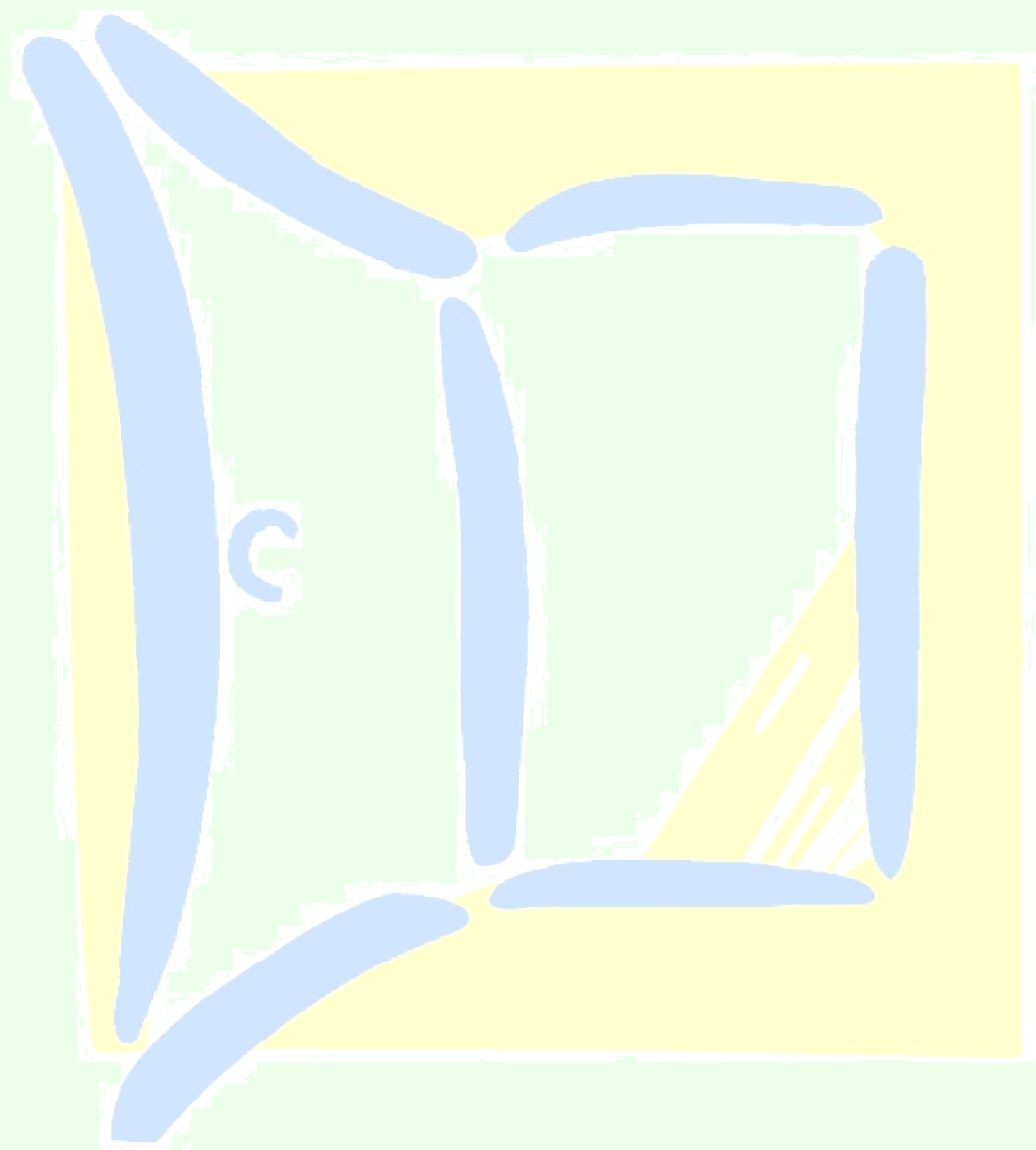


**Social Welfare Appeals Office**

# **Annual Report 2010**



**Report by the Chief Appeals Officer on the activities  
of the Social Welfare Appeals Office in 2010**



Ms. Joan Burton T.D.  
Minister for Social Protection  
Áras Mhic Dhiarmada  
Dublin 1

June 2011

Dear Minister,

In accordance with the provisions of section 308 (1) of the Social Welfare Consolidation Act 2005, I hereby submit a report on the activities of the Social Welfare Appeals Office for the year ended 31 December 2010.

Yours sincerely,

A handwritten signature in blue ink that reads "Geraldine Gleeson". The signature is written in a cursive style.

Geraldine Gleeson  
Chief Appeals Officer

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## INTRODUCTION

The Social Welfare Appeals Office was established on a statutory basis 20 years ago in 1991. The relevant legislation introduced at that time provides for the Chief Appeals Officer to make an annual report to the Minister. This is the 20<sup>th</sup> such report and relates to my first year as Chief Appeals Officer.

The first annual report showed that the number of cases pending adjudication at the end of 1991 was 8,287 and the then Chief Appeals Officer noted that this number was considered high. Over the period 1991 to 2007 inclusive, the number on hands at the end of each year averaged at a level under 6,000. This rose to 7,832 in 2008, 16,008 in 2009 and 20,274 in 2010.

This increase in the number of cases on hands over the last three years is due to the unprecedented increase in the volume of appeals received, particularly in 2009 and 2010. Average annual receipts over the period from 1991 to 2007 were 15,000. Receipts increased to 17,833 in 2008, 25,963 in 2009 and 32,432 in 2010. Therefore, the number of appeals received in 2010 is running at 116% ahead of the levels experienced up to relatively recently.

I am happy to report the number of cases finalised in 2010 was 28,166 or 58% ahead of 17,787 cases finalised in 2009. This is by any measure a very significant increase in the number of appeals finalised. The constant challenge for us in 2010 has been to undertake many initiatives to ensure we operate as efficiently as possible while maintaining high standards. We must always balance the drive for efficiency with the need to ensure due process in terms of the rights of appellants and adherence to the requirements of natural justice.

The increase in cases finalised reflects that effort and, along with my Deputy Mr Dan Kavanagh, I am happy to express our appreciation to each and every Appeals Officer and member of staff for their ongoing flexibility and willingness to engage with these new initiatives. It also reflects the allocation of additional resources by the Department at a time when the Department itself is facing significant challenges and this is very much appreciated.

Despite the additional resources and effort, processing times remained unacceptably high in 2010 having increased from an average of 24 weeks in 2009 to 28 weeks in 2010. This increase is primarily due to the overall increase in the number of new appeals in 2010. Further innovation and additional resources will be necessary in 2011 if we are to bring these waiting times to an acceptable level. Although not strictly relevant to the year under report, I can say that an additional 9 Appeals Officers have been appointed to the Social Welfare Appeals Office with effect from April 2011 which should mean a significant improvement in the position for this year.

It is important to note that the processing time for appeals covers all phases of the appeal process, including some elements which are outside of the direct control of my office. The processing times detailed in this report cover all phases including the submission by the Department of its comments on the grounds for the appeal, further examination by the Department's Medical Assessors in certain illness related cases, further investigation by Social Welfare Inspectors where required and circumstances may also arise where further information is sought from the appellant. Therefore, improving processing times is also very much dependent on the response of the Department in ensuring that the papers are submitted to the appeals office in a timely manner and we in the Social Welfare Appeals Office continue to engage with the Department with a view to improving this aspect of the processing time.

This report sets out a wide range of statistical data relating to 2010. It also contains commentary on issues arising from appeals and a selection of case studies determined by Appeals Officers during the year.

Geraldine Gleeson  
Director and Chief Appeals Officer  
June 2011

## Statistical Trends – 2010

**Our main statistical data for 2010 is set out in commentary form below and in the "Workflow Chart" and tables which follow.**

### Appeals Received in 2010

There has been a significant increase in the numbers of appeals being made to the Social Welfare Appeals Office. In 2010 the Office received 32,432 appeals compared to 25,963 in 2009, an increase of 25%. This was lower than the 46% increase in the number of appeals received by the Social Welfare Appeals Office in 2009 when compared to 2008.

### Clarifications in 2010

In addition to the 32,432 appeals registered in 2010, a further 2,585 appeals were received where it appeared to us that the reason for the adverse decision may not have been fully understood by the appellant. In those circumstances, the letter of appeal was referred to the relevant scheme area of the Department requesting that the decision be clarified for the appellant. We informed the appellant accordingly and advised that if they were still dissatisfied with the decision following the Department's clarification, they could then appeal the decision to my Office. During 2010, only 709 (27%) of the 2,585 cases identified as requiring clarification were subsequently registered as formal appeals. This is considered to be a very practical way of dealing with such appeals so as to avoid unnecessarily invoking the full appeals process.

### Appeals Types in 2010

The number of appeals regarding jobseeker's claims continued to increase in 2010. However, it is significant that the increase in 2010 has shifted from jobseeker claims where means was the issue to cases where other conditionality was in contention, in particular the habitual residence condition. Appeals where means were the issue rose by 12% in 2010 from 3,615 to 4,050 while appeals against other conditionality rose by 73% from 3,179 to 5,506.

Appeals in relation to Carers increased by 53%; Domiciliary Care Allowance by 122%; Illness Benefit by 11%; Invalidity Pensions by

59%, and Supplementary Welfare Allowance by 29%.

### Workload for 2010

The workload of 48,440 for 2010 was arrived at by adding the 32,432 appeals received to the 16,008 appeals on hands at the beginning of the year. That total workload was 43% higher than the workload of 33,795 for 2009.

### Appeals Finalised in 2010

We finalised 28,166 appeals in 2010 which represented a 58% increase on 2009.

The appeals finalised were broken down between:

- Appeals Officers (62.1%): 17,499 were finalised by Appeals Officers either summarily or by way of oral hearings (10,027 or 56.4% in 2009),
- Revised Decisions (25.9%): 7,282 were finalised as a result of revised decisions being made by Deciding Officers before the appeals were referred to an Appeals Officer (4,873 or 27.4% in 2009), and
- Withdrawn (12%): 3,385 were withdrawn or otherwise not pursued by the appellant (2,887 or 16.2% in 2009).

### Appeals Outcomes in 2010

The outcomes of the 28,166 appeals finalised in 2010 were broken down as follows:

- Favourable (42.7%): 12,029 of the appeals finalised had a favourable outcome for the appellant in that they were either allowed in full or in part or resolved by way of a revised decision by a Deciding Officer in favour of the appellant (48.2% in 2009),
- Unfavourable (45.3%): 12,752 of the appeals finalised were disallowed thereby upholding the decision of the Deciding Officer. (35.6% in 2009), and
- Withdrawn (12%): As previously indicated, 3,385 of the appeals finalised were withdrawn or otherwise not pursued by the appellant (16.2% in 2009).

### Determinations by Appeals Officers in 2010

The following gives a statistical breakdown on the outcomes of determinations by Appeals Officers by reference to whether the appeal was dealt with summarily or by way of an oral hearing.

- Oral Hearings (31%): 5,514 of the 17,499 appeals finalised in 2010 were dealt with by way of oral hearings, of which 2,483 (45%) had a favourable outcome. In 2009, 48.6% had a favourable outcome out of 5,914 cases dealt with by way of oral hearings.
- Summary Decisions (69%): The balance of 11,985 appeals finalised were dealt with by way of summary decisions of which 2,264 (18.9%) had a favourable outcome for the appellant. In 2009, 19.9% had a favourable outcome.

### Processing Times in 2010

During 2010, the average time taken to process all appeals was 28 weeks (24 weeks in 2009). However, if allowance is made for the 25% most protracted cases the average time fell to 19.4 weeks (15.8 weeks in 2009).

Of the 28 weeks overall average,

- 12.7 weeks was attributable to work in progress in the Department
- 2.4 weeks was due to responses awaited from appellants
- 12.9 weeks was attributable to ongoing processes within the Social Welfare Appeals Office

When these figures are broken down by process type, the overall average waiting time for an appeal dealt with by way of a summary decision in 2010 was 27.4 weeks, while the average time to process an oral hearing was 45.6 weeks. The average waiting by scheme and process type are set out in Table 1.

The time taken to finalise appeals reflects all aspects of the appeals process which includes:

- seeking the Department's submission on the grounds for the appeal,
- further medical assessments by the Department in certain illness related cases,
- affording the appellant the opportunity to respond or submit any additional medical evidence where there is an unfavourable outcome following further medical assessments by the Department,
- further investigation by Social Welfare Inspectors where required and
- the logistics involved in arranging oral appeal hearings where deemed appropriate.

### Appeals by Gender in 2010

A gender breakdown of appeals received in 2010 revealed that 47.9% were from men and 52.1% from women. The corresponding breakdown for 2009 was 48.4% and 51.6% respectively. In terms of favourable outcomes in 2010, 39.2% of men and 46.4% of women benefited.

### Statistical tables:

Table 1:  
Appeals processing times by scheme 2010 – Summary and Oral

Table 2.  
Appeals received and finalised 2010

Table 3.  
Appeals received 2003 – 2010

Table 4.  
Outcome of appeals by category 2010

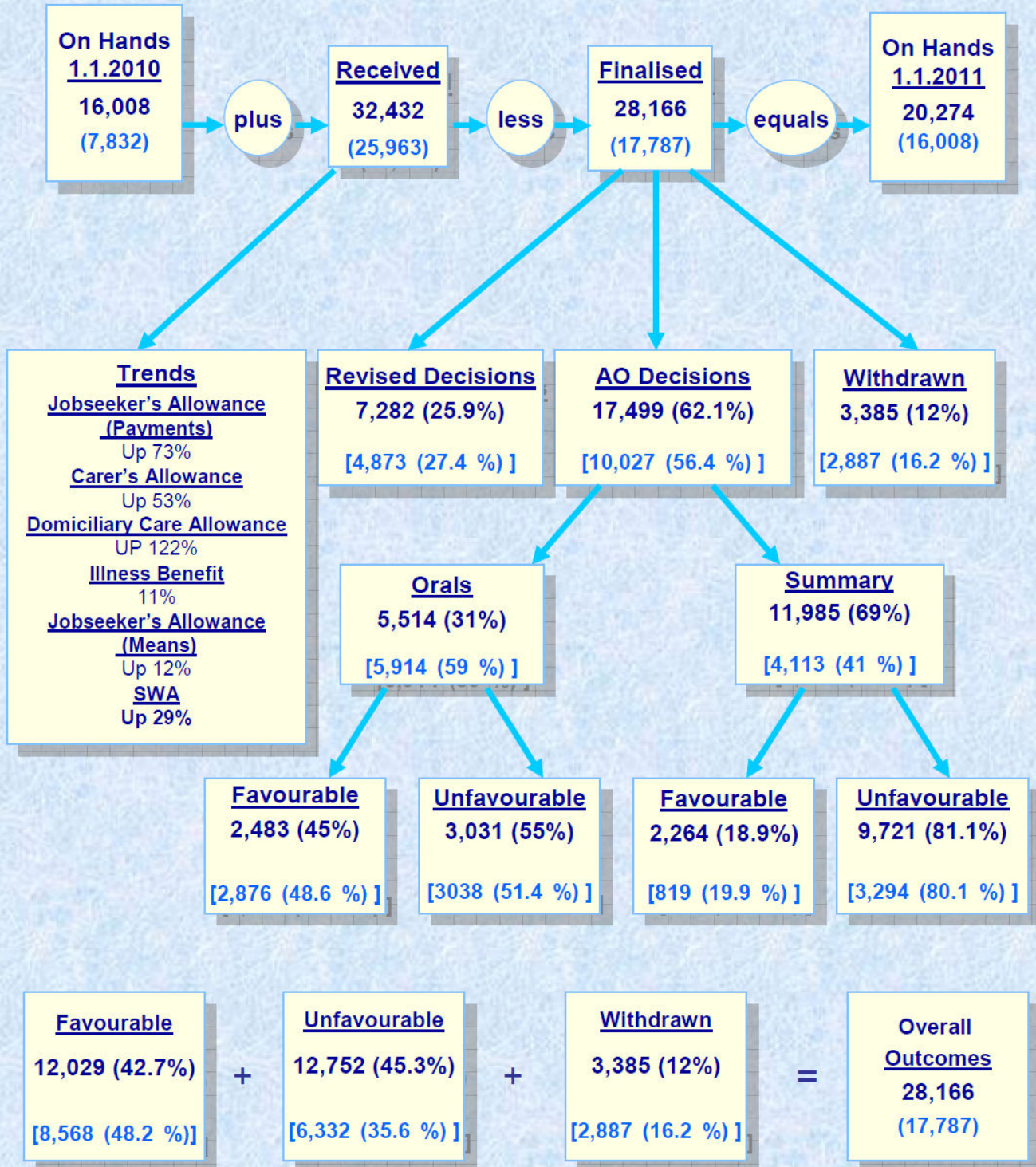
Table 5.  
Appeals in progress at 31 December 2003 – 2010

Table 6.  
Appeals statistics 1991 – 2010



## Workflow Chart - 2010

(Corresponding figures for 2009 are in brackets)



**Table 1. Appeals processing times by scheme 2010 – Summary and Oral**

	Average time taken to process appeals decided summarily.	Average time taken to process appeals where oral hearing is involved.
Adoptive Benefit	32.6	-
Blind Pension	19.8	39.4
Carer's Allowance	26.9	47.3
Carer's Benefit	21.6	44.2
Child Benefit	48.4	63.1
Disability Allowance	30.8	51.1
Illness Benefit	39.2	56.4
Domiciliary Care Allowance	26.8	49.1
Deserted Wife's Benefit	33.9	29.0
Farm Assist	23.2	50.7
Bereavement Grant	25.1	-
Family Income Supplement	21.4	29.0
Invalidity Pension	40.9	59.7
Liabile Relatives	35.9	-
One-Parent Family Payment	30.2	49.4
Maternity Benefit	37.7	-
State Pension (Contributory)	29.6	49.2
State Pension (Non-Cont)	26.5	49.9
State Pension (Transition)	30.7	-
Occupational Injury Benefit	55.7	53.8
Occupational Injury Ben (Med)	32.5	67.9
Disablement Pension	27.4	51.9
Incapacity Supplement	-	30.7
Guardian's Payment (Con)	25.3	48.3
Guardian's Payment (Non-Con)	24.3	42.2
Pre-Retirement Allowance	-	-
Jobseeker's Allow (Means)	22.2	46.9
Jobseeker's Allowance	23.6	43.0
Jobseeker's Benefit	22.6	36.0
Respite Care Grant	30.5	49.1
Insurability of Employment	31.3	67.4
Supplementary Welfare All	6.9	14.8
Treatment Benefit	21.9	57.8
Widow(er)'s Pension (Con)	35.2	53.6
Widow(er)'s Pension (Non-Con)	31.9	54.6
Widowed Parent Grant	20.9	-



**Table 2. Appeals received and finalised 2010**

	In Progress 01-Jan-10	Receipts	Decided Appeals Officer	Revised Decision Deciding Officer	Withdrawn	In Progress 1- Jan-11
State Pension (non-contributory)	177	370	214	73	23	237
State Pension (Transition)	9	7	4	1	0	11
Pre-retirement Allowance	0	2	0	0	1	1
State Pension (contributory)	62	256	47	153	8	110
Illness Benefit	2,423	5,473	1,784	2,075	1,377	2,660
Invalidity Pension	467	1,024	661	185	33	612
Disability Allowance	2,846	4,840	2,535	972	1,133	3,046
Occupational Injuries Benefits	259	459	195	63	14	446
Treatment Benefit	6	8	6	3	1	4
Jobseeker's Benefit	670	1,307	858	268	82	766
Jobseeker's Allowance - Payments	2,092	5,506	3,481	641	161	3,318
Jobseeker's Allowance - Means	2,269	4,050	2,948	618	257	2,496
Widow's/Widower's and Guardian's Payments	46	69	44	8	0	63
One-Parent Family Payment	472	1,124	468	219	75	833
Maternity Benefit	6	29	10	4	0	21
Child Benefit	1,420	1,051	778	456	50	1,187
Carer's Benefit and Allowances	1,413	3,207	1,568	764	70	2,218
Domiciliary Care Allowance	776	1,858	652	584	12	1,386
Respite Care	185	162	161	65	7	114
Family Income Supplement	73	227	124	64	7	105
Farm / Fish Assist	98	244	124	37	18	163
Supplementary Welfare Allowances	140	1,020	777	6	35	343
Liable relatives (contributions)	22	16	5	5	6	22
Insurability of Employment	77	123	55	18	15	112
<b>Totals</b>	<b>16,008</b>	<b>32,432</b>	<b>17,499</b>	<b>7,282</b>	<b>3,385</b>	<b>20,274</b>

**Table 3. Appeals received 2003 – 2010**

	2003	2004	2005	2006	2007	2008	2009	2010
State Pension (non-con), Blind Pen	376	328	339	413	347	287	340	370
State Pension (Transition)	46	39	35	28	30	15	22	7
Pre-retirement Allowance	24	21	23	21	11	10	3	2
State Pension (con)	155	104	126	71	86	87	88	256
Illness Benefit	3,634	3,071	2,742	2,674	2,564	3,597	4,948	5,473
Invalidity Pension	529	519	443	446	535	526	642	1,024
Disability Allowance	2,257	2,252	2,392	2,622	2,938	3,522	4,696	4,840
Occupational Injuries Benefits	503	470	434	440	423	409	396	459
Treatment Benefit	9	50	52	41	17	18	10	8
Jobseeker's Benefit	1,626	1,421	1,243	1,028	1,139	1,358	1,354	1,307
Jobseeker's Allowance - Payments	1,874	1,956	2,274	2,375	2,296	2,401	3,179	5,506
Jobseeker's Allowance - Means	1,167	907	843	848	903	1,901	3,615	4,050
Widows/Widowers and Guradian's Pensions	64	64	63	62	31	58	69	69
One-Parent Family Payment	1,348	1,271	1,034	931	701	774	810	1,124
Maternity Benefit	10	14	16	20	10	15	11	29
Child Benefit	41	324	357	236	269	689	1,361	1,051
Carer's Benefit and Allowance	812	598	586	630	736	1,102	2,098	3,207
Domiciliary Care Allowance	0	0	0	0	0	0	836	1,858
Respite Care	0	0	206	361	457	319	262	162
Family Income Supplement	43	47	57	65	92	142	170	227
Farm / Fish Assist	127	107	114	71	66	61	137	244
Supplementary Welfare Allowances	433	370	327	329	323	437	789	1,020
Liabile Relatives (contributions)	7	5	12	3	9	19	25	16
Insurability of Employment	139	145	79	85	87	86	102	123
<b>Totals</b>	<b>15,224</b>	<b>14,083</b>	<b>13,797</b>	<b>13,800</b>	<b>14,070</b>	<b>17,833</b>	<b>25,963</b>	<b>32,432</b>

**Table 4. Outcome of appeals by category 2010**

	Allowed	Partly Allowed	Revised DO Decision	Disallowed	Withdrawn	Total
State Pension (non-contributory) and Blind Pension	16 5%	21 7%	73 24%	177 57%	23 7%	310
Illness Benefit	605 11.6%	21 0.4%	2,075 39.6%	1,158 22.1%	1,377 26.3%	5,236
Invalidity Pension	341 38.8%	6 0.7%	185 21.0%	314 35.7%	33 3.8%	879
Disability Allowance	935 20.2%	44 0.9%	972 20.9%	1,556 33.5%	1,133 24.4%	4,640
Occupational Injuries Benefits	68 25.0%	12 4.4%	63 23.2%	115 42.3%	14 5.1%	272
Jobseeker's Benefit	135 11.2%	25 2.1%	268 22.2%	698 57.8%	82 6.8%	1,208
Jobseeker's Allowance - Payments	478 11.2%	56 1.3%	641 15.0%	2,947 68.8%	161 3.8%	4,283
Jobseeker's Allowance - Means	377 9.9%	243 6.4%	618 16.2%	2,328 60.9%	257 6.7%	3,823
Widow's/Widower's Pensions and Guardian's Payment	14 26.9%	1 1.9%	8 15.4%	29 55.8%	- 0.0%	52
One-Parent Family Payment	74 9.7%	23 3.0%	219 28.7%	371 48.7%	75 9.8%	762
Carer's Allowance	488 20.3%	61 2.5%	764 31.8%	1,019 42.4%	70 2.9%	2,402
Domiciliary Care Allowance	221 17.7%	14 1.1%	584 46.8%	417 33.4%	12 1.0%	1,248
Respite Care	48 20.6%	1 0.4%	65 27.9%	112 48.1%	7 3.00%	233
Family Income Supplement	26 13.3%	1 0.5%	64 32.8%	97 49.7%	7 3.6%	195
Farm / Fish Assist	10 5.6%	22 12.3%	37 20.7%	92 51.4%	18 10.1%	179
Supplementary Welfare Allowances	170 20.8%	42 5.1%	6 0.7%	565 69.1%	35 4.3%	818
Insurability of Employment	6 6.8%	1 1.1%	18 20.5%	48 54.5%	15 17.0%	88
Other Appeals - State Pension (Contributory), Child Benefit, Treatment Benefit, etc.,	112 7.3%	29 1.9%	622 40.4%	709 46.1%	66 4.3%	1538
<b>Totals</b>	<b>4,124</b> <b>14.6%</b>	<b>623</b> <b>2.2%</b>	<b>7,282</b> <b>25.9%</b>	<b>12,752</b> <b>45.3%</b>	<b>3,385</b> <b>12.0%</b>	<b>28,166</b>

**Table 5. Appeals in progress at 31 December 2003 – 2010**

	2003	2004	2005	2006	2007	2008	2009	2010
State Pension (non-con), Blind Pension	139	138	149	195	143	147	177	237
State Pension (Transition)	13	15	13	21	19	12	9	11
Pre-retirement Allowance	5	10	13	8	5	4	0	1
State Pension (contributory)	117	128	90	95	55	47	62	110
Illness Benefit	1,272	1,068	997	1,007	1,015	1,404	2,421	2,660
Invalidity Pension	234	276	260	268	297	317	474	612
Disability Allowance	802	803	1,040	1,127	1,311	1,550	2,846	3,046
Occupational Injuries Benefits	259	306	268	272	239	258	256	446
Treatment Benefit	2	11	23	7	3	8	6	4
Jobseeker's Benefit	388	360	390	277	317	448	692	766
Jobseeker's Allowance - Payments	318	468	668	576	681	755	2,085	3,318
Jobseeker's Allowance - Means	268	290	347	322	382	859	2,253	2,496
Widow's/ers and Guardian's payments	29	31	41	31	14	32	46	63
One-Parent Family Payment	950	765	642	461	296	388	472	833
Maternity Benefit	4	4	8	9	4	2	6	21
Child Benefit	14	165	136	104	131	573	1,420	1,187
Carers Benefit and Allowances	275	249	311	371	353	618	1,413	2,218
Domiciliary Care Allowance	0	0	0	0	0	0	776	1,386
Respite Care	0	0	69	166	221	119	185	114
Family Income Supplement	26	25	36	29	40	51	73	105
Farm / Fish Assist	61	39	65	32	31	34	98	163
Supplementary Welfare Allowance	38	65	54	43	79	114	139	343
Liabile relatives (contributions)	6	6	10	2	2	15	22	22
Insurability of Employment	111	103	73	75	85	77	77	112
<b>Totals</b>	<b>5,331</b>	<b>5,325</b>	<b>5,703</b>	<b>5,498</b>	<b>5,723</b>	<b>7,832</b>	<b>16,008</b>	<b>20,274</b>

## Social Welfare Appeals Office 2010

As I said in my introduction, the legislation underpinning the Social Welfare Appeals Office (SWAO) was enacted 20 years ago in January 1991. In the first annual report, the then Chief Appeals Officer (CAO) outlined the changes brought about under the new legislation. Prior to the enactment of the legislation, appeals were made to the Minister through the Department. An oral hearing might have been the only point in the process when a client dealt directly with the appeals area and, where a summary decision was involved, there was no direct contact between the appellant and the area in which his case was actually decided.

Under the new legislation, the SWAO was established as an independent executive office with its own separate premises and staff. Appeals are made directly to the CAO, better information was issued to appellants and all correspondence about the appeal is dealt with by the appeals office.

While the appeals system has remained largely the same in the intervening 20 years, the demands on the service have increased significantly with the addition of new schemes, for example Disability Allowance and Domiciliary Care Allowance, and the increasing complexity of the conditions of entitlement for schemes, for example the medical criteria for Disability Allowance and Domiciliary Care Allowance and more generally the Habitual Residence Condition.

Equally, the scale of business dealt with by the office has increased dramatically. As table 6 shows, the workload of the office has more than doubled.

In 2010, the SWAO introduced a number of initiatives designed to increase the capacity of the office to deal with this increased workload.

### ➤ **Additional Appeals Officers (AOs)**

3 additional Appeals Officers (AOs) were assigned and eight retired AOs (the equivalent of three full time officers) were brought back on a temporary basis, from July 2010. This was a very successful initiative with the retired officers dealing with 4,946 appeals in 2010.

### ➤ **Increased workload**

AOs took on an increased workload and more emphasis was placed on deciding cases on a summary basis where possible, tempered of course by the need to ensure that due process and fair procedures were adhered to.

### ➤ **Vetting**

Vetting is the term used in the SWAO to describe the first consideration that an AO gives to the appeal. At this stage, an AO will either decide the case on a summary basis or remit the case for oral hearing where it is considered appropriate. Given that cases are dealt with in chronological order, it is more likely than not that the oral hearing will be assigned to a different AO. This carries an overhead as two AOs must study the case. In 2010, a pilot was established whereby 2 AOs in the west of Ireland are assigned a case load which they vet, and, where an oral hearing is warranted, they will see it through to conclusion. This pilot has proved very successful and consideration will be given to extending it in 2011.

### ➤ **Satellite office**

A satellite appeals office was established in Longford to obviate the need for transportation of the large numbers of files which originate in the Longford office. The office is staffed by Social Welfare Appeals Office administration staff and AOs are assigned there on a rota basis to vet the files and only those cases which require an oral hearing are sent to Dublin.

### ➤ **Business Process Improvement**

A business process improvement initiative was established to increase the capacity of the administration area of the appeals office. This initiative delivered much efficiency including more streamlined processes, elimination of obsolete or unnecessary tasks, centralisation of tasks and better use of information technology systems.

### ➤ **Recording decisions and reports**

An I.T. reports System was developed for recording AO decisions. The purpose of this database is to create a central repository of decisions and reports which can be used to facilitate training of AOs. In addition, it is my intention to use this facility to make more cases available to the general public via the appeals office website and in the annual report.

There is no doubt that further innovation and additional resources will be required in 2011 to address the backlog and I expect to be reporting on much improved processing times in my 2011 annual report.

**Table 6. Appeals statistics 1991 – 2010**

<b>APPEALS STATISTICS 1991 - 2010</b>					
<b>Year</b>	<b>On hands at start of year</b>	<b>Received</b>	<b>Workload</b>	<b>Finalised</b>	<b>On hands at end of year</b>
1991	5,135	19,314	24,449	16,162	8,287
1992	8,287	17,610	25,897	18,844	7,053
1993	7,053	18,285	25,338	20,021	5,317
1994	5,317	13,504	18,821	14,971	3,850
1995	3,850	12,353	16,203	12,087	4,116
1996	4,116	12,183	16,299	11,613	4,686
1997	4,686	14,004	18,690	12,835	5,855
1998	5,855	14,014	19,869	13,990	5,879
1999	5,879	15,465	21,344	14,397	6,947
2000	6,947	17,650	24,597	17,060	7,537
2001	7,537	15,961	23,498	16,525	6,973
2002	6,973	15,017	21,990	15,834	6,156
2003	6,156	15,224	21,380	16,049	5,331
2004	5,331	14,083	19,414	14,089	5,325
2005	5,325	13,797	19,122	13,419	5,703
2006	5,704	13,800	19,504	14,006	5,498
2007	5,498	14,070	19,568	13,845	5,723
2008	5,723	17,833	23,556	15,724	7,832
2009	7,832	25,963	33,795	17,787	16,008
2010	16,008	32,432	48,440	28,166	20,724

## Meetings and Consultations

### Meetings of Appeals Officers.

Meetings of all Appeals Officers were convened in April and October 2010 with smaller meetings taking place throughout the year. These meetings are convened to discuss issues arising in relation to the office and the work and to discuss best practice and consistency in decision making.

Numerous aspects of the work were discussed, not least the challenge presented by the increased volume of appeals and various aspects of what is now a wide and diverse range of conditions and entitlements.

Some of the issues raised at those meetings are considered below.

- Challenges facing the office

Clearly a big focus of efforts in 2010 related to the challenge facing the office in terms of the rising backlog of appeals. Various initiatives were discussed and undertaken throughout the year, not least the allocation of additional work to Appeals Officers and more summary decisions where possible. In addition there were changes to the way oral hearings are scheduled, with adjustments made during the year to reflect the balance of cases ready for vetting and oral hearing.

- Training and mentoring.

Many experienced Appeals Officers retired in 2009 through a combination of ordinary retirement and the incentivised early retirement scheme. As a result an unusually high number of new Appeals Officers were appointed throughout 2009 and 2010. It takes some

considerable time for newly appointed Appeals Officers to become proficient in the full range of the Department's schemes and legislation. Therefore, the combined effect of the loss of experience and arrival of new personnel was a matter of concern to the SWAO in 2010.

To address this, one experienced Appeals Officer was appointed as mentor/ trainer for new and existing Appeals Officers. This initiative has proved very worthwhile in terms of a forum for discussion of topical issues and sharing experience gained from difficult or unusual cases. The other aspect, i.e. the loss of experience, highlighted the fact that there is no database of reports compiled by Appeals Officers through which that experience can be passed on. To address this, a new central repository for reports was designed and implemented.

- Habitual residence condition (HRC).

The HRC was introduced in 2004 for people applying for social assistance payments or child benefit.

The number of appeals relating to the HRC rose from 1,383 in 2009 to 4,146 in 2010. Appeals in relation to Jobseeker's Allowance account for a large number of the increase. There was some discussion throughout the year relating to various aspects of this condition.

One such issue was whether section 246(1) of the Social Welfare Consolidation Act 2005 affords any special status to persons resident in the wider Common Travel Area (CTA). Section 246(1) provides "*For the purpose of each provision of this Act specified in subsection (3), 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 the person 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.*"

Under the Social Welfare Consolidation Act, it is clear that the HRC applies to all applicants. For example, for the purposes of Jobseeker's Allowance, section 141(9) provides that a person shall not be entitled to Jobseeker's Allowance unless they are habitually resident in the State at the date of making the application. Section 246 (as amended) sets out the factors to be considered in deciding whether a person meets this condition. The only special status afforded to a person resident within the CTA is that the negative presumption under section 246(1) does not apply if they have resided continuously in the CTA for 2 years.

A new prerequisite for establishing habitual residence was introduced in 2010 "*....a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State.*". Whether an EEA national has the right to reside is governed by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006) which gave effect to Directive 2004/38/EC. The experience of AOs is that deciding whether an EEA national has the right to reside in accordance with this legislation is quite problematical.

During 2010, the Department established a working group to review the HRC guidelines and I worked with this group to distil the issues arising in cases presenting for appeal. This group will conclude its work in 2011.

- Domiciliary Care Allowance

This scheme was transferred to the Department in 2009. The number of appeals received in 2010 was 1,827 as opposed to 836 in 2009. The medical criteria require that "*the child has a severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age.*".

Therefore, eligibility for Domiciliary Care Allowance (DCA) is not based primarily on the

medical or psychological condition, but on the resulting lack of function of body or mind necessitating the degree of extra care and attention required. Each application is assessed on an individual basis taking account of the evidence submitted by the applicant. A number of issues arose during the year -

- The DCA scheme was introduced by the HSE in 1973 as recognition of the burden involved in caring for a child with a severe disability in their own home. Since the scheme was introduced, there is much greater access to health, education, social and other services in the community. In this regard, an elaboration in the legislation of what is regarded as "domiciliary" care would be of benefit in deciding appeals.
- The experience of the Appeals Officers is that identifying what constitutes "substantial" extra care can be very difficult, particularly in cases which involve children whose disabilities are intellectual in nature, including Autism Spectrum Disorder (ASD). We met with the Chief Medical Advisor whose presentation and the ensuing discussion was very useful in clarifying the basis on which the Medical Assessors formulate their opinions. However, this still remains a difficult issue for Appeals Officers.
- An area where it was considered improvement could be made relates to the manner in which a negative decision is communicated. The experience of the Appeals Officers is that many parents did not understand that their child's condition was fully acknowledged and that it is accepted that additional support is required, but that in many cases the extra support required and given is not at a level envisaged by the legislation governing the scheme.

We met with the Department in relation to this issue and as a result the wording on the letter to parents in such cases was amended.



- Guardians Payment

Another issue which gave rise to difficulties during the year relates to Guardian's Payment. While such appeals are very small in number, the issues can be complex. In particular, difficulties arise in relation to the definition of an orphan. This definition refers to situations where both parents have abandoned and failed to provide for the child. In some of the cases which come before us, the parent or parents may have severe addiction issues, or may be serving prison sentences, and the child is being raised by a family member. These situations are outside the scope of the Foster Care provisions administered by the HSE. In such cases there may be some small, possibly random, contact between the parent and the child or some limited, possibly infrequent, provision for the child. There is scope for different views in such cases as to whether the parent has abandoned and failed to provide for the child. There are also issues of wider concern, including the fact that there is no provision for assessment or support for those in receipt of a Guardian's Payment. I understand these complex issues are under review by the Department.

- Means assessment

Under social welfare legislation, property "*owned but not personally used or enjoyed*" is assessable on a capital value basis. There are an increasing number of cases presenting where the issue relates to the value of second or often third properties and where the appellant considers the property cannot be sold in the current climate. While every property has a value and that value must be assessed, it is considered that the value assessed must take account of the prevailing market.

Means from self-employment was also a factor in a significant number of cases in 2010. In this regard the Social Welfare Appeals Office notes and welcomes the Department's new guide for Inspectors entitled "Interviewing Means Tested Self Employment Cases" which will bring greater consistency in the assessment of such cases.

Given the number of cases presenting relating to means from self-employment, we arranged for a presentation from an official of the Revenue Training Branch in relation to the interpretation of accounts. The presentation and ensuing discussion was very useful in terms of interpreting accounts which come before Appeals Officers by way of evidence.

### DAO meetings

I consider it vitally important that the SWAO engages with the Department with a view to improving decision making by the Department itself and also with a view to improving the time taken to respond to appeals. It is particularly important to ensure that Deciding Officers have all the facts available to make a properly informed decision and that, where it is warranted, a revised decision is made before the case goes to full appeal.

In this regard, during 2010, the SWAO had meetings with various areas of the Department, and in particular with the Decisions Advisory Office which is tasked with ensuring that decisions are consistent and of good quality.

Among the issues discussed with the DAO during 2010 were:

- The operation of HRC generally and in particular in relation to persons resident in the Common Travel Area;
- Means assessments, in particular in relation to self-employment and second properties;
- Backdating of claims, particularly Domiciliary Care Allowance;
- Availability for work where a person requires a work permit.

## Organisational and Operational Matters

### Staffing Resources

The number of staff serving in my Office at the end of 2010 was 68 which equates to 61.2 full-time equivalents. The corresponding staffing levels for 2009 were 64 and 56.5 respectively.

The staffing breakdown for 2010 is as follows:

1 Chief Appeals Officer	1.0
1 Deputy Chief Appeals Officer	1.0
20 Appeals Officers (2 work-sharing)	19.6
3 Higher Executive Officers (1 work-sharing)	2.8
10 Executive Officers (3 work-sharing)	9.2
7 Staff Officers (4 work-sharing)	5.0
26 Clerical Officers (8 work-sharing)	<u>22.6</u>
	<b>61.2</b>

It was decided to use experienced retired Appeals Officers strictly on a short-term basis to supplement the current resources and eight of these officers have been operating on a part-time basis since July 2010.

The structure of my Office is set out in the Organisation Chart at Appendix 1 to this report.

### Parliamentary Questions

During 2010, 1,331 Parliamentary Questions were put down (744 in 2009) in relation to the work of my Office. Of that number, replies were given in Dáil Éireann to 404 and the remaining 927 were withdrawn when the current status of the appeal case which was the subject of the Question was explained to the Deputy.

### Correspondence

A total of 7,235 enquiries and representations were made by public representatives on behalf of appellants in 2010 (4,251 in 2009).

### Freedom of Information

A total of 117 formal requests were received in 2010 (81 in 2009) under the provisions of the Freedom of Information Acts. Of these requests, 116 were in respect of personal information and 1 was in respect of non-personal information.

## Case Studies of Appeals Officers' Decisions

**This section of the report contains a selection of case studies which serve to clarify the process by which appeals are determined.**

**Appeals may be determined on a summary basis, taking account of the documentary evidence presented to the Appeals Officer. Alternatively, an oral hearing may be arranged where the Appeals Officer considers that there is a conflict in the evidence or the question at issue requires clarification by the appellant or by the relevant witnesses who may be invited to attend.**

**A brief report is outlined for each appeal included – the Appeals Officer's report would generally be much longer and a formal decision is always completed. No personal details are disclosed.**

### 1. Child Benefit – oral hearing

**Question at issue:** whether the appellant may be deemed to have been habitually resident in the State prior to January 2009 for purposes of her claim to Child Benefit.

**Background:** The appellant came to Ireland from the Congo, on a date in 2004, and sought asylum. In February 2009, she was given permission to remain in the State until 2012. She made a claim for Child Benefit in April 2009 which was awarded with effect from the date that her permission to remain was granted. Her appeal refers to a request for arrears of payment on grounds that she met the Habitual Residence Condition (HRC) before that date.

**Oral hearing:** The appellant advised that she came to Ireland with her three children in 2004 and that she has remained in the State continuously since then. She said she had left the Congo as her children were being ostracized and life had become unbearable. She reported that their father was from Rwanda and said that anyone in the Congo that looked Rwandan was despised. She said she came to Ireland as a friend had told her she would be safe here. She went on to say that she no longer had contact with the father of her children and that, as far as

she was aware, he had returned to Rwanda. She reported that her mother still lives in the Congo but that she cannot go back to visit her. She said her life was now in Ireland. The appellant said she had been working as an administrator on a FÁS scheme since October 2009; before that, she had worked in the same position for about a year on a voluntary basis. She said that her children were now in school here and doing very well. She described efforts she had made to integrate into the local community.

**Consideration of the Appeals Officer:** The Appeals Officer referred to the legislation which provides that applicants to Child Benefit must be habitually resident in the State in order to qualify for payment. In determining whether a person is habitually resident in the State, account has to be taken of the following:

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

In terms of the duration of residence, the Appeals Officer noted that the appellant had been living in Ireland for almost six years, more than four of which were as an asylum seeker. In relation to any absence from the State, he was satisfied that she had not left Ireland since she came here. In regard to employment, he noted that she had been working for over a year and had worked previously as a voluntary worker while she had not been allowed to take up employment. On the point of her main centre of interest, he was satisfied that her centre of interest was now in Ireland. He considered that it was more difficult to say where her centre of interest was when she first came to Ireland. While she had no obvious ties to Ireland at that time, it appeared also that she could not easily have returned to the Congo which had been her centre of interest up to then. Concerning her future intentions, he was satisfied that it had been her intention to stay from the time she arrived in Ireland. He considered that it

was not reasonable to say that she had established a centre of interest in Ireland on her immediate arrival; while he accepted that she had cut her ties with the Congo, he viewed her as having had no significant ties of any kind to Ireland at that time. However, he considered that it was clear from her actions over the following years in relation to employment, her children attending school and her willingness to integrate into the community, that she had established a centre of interest in the State. Her position was recognised by granting her leave to remain here until 2012.

The Appeals Officer examined a submission from the appellant's solicitor which made three main points on her behalf. Firstly, he argued that that she had suffered financial hardship due to the delay in processing her refugee claim and that it would have been reasonable to expect her claim to have been dealt with within six to twelve months. Secondly, he stated that the appellant would give evidence of similar cases where arrears of payments were made. Thirdly he made the point that the legislation outlined in the Social Welfare and Pensions (No. 2) Act, 2009, does not apply in this case.

In relation to the delay in processing the appellant's application for refugee status, the Appeals Officer noted that there was no evidence as to the reason for the delay. However, he considered that the time taken in this case did seem unreasonable, although the solicitor's contention of six to twelve months seemed somewhat optimistic. While acknowledging that he did not have full details of the application, he suggested that processing within two years would be a more reasonable expectation. In relation to the contention that other applicants in similar circumstances had received arrears of payments, he noted that there was no evidence of this on file, nor had any evidence of this been produced at the oral hearing.

He drew attention to the fact that the legislation on HRC, as provided for in the Social Welfare and Pensions (No. 2) Act, 2009, did not apply in this case as the appellant's application for Child Benefit was received in the Department in April 2009, while the legislation came into effect from 21 December 2009. Accordingly, the only issue to be determined was the date from which the appellant could be considered to be habitually resident. While the Department had taken the date from which she was allowed to remain in the State, the Appeals Officer regarded this as

unreasonable in view of all the other factors outlined, as well as the fact that her circumstances did not change in any other way on that date. He concluded that while habitual residence has to be established with reference to the five factors outlined, Section 246 of the Social Welfare Consolidation Act, 2005 must also be considered; this contains a presumption that until the contrary is shown, a person is not habitually resident in the State unless they have been present in the State or in any other part of the Common Travel Area for a continuous period of two years. He was not satisfied that the appellant had rebutted this presumption for that two year period. He noted, however, that this presumption no longer applies after two years. In view of the fact that by that time, the appellant had been in the State continuously since she arrived and could reasonably have expected a decision on her application for asylum by that time, the fact that she had later shown her intention to establish a pattern of employment and to integrate into the local community, he concluded that she could be regarded as habitually resident in the State with effect from 1 January 2007.

**Outcome:** Appeal partially allowed.

## 2. Domiciliary Care Allowance – summary decision

**Question at issue:** whether the medical condition for receipt of Domiciliary Care Allowance has been met in this case.

**Background:** The appellant's claim in respect of her son, aged five years, was disallowed as the Deciding Officer determined that the medical criteria had not been satisfied. The child had been diagnosed with autism and absence seizures.

**Consideration of the Appeals Officer:** The Appeals Officer noted details of the medical evidence submitted in this case, including:

- medical report completed by the family doctor
- psychological assessment report
- report by a consultant paediatrician
- letter from a second consultant paediatrician
- occupational therapist's report
- further letter from the family doctor

- opinion of the Medical Assessor for the Department of Social Protection

The Appeals Officer noted the appellant's grounds of appeal and the level of care which she described in her application form and subsequent correspondence. The Appeals Officer noted also the more recent medical evidence which indicated that the child had a history of absence seizures and was being treated with medication, with regular specialist follow-up. Based on the evidence before her, the Appeals Officer concluded that the child satisfied the medical (and resulting care requirement) criteria of the scheme.

**Outcome:** Appeal allowed.

### 3. Domiciliary Care Allowance – oral hearing

**Question at issue:** whether the requirement as to the provision of substantial extra continuous care, in excess of that required by a child of the same age without a disability, is met in this case.

**Background:** The appellant made a claim for Domiciliary Care Allowance in respect of her son N, aged 13 years. He suffers from severe Eczema and Asthma, and has had both conditions since birth.

**Oral hearing:** The appellant was accompanied at the hearing by her mother. Having outlined the decision under appeal and the purpose and format of the oral hearing, the Appeals Officer invited her to outline the circumstances which she felt he should consider in relation to her appeal.

The appellant advised that her N's problems had been present since birth and that both conditions are prevalent in the family. She reported that he has to have a bath and have prescribed creams put on every morning and that he must then take inhalers. She went on to say that the inhalers have to be taken at least four times per day.

The appellant said that N has had constant colds and, in the previous couple of months, had also suffered nose bleeds. He attends Our Lady's Hospital for Sick Children, and sees a consultant there every eight weeks in relation to his asthma and a second consultant on an annual basis for his eczema. She advised that he was on steroids at the time of the hearing. She said that she tried to

discourage him from playing sports as she was concerned he might collapse and that he had, in fact, collapsed in the playground a few weeks earlier. She reported that he likes drawing and computer games and that he plays sports with his friends in spite of her misgivings. In conclusion, the appellant reported that N suffers from allergies and is currently awaiting the result of allergy tests.

**Consideration of the Appeals Officer:** The Appeals Officer noted the opinion of the appellant's family doctor, who completed the medical assessment section of the Domiciliary Care Allowance claim form. He described N as having mild difficulties in two areas: climbing stairs and walking. In all of the other categories, he had assessed N as being in the normal range. From the evidence provided by the appellant at the oral hearing, the Appeals Officer accepted that the appellant's son suffered from both severe eczema and asthma and that he required extra care and attention as a result. He took account of the fact that N needed to apply special creams and to use inhalers, as well as having to attend hospital on a regular basis. He concluded, however that N appeared to lead a relatively normal life and, while acknowledging that he required extra continuous care, did not consider that he required *substantial* extra continuous care. In the circumstances, the appeal did not succeed.

**Outcome:** Appeal disallowed.

### 4. Domiciliary Care Allowance – oral hearing

**Question at issue:** whether the requirement for continual or continuous care and attention, substantially in excess of the care and attention required by a child of the same age without a disability, is met in this case.

**Background:** The appellant has two sons, aged 18 and 15 years. Her younger son, P, was diagnosed with Asperger Syndrome (Autism Spectrum Disorder (ASD)) by the local Child and Adolescent Mental Health Service.

**Oral hearing:** The appellant was accompanied by her sister. The Appeals Officer outlined the decision under appeal and requested that the appellant provide him with an account of the circumstances in which her son had been

diagnosed and an outline of the care requirement attributable to that assessment.

The appellant said that she had known from about the age of 3 years (pre-school) that her son had 'issues'. He had attended various specialists and was diagnosed with Oppositional Defiant Disorder (ODD) and Dyspraxia; at about age 12 years, P had been diagnosed with ASD. He has a Special Needs Assistant in school.

The appellant advised that P had been suspended from school on a number of occasions because of his behaviour; he can be inclined to get extremely angry and frustrated, and can lash out. He had run away from home on a number of occasions (3 times last year). She reported that he had to be watched at all times and that she tries to prevent problems arising by maintaining a routine for him. She said that P has very low self esteem, is a compulsive eater, and is overweight. She has to shop on a daily basis or he would eat a week or a fortnight's food in a couple of days. He has been prescribed *Respirol* to calm his anger. He attends a psychiatrist on a three monthly basis and has to have regular blood tests because of the medication.

**Consideration of the Appeals Officer:** The Appeals Officer noted that the evidence available indicated clearly that the appellant's son had anger and behavioural problems and could be deemed to be a danger to others as a result. He noted also that P had low self esteem, was volatile and had run away from home. He concluded that he requires continual or continuous care and attention substantially in excess of the care and attention required by a child of the same age without a disability and, accordingly, he allowed the appeal.

**Outcome:** Appeal allowed.

## 5. Domiciliary Care Allowance – oral hearing

**Question at issue:** whether the appellant is entitled to continue to receive Domiciliary Care Allowance in light of a decision to terminate payment in respect of two of her children with effect from a date in 2010. (This is the first of two appeals, and refers to the appellant's son.)

**Background:** The appellant had been in receipt of Domiciliary Care Allowance in respect of four of her children, all of whom have a diagnosis of

Attention Deficit and Hyperactivity Disorder (ADHD) with complications. Following review, it was determined that two of those children no longer needed care at the level envisaged by the scheme and, with effect from a date in 2010, the payment was terminated. The appeal at issue was made in respect of the appellant's son, G, aged 13 years. A Medical Assessor for the Department of Social Protection had examined the medical evidence and found that his condition did not indicate the need for substantial extra continuous care. This opinion was confirmed subsequently by a second Medical Assessor. He has a diagnosis of ADHD, arthritis, asthma and a learning disability. The family doctor assessed G as being affected as follows:

- Mental health, learning/intelligence, balance/co-ordination, manual dexterity – affected to a moderate degree.
- Lifting/carrying, bending/kneeling/squatting – affected to a mild degree.

**Oral hearing:** The appellant was unaccompanied at the hearing. In her appeal submission, she had stated that her son suffered from asthma and ADHD, and that he requires constant supervision. He attends a consultant child and adolescent psychiatrist, and another consultant in relation to the mobility problems which he encounters due to rheumatoid arthritis.

At the hearing, the appellant advised that she had been in receipt of Domiciliary Care Allowance in respect of G and her daughter, K, for some five years prior to it being withdrawn. She continues to get the allowance for two younger children. She advised that G is in first year in secondary school. He uses the school bus to get there, and he has a Special Needs Assistant (SNA) and resource teacher. He is doing well at school, and achieved 60-70% in his 7 subjects at his Christmas exams. The appellant reported that the school is happy with him and that he is holding his own. His medical problems have, however, resulted in a lot of absences (25 days in the school year at that stage).

In addition to ADHD and a mild learning disability, G suffers from epilepsy, asthma and rheumatoid arthritis. The seizures began last autumn and the appellant said that she had trouble accessing services for a diagnosis; epilepsy was confirmed by MRI scan just two months earlier and he has been prescribed

*Lamictal*. This has controlled the seizures but its efficacy will have to be monitored.

The appellant described G's memory as poor, saying that he forgets that he has his school tie on. He is not interested in sport because of his arthritis but he walks and cycles and has a good diet. He enjoys music and video games.

**Consideration of the Appeals Officer:** The Appeals Officer considered that that, despite the onset of epilepsy, G was described as having a fairly normal life. While he does have medical complications which require a significant amount of care and attention, he took the view that that these did not demand a level of care that was substantially greater than another child of the same age without such complaints. He noted, however, that should the diagnosis of epilepsy lead to further complications, it may be necessary to revise the decision in this case. Having examined the evidence carefully, including that put forward at the oral hearing, the Appeals Officer concluded that while G may require additional supports, it had not been shown that he required substantial additional care, as provided for in social welfare legislation. In the circumstances, the appeal was unsuccessful.

**Outcome:** Appeal disallowed.

## 6. Domiciliary Care Allowance – oral hearing

**Question at issue:** whether the appellant is entitled to continue to receive Domiciliary Care Allowance in light of a decision to terminate payment in respect of two of her children with effect from a date in 2010. (This is a second appeal and refers to the appellant's daughter.)

**Background:** The appellant had been in receipt of Domiciliary Care Allowance in respect of four of her children, all of whom have a diagnosis of Attention Deficit and Hyperactivity Disorder (ADHD) with complications. Following review, it was determined that two of those children no longer needed care at the level envisaged by the scheme and, with effect from a date in 2010, the payment was terminated. The appeal at issue was made in respect of the appellant's daughter, K, aged 14 years. A Medical Assessor for the Department of Social Protection had examined the medical evidence and found that her condition did not indicate the need for substantial

extra continuous care. This opinion was confirmed subsequently by a second Medical Assessor. K has a diagnosis of ADHD and a learning disability; she also suffers from scoliosis. She is under the care of a consultant in Our Lady's Hospital for Sick Children.

In the medical report which forms part of the Domiciliary Care Allowance claim form, the family doctor assessed the degree to which her condition had affected K's ability across a range of categories, as follows:

- Mental health, learning/intelligence – affected to a moderate degree.
- Balance/co-ordination, lifting/carrying, bending/kneeling/squatting – affected to a mild degree.

**Oral hearing:** The appellant was unaccompanied at the hearing. In her appeal submission, she had stated that her daughter has a learning disability with a mental age of 10 years and that she also has ADHD, as well as mild congenital scoliosis. At oral hearing, she said that K suffers from chronic anxiety and oversensitivity and she outlined the impact this has had on her life, including the fact that she sleep walks regularly. She reported also that K had suffered severe scalding as a baby which left her with extensive scarring and may have contributed to her feelings of anxiety. K also suffers from chronic asthma. The appellant advised that K attends secondary school, and goes there by school bus. She said that although she has a Special Needs Assistant (SNA) and a resource teacher, she is not doing well at school. She has been assessed with a reading and mathematical age of 8-10 years; she is unable to tell the time and does not understand money. The appellant said that she provides an hour of physiotherapy for her daily in line with the medical advice she has been given. She agreed that K had more medical needs than her son, G, but argued that she was constantly bringing one or other of them to medical appointments.

**Consideration of the Appeals Officer:** The Appeals Officer, having heard the evidence provided by the appellant, concluded that the level of care being provided for K could be regarded as substantially in excess of that normally required of a child of her age without the various medical complications in addition to the ADHD diagnosed.

**Outcome:** Appeal allowed.

## 7. Guardian's Payment – oral hearing

**Question at issue:** whether the appellant's granddaughter may be deemed to satisfy the definition of orphan as prescribed in social welfare legislation.

**Background:** The appellant applied for Guardian's Payment in respect of the provision of full-time care and attention for her granddaughter C whose parents had both been given custodial sentences. C's mother M (the appellant's daughter) and her father had been committed to prison in 2009 and were due for release at the end of 2010. M was caring for C prior to her incarceration, and had been in receipt of a One Parent Family Payment. The appellant had full-time responsibility for C, who is brought to visit her mother on a weekly basis. Arrangements have been made to allow her to speak with her for six minutes daily by telephone. She is brought to visit her father on a monthly basis and also speaks with him by telephone for six minutes once a week.

**Report of hearing:** Having confirmed the decision under appeal and advised as to the purpose of the hearing, the Appeals Officer invited the appellant to outline the circumstances of the case.

The appellant stated that she had responsibility for all day to day care, both financial and emotional, for her granddaughter C. She reported that while she had full-time employment, she had fallen into debt due to the additional expense involved, and that she owed significant sums of money to her mother and to the Credit Union. She took issue with the Department's interpretation and stated that, due to the cost and non-availability of help, C's visits to her mother now average approximately one per month.

**Consideration of the Appeals Officer:** In examining this case, the Appeals Officer noted the conclusions of the Deciding Officer and the appellant's contentions, both written and oral. He found the Department's interpretation of the relevant legislation to be quite narrow. In his view, the consequence of C's parents' actions was that they had abandoned their child as, through their criminal behaviour, they were no longer able to provide any financial support. In addition, he considered that the six minute telephone calls and monthly visits could not be said to constitute any significant emotional support and could only be described as marginal

at best. He was satisfied that all financial support and all daily emotional support fell to be provided by the appellant. In addition, he noted that because she wished to continue working full-time, the appellant had the significant extra financial burden of paying for full-time childcare. He concluded that the lack of financial support and the very marginal level of emotional support provided by C's parents amounted to abandonment and a failure to provide.

**Outcome:** Appeal allowed.

## 8. Guardians Payment – summary decision

**Question at issue:** whether the appellant was entitled to payment as the child's guardian in view of the fact that her parents were providing support.

**Background:** The mother of two children (J and E) left the family home, leaving E in the care of J. E was a minor.

J applied for Guardian's Payment but her claim was disallowed as the Deciding Officer held that her mother was providing support by remitting Child Benefit payable in respect of E, that she visited periodically and that E was at liberty to reside with her. Further, the Deciding Officer referred to phone calls from E's estranged father (who had left the family home some ten years earlier) and occasional shopping visits, and held that the condition as to abandonment had not been met.

On advice from the Department of Social Protection, J applied for and was granted direct payment of Child Benefit in respect of E. Further, J applied for and was granted One Parent Family Payment with E as a qualified child.

**Consideration of the Appeals Officer:** His reading of the evidence in this case led the Appeals Officer to conclude that both of E's parents were effectively out of the picture and that little or no emotional support was being provided, with only occasional phone contact. He noted that financial support appeared to have been limited to the transfer of Child Benefit and a small discretionary stipend. He observed that there was nothing in the arrangement that he would regard as providing familial guardianship and that E had, in effect, been abandoned.



He noted also that the Social Welfare Inspector, who investigated the case, had reported that she was satisfied that J was the sole guardian for E and that she met the conditions for receipt of Guardian's Payment. Furthermore, J's case had been supported by the Health Service Executive (HSE). The Appeals Officer regarded as important the evidence indicating that the District Court had directed, in September 2009, that all relevant allowances be paid to J who had day-to-day control of E.

The Appeals Officer concluded that J met and exceeded all that could reasonably be asked of any person as guardian and, importantly, that she could not but be considered to meet all the legal requirements of the Guardian's Payment scheme and her appeal succeeded.

**Outcome:** Appeal allowed.

## 9. Supplementary Welfare Allowance (Rent Supplement) – oral hearing

**Question at issue:** whether Rent Supplement is payable in view of the fact that an assessment of the appellant's housing need was not carried out and the residence at issue was considered not to be a residence as envisaged by the relevant legislation.

**Background:** The appellant applied for a Rent Supplement, having moved into a boat on the canal some two months earlier. In his application to the HSE, it was described as a houseboat and the monthly rent was stated as €485.00. Proof of ownership of the boat and part of the lease agreement was submitted with the application. In its determination, the HSE did not accept that a boat came within the definition of 'residence' as outlined in legislation, nor was it regarded as a building or part of a building. On that basis, the appellant's claim was disallowed and that decision was upheld on appeal to the HSE.

**Oral hearing:** The appellant was unaccompanied at the hearing and the HSE Appeals Officer (Designated Officer) attended at the request of the Appeals Officer.

The appellant said that he was living alone on the boat and had no income other than Jobseeker's Allowance. Prior to becoming unemployed, he had worked as a caretaker and resided in a mobile home that came with the job. When the job finished, he said that he had to find alternative

accommodation and he moved into the boat at that stage.

The HSE Appeals Officer, on request, outlined the background to the case and the basis for refusing the appellant's claim. She re-iterated the fact that no housing need had been carried out and stated that, in her view, a boat did not fit the definition of either a residence or residential premises and quoted from the relevant legislation.

The appellant advised that all of his contact with the HSE had been carried out by letter and said that he was not aware of the need to have the local authority carry out a housing needs assessment. Having had the situation explained to him, he undertook to call to the offices of the local authority without delay.

In support of his assertion that the property should be regarded as a residence, the appellant explained that it had its own electricity meter and its own postal address; when water was required, it was obtained from a tap on the jetty. He stated that the boat never moved and that a yearly payment was made to Waterways Ireland for the mooring. He went on to say that he knew the owner. He had not paid any rent since he moved in and was in arrears; he was now afraid of being evicted and of being made homeless.

**Consideration of the Appeals Officer:** The Appeals Officer accepted that the appellant was unaware of some of the conditions for receipt of Rent Supplement. He noted that he had never met anybody from the HSE after he made his application; all aspects of his claim had been dealt with by way of correspondence. While he considered that the absence of a housing need assessment was in itself a basis for the appeal to be disallowed, he took the view that he was required at least to address the issue of the boat being a residence within the meaning of the legislation. The Social Welfare (Consolidated Supplementary Welfare Allowance) Regulations (S.I. No. 412 of 2007) provide that:

**'rent'** includes any periodical payment in the nature of rent made in return for a special possession of a dwelling or for the use, occupation or enjoyment of a dwelling ...

**'residence'** means a residential premises, other than an institution, that is used as the sole or main residence of the claimant;

**‘residential premises’** means a building or part of a building, used or suitable for use, as a dwelling and any land which the occupier of a building or part of a building used as a dwelling has for his or her own occupation and enjoyment with the said building or part thereof as its garden;

and

Subject to these Regulations, a person shall be entitled to a supplement towards the amount of rent payable by him or her in respect of his or her residence.

The Appeals Officer noted that under the definition of ‘rent’ the word dwelling is used, yet Article 9 of the Regulations states that a person shall be entitled to a supplement in respect of a residence. The definitions of residence and residential premises give the definition as a building or part of a building. While he concurred with the HSE in their interpretation that a boat is not a building or part of a building, he considered that the boat was in this case a dwelling and that the appellant was a bona fide tenant. In upholding the decision in the case, he stated that it was his intention nonetheless to make a case to have this piece of legislation examined with a view to properly aligning these provisions.

Having considered all of the evidence in the case, the Appeals Officer upheld the decision of the HSE as no housing needs assessment had been carried out. In addition, he concluded that a boat could not be regarded as meeting the requirements of the legislation as it could not be considered a building or part of a building.

Notwithstanding the above, and given the evidence of the appellant at the oral hearing and in an effort to avoid eviction, homelessness and hardship, the Appeals Officer allowed the appeal using the exceptional circumstances as provided for in Section 38 of the Regulations and determined that the appellant could receive Rent Supplement at the appropriate rate from the date of application for a period of twelve months. This was to allow him time to have a housing needs assessment carried out and to secure accommodation that meets the requirements of the legislation.

**Outcome:** Appeal allowed.

## 10. Supplementary Welfare Allowance (Basic Income)

### Jobseeker’s Allowance – oral hearing

**Question at issue:** There were two appeals dealt with in this case – concerning the appellant’s entitlement to Supplementary Welfare Allowance (basic income) and/or to Jobseeker’s Allowance. Her means had been assessed at €210 per week derived from the capital value of property, an amount in excess of the qualifying threshold for both schemes.

**Background:** The appellant left the family home in 2008, following the breakdown of her marriage. Her husband was retired and in receipt of a private pension. He received a lump sum on retirement which he used to clear the mortgage on the family home; he continued to live there with one of the couple’s adult daughters.

**Oral hearing:** The appellant was accompanied by a counsellor. The Community Welfare Officer (CWO) who had assessed the appellant’s entitlement to Supplementary Welfare Allowance attended at the request of the Appeals Officer, as did the Social Welfare Inspector who had investigated her claim for Jobseeker’s Allowance.

The appellant reported that she had left the marriage in 2008. She confirmed that the family home was held in the joint names of her husband and herself. She said that she had worked during her marriage, as had her husband, and that they had shared household expenses. Her husband had been responsible mainly for the mortgage while she looked after the daily necessities for the family.

In terms of her current circumstances, the appellant reported that she had lost her job and had claimed Jobseeker’s Benefit. When the period of entitlement ceased, she applied for Jobseeker’s Allowance and her claim was disallowed. She said that she had nothing to live on and was staying at a friend’s apartment. She asserted that it was very unfair to assess her with capital from property based on her family home as the property was still a family home. She said that if she looked for her share, her husband could not afford to buy her out. The other alternative, insisting on the house being sold, would render her husband and son homeless. She advised that she did not intend to seek a judicial separation, and that she would not apply for maintenance as it was she who had walked out on the marriage. The appellant went on to say that

the HSE had also refused her a medical card as the property was assessed as means under that scheme also.

The Social Welfare Inspector stated that the property at issue had been valued at some €170,000. Based on her investigation, she advised that the appellant's interest in the property was deemed to be capital; as she no longer lived there, it was not regarded as her family home in spite of the fact that her husband and daughter continued to reside there. The Inspector said that the appellant was expected to realise her share of the property.

In response, the appellant reiterated that she was the one who left the marriage and said that she felt her husband was entitled to more of the property as he was the one who had paid off the mortgage when he retired.

**Consideration of the Appeals Officer:** The Appeals Officer observed that the appellant had appeared somewhat overawed by the oral hearing. She considered that she had been very open regarding her current circumstances but reticent to discuss her separation. Having considered all of the evidence, including that presented at the oral hearing, the Appeals Officer concluded that the property in question should not be assessed as means. In making that decision, she referred to the Social Welfare (Consolidation) Act, 2005 (Part 2, section 1), as follows:

In the calculation of means of a person for the purposes of Chapters 2, 3, 10 and 11 of Part 3, account shall be taken of the following –

- (1) other than in the circumstances and subject to the conditions and for the periods that may be prescribed, the weekly value of property belonging to the person or to his or her spouse (not being property personally used or enjoyed by the person or his or her spouse or a farm of land leased either by the person or his or her spouse) which is invested or otherwise put to profitable use or is capable of being, but is not, invested or put to profitable use and the weekly value, calculated in accordance with Table 1 to this Schedule, constitutes the weekly means of a person from that property ...

The Appeals Officer held that, although the appellant had left the property, it was still functioning as the family home and was being

personally used and enjoyed as such by the appellant's husband and daughter. In accordance with the provisions of social welfare legislation, and the Department of Social Protection's own Guidelines ('Assessment of Second or Multiple Properties'), the Appeals Officer concluded that the property was not capable of being sold, let or put to profitable use and should not be assessed as means in this case. Accordingly, the appellant was assessed with nil means and the appeal was successful.

**Outcome:** Appeal allowed.

## 11. Supplementary Welfare Allowance (Mortgage Interest Supplement) – oral hearing

**Question at issue:** whether the appellant is entitled to a mortgage interest supplement in respect of a property purchased in 2006.

**Background:** The appellant purchased his former parental home from his brother in July 2006 for €300,000, using a 100% interest only investment mortgage. In October 2009, he applied for Supplementary Welfare Allowance (Mortgage Interest Supplement) and was refused on grounds that the mortgage had been obtained for investment purposes. In May 2010, he submitted a letter from the lending agency stating that it had agreed to treat the mortgage as a home loan. (The appellant had ceased self-employment at the end of 2007 for health reasons and has been in receipt of Disability Allowance since then.)

**Oral hearing:** The appellant reported that his brother had decided to sell the former parental home at a time when he was living in a one bedroom apartment provided by the Respond Housing Association. He had applied previously to a lending agency for a mortgage but had been refused in view of his health. Subsequently, however, he said that the estate agent handling the sale had advised that he could get a mortgage with a different lending agency. He said he had not been aware that the mortgage was made available on the basis that it was for a residential investment. The Appeals Officer asked whether this had not become apparent when he signed the application but the appellant insisted that he had focused wholly on saving the family home and not on the nature of the mortgage application.

The appellant said that he moved into the house in mid 2006 when the sale had been completed.

The appellant stated that the mortgage repayments had been met in full until early in 2010. He said that he had cashed in an occupational pension (€13,000) and used this and other savings. He had also received help from his family to meet the repayments. Since then, he had agreed to pay €200 per month. The Appeals Officer asked about the income stated for the mortgage application and that returned for income tax purposes. The appellant said that €65,000 had been stated in the context of the mortgage application and indicated that the estate agent had advised him that an income at that level was required. In relation to income tax, he was unable to state the amount involved but thought it had been between €400 and €800 each year. The Appeals Officer suggested that this amount did not appear compatible with declared earnings of €65,000 and he invited the appellant to submit a copy of the mortgage application and a copy of his tax returns for the period at issue. The appellant subsequently provided these documents.

**Consideration of the Appeals Officer:** The Appeals Officer noted that the appellant's initial application for a home loan had been refused as the lending agency did not consider his health would allow him to continue in employment and so be in a position to service the loan. He considered that this assessment had, regrettably, been borne out by subsequent developments. He noted also that, at the suggestion of the estate agent, the appellant had applied to a second lender for an investment mortgage.

Having examined the documentary evidence submitted by the appellant, the Appeals Officer noted that the statement of the appellant's earnings supplied to the lending agency by the appellant's accountant was sufficient to support a mortgage at the level sought but was not consistent with the income declared for income tax purposes. In the circumstances, he indicated that he was not prepared to accept that the information supplied to the lending agency represented an accurate reflection of the appellant's income or demonstrated an ability to service the loan on an ongoing basis. He took into account also the fact that the accommodation was in excess of the appellant's needs as a single person and that he had not been in need of accommodation in 2006. He considered that

there did not appear to be any prospect of the appellant being able to service the mortgage at any stage in the future.

The relevant social welfare legislation (S.I. 412 of 2007) provides that Mortgage Interest Supplement is payable where:

‘the amount of the mortgage interest payable by the claimant does not exceed such amount as the Executive (HSE) considers reasonable to meet his or her residential and other needs’.

In determining whether a supplement is payable, account is taken of the accommodation requirements of the applicant, the level of mortgage repayments, the age of the mortgage, whether the mortgage was affordable when taken out, if it is solely related to the provision of housing or incorporates other debts, the level of arrears, the prospects of the applicant being able to service the mortgage within a reasonable timescale and how the interest payable relates to the equivalent rental income for the family size in question. Having carefully considered the evidence and the circumstances of the case, the Appeals Officer concluded that the application should not be approved.

**Outcome:** Appeal disallowed.

## 12. Jobseeker's Benefit – oral hearing

**Question at issue:** whether the appellant, who is on a career break, may be deemed to be unemployed for purposes of her Jobseeker's Benefit claim.

**Background:** The appellant worked as a solicitor until 2009 when she took a two year career break. The Deciding Officer disallowed her claim on the basis that she was deemed to be ‘not unemployed’ throughout the period of her career break. He referred to the Guidelines set down by the Department of Social Protection as the basis for that decision and concluded that the appellant, being on a career break, was ‘under contract’ with her employer.

**Oral hearing:** The appellant advised that it was she who initially approached her employer seeking a period of absence from work. She reported that she had indicated to her employer that she was seeking the protracted absence to pursue further studies. Her employer offered her

a career break, specifying both the date of commencement and an expected date of return to work.

The appellant advised that it had never been her intention to concentrate all her time and energies to studying, having left work. She suggested that her ultimate goal at the time was to find alternative employment and pursue her studies outside of core working times.

She asserted that since taking her career break she had continually been available for and genuinely seeking work. She stated that she had been issued with a P45 at the time of leaving and that she had also received an ex-gratia payment. The appellant advised that although the terms of her career break precluded her from working with any other law firm during the period in question she considered her scope in seeking alternative employment had not been unduly restricted. She referred to the fact that she had subsequently taken up employment and was, at the time, working as an in-house solicitor.

**Consideration of the Appeals Officer:** The Appeals Officer noted that career breaks, as they relate to entitlement to benefits, are not specifically prescribed for in social welfare legislation. He noted also the Department's Guidelines in the matter, suggesting that a person on a career break is 'not unemployed' during the agreed period of the career break. He considered that the terms of the appellant's career break were, therefore, relevant in establishing the employment status of the appellant throughout the period in question. In this context, he drew attention to some of the specific terms and conditions outlined in the relevant contract, as follows:

- Rights to remuneration and benefits suspended.
- Precluded from working with any other law firm during the period at issue.
- Period of career break not considered as reckonable service.
- Firm to continue to contribute to health insurance for the first 12 months.
- Continuous service record to be retained during the period in question.
- Possible return to work, with one month's written notice, at the firm's discretion.

The Appeals Officer noted that the appellant had accepted the terms applying to the career break, and also that she had commenced employment during the period of the career break. He took account of the fact that she had received a payment of €20,000 at the commencement of her career break, which was identified in the contract as a 'career break payment'. He considered that this career break payment and the health insurance payments implied some retention or attachment to the employment, particularly during the initial twelve month period. While the appellant argued that her scope in seeking alternative employment had not been unduly restricted by the terms of the career break, the Appeals Officer indicated that the contract made clear that there were parameters put in place. Given that the terms of the contract provided the firm with discretion in requiring the appellant to return to work, he considered that under the terms of the contract her services were retained. In the circumstances, he upheld the Deciding Officer's decision.

The Appeals Officer referred to the fact that social welfare legislation does not, at this time, specifically address such circumstances. He suggested, however, that the ever changing nature of employment and the availability within the public and private sectors of more varied and accessible work/life balance arrangements, including the option of more varied and flexible career break options, would indicate the need to establish a statutory legislative basis specific to this area.

**Outcome:** Appeal disallowed.

### 13. Jobseeker's Benefit – oral hearing

**Question at issue:** whether the appellant could be deemed to be available for full-time employment for purposes of her Jobseeker's Benefit claim.

**Background:** The appellant was employed by a large company in the period from February 2008 to March 2010. She was let go due to restructuring and applied for Jobseeker's Benefit. Her claim was disallowed on grounds that she was not available for work. The reason cited by the Deciding Officer was as follows:

'your Garda immigration card indicates Stamp 3. This means you are permitted to

remain in Ireland on condition that you do not enter employment. Therefore you do not satisfy the condition of being available for full-time work which is required for payment of a Jobseeker's payment'.

The appellant resides with her husband and two children. The children attend the local school and she is in receipt of monthly Child Benefit.

**Oral hearing:** The Appeals Officer read out the formal decision, the Deciding Officer's submission and the appellant's letter of appeal. In her detailed letter of appeal, she had outlined the background to her move to Ireland with her spouse and children, how she sought and obtained employment and how she had received a 'spousal/dependent permit'. She was issued with a Stamp 1 visa at that time. She stated that her husband had applied for and received a Green Card permit from the Department of Enterprise. The issues raised in her letter of appeal were expanded upon at the hearing.

The appellant advised that her husband had been employed in India. He was promoted and, in 2006, came to work in a European branch of the company located in Dublin. The family joined him some months later. He is the holder of a Green Card permit and has an open ended contract with the company.

The appellant advised that when she arrived in the country initially she was given Stamp 3 visa status but when she secured employment, this was changed to Stamp 1. Documentary evidence in support of this was on her file.

She stated that she was available for work and had tried to secure employment but to no avail. Given the fact that she is a dependant of her husband who holds a Green Card, her Stamp 3 visa status will be changed to Stamp 1 when she secures employment – of any nature – as happened when she took up employment in 2008. She made the point that she had paid income tax and Pay-Related Social Insurance (PRSI) while she was employed.

**Consideration of the Appeals Officer:** The Appeals Officer observed that the appellant had been very open and appeared genuine when giving her testimony. He noted that there was no doubt regarding her husband's status in the country and the fact that she is a spouse of an employment permit holder. He drew attention to the fact that the decision under appeal was that the appellant was deemed not available for full-

time work and the primary reason given by the Deciding Officer was that she had 'Stamp 3' status.

The Appeals Officer reviewed the 'Guide to Work Permits for Spouses and Dependants of Employment Permit Holders' as issued by the Department of Enterprise. The Guidelines, which were introduced in January 2007, were designed to give greater ease of access to employment for spouses and dependent unmarried children under 18 years who have been admitted to the State as family members of 'employment permit holders'. They are allowed to apply for a work permit in respect of all occupations; the employer does not have to undertake a labour market test and the applicant is exempted from any application fee.

The Appeals Officer noted that the appellant had applied for and received the necessary work permit when she obtained employment in 2008. He accepted that the evidence provided at oral hearing indicated that she was actively looking for work. Should she be successful in securing any type of work and, bearing in mind the Department of Enterprise Guidelines, she would have her Stamp 3 status changed to Stamp 1, thus allowing her to work. He considered that her current situation was a technical one and would be changed without any difficulty as soon as she secured employment. In the circumstances, he concluded that she fulfilled the condition of being available for work, in line with the requirements of social welfare legislation.

**Outcome:** Appeal allowed.

## 14. Jobseekers Benefit – oral hearing

**Question at issue:** whether the appellant sustained a substantial loss of employment for purposes of her claim to Jobseeker's Benefit.

**Background:** The appellant had been in employment from age 17 years and had a social insurance record of 2,366 weeks of insurable employment. Due to a downturn in business, her working week was reduced from five days to two days, with a corresponding loss of earnings, with effect from January 2008. In January 2010, the appellant's claim for Jobseeker's Benefit was disallowed on grounds that she had not suffered a substantial loss of employment, as prescribed in legislation. This decision was based on the fact that she had been working a two-day week for the

previous year and that there had been no relevant reduction in her normal level of employment.

**Oral hearing:** The appellant was accompanied by a friend. In line with the details set out in her letter of appeal, she reported that she had been employed on a full-time basis by the same employer for approximately 40 years prior to suffering a substantial loss of employment, with effect from January 2008. She stated that she had not claimed Jobseeker's Benefit immediately due to difficult ongoing domestic and personal circumstances, and that she had made do on her reduced earnings. She outlined details of those circumstances and sought to explain the reason for the delay in making her claim.

**Consideration of the Appeals Officer:** The Appeals Officer referred to the Guidelines of the Department of Social Protection on establishing the normal level of employment for the purposes of determining whether there has been a substantial loss of employment, including the following:

'Where the level of employment during the preceding 13 weeks differed temporarily but significantly from the person's previous level of employment, it may be more appropriate for the Deciding Officer to choose an alternative period. For example, where the person's level of employment fluctuated because of annual workflow patterns or unusual circumstances, the Deciding Officer should look at the record of employment over the previous 26 or 52 weeks.'

The Appeals Officer noted that the substantial loss condition was introduced in 1993 in tandem with the effects of the extension of full Pay-Related Social Insurance (PRSI) to include certain part-time workers in order to ensure that a person would only qualify for benefit where he or she had had suffered a loss of employment. While the legislation prescribes that a person must suffer a loss of employment, it does not prescribe a period prior to the claim which may be considered in determining if such a loss has been sustained.

He considered that while it was reasonable and appropriate to outline in Guidelines a method for determining a loss of employment in order to ensure consistency in the application of the condition, account must also be taken of exceptional cases or circumstances. He observed that where a person had not established a

consistent level of employment over several consecutive years, it would be appropriate to apply the method used in the Departmental Guidelines. However, he was also of the view that, having established a record of full-time employment with the same employer over such a protracted period of 40 years prior to suffering an involuntary loss of employment, and given all of the circumstances of this case, it would be unreasonable to regard the appellant's employment at 2 days per week for approximately 2 years as her normal level of employment. In view of the appellant's exceptional employment record, and taking account of her appeal contentions, he concluded that she had suffered an involuntary substantial loss of employment, as prescribed, for the purposes of Jobseeker's Benefit. Accordingly, the appeal was allowed with effect from the date of claim.

**Outcome:** Appeal allowed.

## 15. Disability Allowance – oral hearing

**Question at issue:** whether it was correct to disallow the appellant's claim in respect of a period between 2007 and 2008, on grounds that his means from employment exceeded the statutory limit – with the assessment of an overpayment of some €19,000.

**Background:** The appellant, a 25 year old single man who resides with his mother, applied for Disability Allowance in 2003 with a certified illness of benign essential tremor and was awarded payment. Subsequently, it came to the attention of the Department of Social Protection that he had been employed with effect from a date in 2007. Having examined his earnings in the period at issue, he was deemed not to have been entitled to payment and an overpayment was assessed.

**Oral hearing:** The appellant maintained that he was unaware of the earnings implications in relation to Disability Allowance. The Appeals Officer drew his attention to his initial interview by the Social Welfare Inspector, which had been conducted to determine whether he had any means in the context of his. He pointed out to the appellant that in his report of that interview, the Inspector stated that he had advised him of his obligations to notify the Department if and when

he commenced employment. In reply, the appellant stated that he had no recollection of that interview or the Inspector's advice.

The Appeals Officer reviewed the documentary evidence on file, including a number of letters issued to the appellant by the Inspector which specifically referred to details of his income and advised of the obligation to notify the Department in the event of taking up employment. The appellant stated he had no recollection of receiving any such letter. He said that he had been away at college and his mother had managed all his affairs; in that capacity, she would have dealt with any correspondence received. He added that as he was in receipt of a Post Leaving Cert Maintenance Grant in addition to his Disability Allowance, he was not sure of the conditions for receipt of the payments. He attributed his failure to notify the Department to this lack of knowledge.

The Appeals Officer advised the appellant that evidence on file indicated that he had been working in a restaurant in 2004 and that he had sent the Department a Form P45 in respect of that employment, with an accompanying letter. The Appeals Officer suggested that this indicated that he was aware of the conditions pertaining to receipt of the payment. In response, the appellant reiterated his earlier written contentions that he never knew the details of the Allowance and that it was always his belief that it was his entitlement. He went on to say that he had been under 18 years of age when he applied for Disability Allowance and that his mother had managed completion of the claim form and related matters. He added that she generally cashed the payment at the post office on his behalf as she was his agent. He submitted, therefore, that he should not be liable for any overpayment.

**Conclusion of the Appeals Officer:** The Appeals Officer noted the contents of the Social Welfare Inspector's report, conducted when the appellant's means were assessed initially in 2003. He noted also that the report of the interview indicated that the appellant's mother was present throughout. He referred to the correspondence issued to the appellant on three occasions, all of which referred specifically to the requirement to notify any change in his circumstances, including the commencement of employment.

In relation to the appellant's contention of ignorance of the conditions attaching to receipt of

Disability Allowance, due in part to his medical condition, the Appeals Officer was not satisfied that this was the case. On the contrary, he noted that the medical report completed by the appellant's family doctor indicated that, despite his medical condition, he was assessed as 'normal' across a range of abilities, with the exception of manual dexterity and balance. This, in the view of the Appeals Officer, was supported by the fact that the appellant did not require the appointment of a 'type 2 agent' where a person is unable to manage their own financial affairs and requires a person to act on their behalf. He had appointed his mother as a 'type 1 agent'; someone who could collect his payment from the local post office.

The Appeals Officer viewed the appellant's capacity to study and maintain himself while attending college and living away from home to be indicative of a person who can manage independently, a fact confirmed by his full-time employment. He referred to the appellant's claim form which indicated that he was over 18 years at the time and not 17 years, as he had stated. He noted the extensive communication from the Social Welfare Inspector to the appellant in late 2003 and early 2004 and was satisfied that the appellant was made aware of his obligations to notify the Department of any change in his circumstances or means. Based on all of these circumstances, he upheld the Deciding Officer's decision in the case. He stressed, however, that in pursuing the recovery of the overpayment, due regard must be taken of the fact that the appellant is the sole earner in the household while his mother is the recipient of a social welfare payment.

**Outcome:** Appeal disallowed.

## 16. One Parent Family – oral hearing

**Question at issue:** co-habitation – whether the decision to disqualify the appellant for receipt of One Parent Family Payment, with effect from a specified date in 2008, was correct.

**Background:** The appellant was awarded One Parent Family Payment (formerly One Parent Family Allowance) in 1991. It came to light that she may have married in 1999. Following several investigations by the Department of Social Protection, it had been concluded that



while the marriage had taken place, it had only lasted a month and the parties were estranged by June 2000.

The appellant participated in a Community Employment Scheme and was paid in respect of four qualified children, whereas her One Parent Family Payment included only two. The case was referred to a Social Welfare Inspector for investigation and it was confirmed that the appellant had four children. It emerged that her husband (J) had an address next door to the appellant's home.

**Oral hearing:** The appellant was accompanied by a Family Support project leader. The Social Welfare Inspector attended at the request of the Appeals Officer.

The Inspector outlined the details of his investigation in the case. He reported that when he had interviewed the appellant initially, she told him that she did not know the identity of the father of her two youngest children. However, when he put it to her that their father was her husband, J, she acknowledged that this was the case. She told him that her husband had stayed over the odd night after family funerals and a chance meeting; she denied that he was living with her. She advised that he resided with his mother. After a number of failed attempts to contact him there, however, his mother had advised the Inspector that he lived at the address adjacent to the appellant's. The owner of that property had advised that she had allowed J and the appellant to have the tenancy for €4,000 as she was going away. On her return, however, she reported that she found that both houses had been converted into one unit. She asserted that the appellant and J had resisted her attempts to regain possession of the property. The Inspector established that a car was registered to J at the appellant's address and he reported that he had observed the car there on a number of occasions.

The Inspector referred to the appellant's failure to notify the Department of Social Protection of significant changes in her circumstances: her marriage in 1999 and the birth of her third and fourth children for whom she did not claim an increase in payment. He referred also to her statement to an Inspector in 2003 that she had had no contact with J since their short and failed marriage, despite being pregnant at that time. He stated also that the fourth child's birth certificate indicated that the father was J, and the appellant's address had been stated as his address also.

In response, the appellant referred to each aspect of the evidence outlined by the Inspector. She said that her marriage in 1999 to J did not last a week; she was embarrassed about this and did not mention it initially when approached by the Inspector. She said, however, that she later accompanied J to the Inspector's office and handed in a marriage certificate. She said that in 2003 she had been unaware of her pregnancy at the time when she was interviewed by the Inspector; it was a difficult pregnancy, during which she had been in hospital for an extended period, and she acknowledged that J took care of the children during that time. She said that when the child's birth was registered, J's mother had moved address and she did not know the new address and so she gave the father's address as her own. She denied any knowledge of a car registered to J at her address. She asserted that a lot of cars parked on the corner near her house but said that this did not indicate that the owners were resident in the house.

The appellant presented a motor vehicle registration certificate in the name of J, using the address adjacent to hers, and a letter from the local authority indicating that he had applied to be placed on the housing list.

The Family Support project worker said she was aware of the appellant's domestic situation and the ups and downs she had experienced over the years. She said that she considered the couple to be very responsible and good parents and had observed that J was always good to the children. She asked if he should be present at the hearing to give evidence. The Appeals Officer advised that he did not consider it necessary to summon J to the hearing but said that if the appellant required his presence, she could invite him to attend.

**Further evidence:** Following the hearing, the appellant submitted a letter from the local authority stating that J had been found eligible for social housing (medical category).

**Consideration of the Appeals Officer:** The Appeals Officer noted the history of the case and the appellant's apparent reluctance to be open and candid with Social Welfare Inspectors in relation to her marriage to J, his address, and their children. She had indicated that their marriage was very brief. He observed that this would appear to indicate that an obvious and significant incompatibility had quickly emerged. He considered that such a scenario was difficult

to reconcile with the evidence of an ongoing close relationship between the parties in subsequent years.

The Appeals Officer referred to the Guidelines of the Department of Social Protection in relation to co-habitation, including the five factors which are taken to point to a couple residing together as husband and wife, and he noted as follows:

- *Co-residence:* The evidence indicates that adjoining houses were converted so as to make one unit where the couple resides with their children. The assessment of housing need relates to J's future needs and cannot be taken as evidence that he is not now resident with the appellant. In addition, he was recorded as living at the appellant's address on his child's birth certificate and for vehicle registration purposes.
- *Household Relationship Finances or Duties shared:* There is evidence of sharing of duties in relation to their children. There is no evidence in relation to financial arrangements.
- *Stability:* The history of the case points to a long-standing relationship.
- *Social:* There is no evidence in relation to the couple being regarded as a couple locally or of sharing a social life.
- *Sexual:* The couple had children in 2001 and 2003 at a time when the appellant presented herself to the Department of Social Protection as a single parent.

Taking account of all the evidence in the case, the Appeals Officer concluded that the appellant and J were in a relationship which had all the appearances of a couple living together as husband and wife.

**Outcome:** Appeal disallowed.

## 17. Insurability – oral hearing

**Question at issue:** the appropriate rate of Pay-Related Social Insurance (PRSI) contribution due in respect of the employment of a person in the appellant's medical practice in the period September 2007 to November 2008.

**Background:** A doctor, N, worked at a Health Care Centre for the period September 2007 to November 2008. The appellant, another doctor

and a sole trader, indicated that he was approached by N, an EU citizen, as she wished to gain practice and experience working as a GP in the Irish health care system. His practice had provided such opportunities for other doctors in the past, and he agreed.

After a time, N appointed a solicitor to investigate the arrangements which applied to her work at the practice and a decision on her insurability status was sought from the Department of Social Protection. Social Welfare Inspectors interviewed both parties to obtain details of the employment. Their reports were made available to a Deciding Officer, who determined as follows:

The employment of N by C during the period specified was insurable under the Social Welfare Acts at PRSI Class A provided reckonable earnings are €38 or more per week.

The appellant appealed the decision on grounds that N was a self-employed operator.

**Oral hearing:** The appellant attended, accompanied by the practice secretary. The Social Welfare Inspector and the Deciding Officer attended, at the request of the Appeals Officer. The PRSI status of N was at issue and she had been summoned as a witness but failed to attend. It was agreed to proceed without her. The Appeals Officer advised, however, that should it transpire that a revised decision in favour of the appellant was contemplated, he would write to N to afford her an opportunity to comment beforehand. The appellant wished it noted that N had similarly failed to attend a Labour Relations hearing and that he had taken time off from his practice to attend.

The Deciding Officer was invited to set out the decision and to outline the grounds on which he had relied. He spoke of the general conditions which apply in determining whether a contract of service or a contract for services applies, referring to contract law and precedent cases. He highlighted the following as indicative of a contract of service in this case:

- N was under control and direction as to when and how to do her work. A person with specialist knowledge could be employed under a contract of service and there were many cases where this occurred. Such a person could work with quite an amount of freedom as to how to

do the work but could still be under control and direction from the employer.

- She had no responsibility for the management of the practice.
- She was paid a fixed wage and she could not suffer a loss or make a gain depending on the success of the practice. She was not exposed to financial risk by her involvement.
- She had to attend in person and was not free to send a substitute.

The Deciding Officer made reference to a recent finding of the Revenue Appeals Commissioners where a doctor employed in an out-of-hours service has been found to be insurable as an employee.

In response, the appellant asserted that the circumstances of an out-of-hours co-operative were not comparable to his situation as they were limited companies. He alluded to N's position at the start of the arrangement: her qualifications were recognised in Ireland by virtue of EU Regulations but she had no experience of general practice in Ireland. The arrangement was solely to afford her the opportunity to gain this experience. He rejected the assertion that she was an employee, indicating that the arrangement was verbal with no written contract. He said that N was well acquainted with similar arrangements as she had worked in a self-employed capacity in the US. He stated that both parties clearly understood that she was to be a self-employed operator at the start of the arrangement.

It was clarified that N attended the practice where she saw both medical card and private patients; she was expected to attend during normal practice opening hours. It was agreed at the commencement of the arrangement that she would be paid a set amount, which rose to €75,000 per annum over time; the amount was not dependent on the number of patients seen. The appellant asserted that N was a poor financial manager and that it was agreed to pay her a set amount to give stability and to bring a certainty to her finances.

The appellant made reference to additional earnings outside of the arrangement with the practice. As N developed a profile, she began to include her own private patients and she was free to see these patients in the practice after normal opening times; she was paid privately by these patients. In addition, the practice was on call for

out-of-hours cover from time to time. N provided cover at such times and was free to keep any fees earned; it was clarified that this arrangement applied to all doctors in the practice. The appellant referred also to an arrangement with the Gardaí to attend for drink driving cases. When the practice was contacted and N attended, she was free to keep half of the fee charged with the other half going to the practice. The appellant stated, however, that if the Gardaí contacted N independently, she was free to retain the full fee.

The appellant stated that N, as is the case with all practicing doctors, carried her own professional indemnity insurance, she was registered with the Medical Council and was personally responsible to deal with any allegation of medical malpractice. She was not required to have public liability insurance, however, as all patients attending the practice, including her private patients attending after practice opening times, were covered under the practice insurance.

The appellant asserted that the arrangement with N was always viewed as temporary; she had indicated that it was her intention to move on. He said that the question of sending another person to cover her attendance at the practice had never arisen. While she often changed her schedule, the practice secretary was informed and it was her responsibility to arrange cover. He said, however, that other doctors were free to send their own substitutes if unable to attend and that, had it arisen, N was free to do so also.

The appellant stated that the arrangement with N was subject to regular review; as she became more experienced, she became more valuable to the practice and her earnings increased but her hours of attendance reduced. He advised that any instance of complaint would have been a matter for the Medical Council. The arrangement could have been terminated had it been found that there was evidence of illegal or unprofessional conduct.

The appellant concluded by saying that, in 15 years of practice, he had always understood that doctors engaged in a similar fashion to N were treated as self-employed and liable to manage their own tax affairs, and that this arrangement had always been accepted by the Revenue Commissioners. He went on to outline the consequences of the decision under appeal, saying that if it were to be upheld, a significant financial liability would arise. It was explained that any liability arising was a matter for the

Department Of Social Protection and the Revenue Commissioners.

In summary, the Deciding Officer alluded again to a recent case where the Revenue Appeal Commissioner found a doctor employed in an out-of-hours co-operative to be insurable as an employee. The appellant reiterated his view that the case was not comparable as co-operatives operated very fixed arrangements and did not offer training or opportunities to improve experience or earn additional income. It was agreed, however, that the Deciding Officer would make the text of that decision available to the Appeals Officer and to the appellant for any comment he might make.

**Further discussion:** An exchange of emails followed the hearing. Details of the case referred to by the Deciding Officer were clarified but he indicated that he was not in a position to supply the text of the decision made by the Revenue Appeals Commission. As the text of that decision was not available, the Appeals Officer advised that he could not take account of the case in reaching his decision. He noted also that the question of the insurability of employment under the Social Welfare Acts is a matter to be decided by the appropriate officer of the Department of Social Protection and that the findings of the Revenue Appeals Commissioners were not, therefore, relevant to the question and should not be used as a precedent.

**Consideration of the Appeals Officer:** The Appeals Officer indicated that as N had failed to attend the hearing and he did not have the benefit of her oral evidence, he had relied on the appellant's account in relation to any points in dispute. He noted that the appellant had confirmed that N had been engaged by him, a sole trader, to attend the practice at set hours, to see patients of the practice and was paid a set amount for her time and work. She was not in any way involved in the management of the practice, was not involved in any decisions relating to the management of staff, equipment or facilities.

The Appeals Officer noted also that N was engaged for her skill as a doctor and as such was not under control and direction as to how she dealt with patients. While the evidence indicated that she was engaged to gain experience, he considered it reasonable to conclude that a certain amount of monitoring of her performance would have taken place particularly at the start of the

arrangement. He referred to the Deciding Officer's contention that persons with particular skills, who would not be controlled and directed in carrying out their specific duties could, nevertheless, be subject to overall control and direction as to their terms of employment. He took the view that the evidence pointed to this being the case here: N was required to attend surgery hours; patients were allocated to her on a random basis; she could not select her own, and she was under the control of the practice procedure as to when and where she did her work.

The Appeals Officer considered that the issue as to sending a substitute was unclear and he noted that it had been stated that such an instance had never arisen. However, it had been agreed that when N was unavailable for her scheduled hours of attendance, the practice secretary made arrangements to cover her absence; the appellant did not arrange the necessary cover.

The Appeals Officer observed that all doctors in practice carry their own professional indemnity insurance; however, this does not of itself suggest that they are in business on their own account. A doctor may be exposed to other risks in relation to public liability and the safety of patients attending the place of business or in relation to the keeping of individual records and data. A doctor in business on his/her own account would be expected to take out the necessary insurance against such risks; N did not carry such insurance nor was she required to do so.

The question of misconduct or unprofessional behaviour was discussed at the hearing, with the appellant indicating that such a case would have been a matter for the Medical Council. The Appeals Officer noted, however, that when pressed in relation to the possibility of continued unacceptable behaviour, the appellant had indicated that he would have taken steps to ensure professional standards at the practice. While he was not specific in relation to the steps envisaged, the Appeals Officer considered it reasonable to assume that N would have been asked to leave. He observed that it was not credible that a doctor joining the practice to gain experience could not have been dismissed if their behaviour had proved unacceptable.

In summary, the Appeals Officer concluded that the essential elements of a contract of service existed in this case: N was paid a fixed wage and was subject to control and direction; she was

required to render personal service and could not gain or suffer a loss from the performance of the business. He considered that N, while engaged by the appellant under a contract of service, was also operating as a self-employed person outside of the hours she was required to attend the appellant's practice.

**Outcome:** Appeal disallowed.

## 18. Widow's (Contributory) Pension – summary decision

**Question at issue:** whether it was correct to award a (pro-rata) Widow's Pension in connection with a claim made in 2006; the appellant held that an earlier claim made in 1992 had not been determined.

**Background:** The appellant, who is living in the USA, made a claim for Widow's Pension in 2006, indicating that she had been widowed in 1992 and re-married in 2003. She referred to an earlier claim made in 1992 and sought to have pension paid to her from the date of that claim. However, the claim made in 2006 was treated as a retrospective claim, with the provisions which refer to late claims being applied. The Deciding Officer determined that the appellant did not qualify for pension based on her Irish social insurance record alone. On the basis of a combined Irish/USA record, however, she was awarded a pro-rate pension at a rate of 42%. She would have been eligible for State Pension from a date in 2005 (at age 66 years) so that date was treated as her date of claim and the proportionate backdating provisions were applied. (These are outlined in the Social Welfare (Consolidated Claims, Payments and Control) regulations, 2007 (S.I. 142 of 2007). The appellant was then awarded arrears of pension from a date in 2002 to the date when she re-married.

**Consideration of the Appeals Officer:** Over an extended period, the appellant sought to have the earlier claim recognised. Ultimately, a review of the case was carried out by the Department of Social Protection. The earlier claim papers were retrieved, establishing that the date of application was 1992, as asserted by the appellant, but the decision in the case was confirmed. The appellant then made an appeal to this Office. In the context of her appeal, the Department pointed out that at the time of her claim in 1992, there was no legislative basis for assessing entitlement

to a pro-rata pension as it pre-dated the introduction of the Irish/USA Bilateral Agreement. That Agreement came into effect on 1 September 1993 and provided the basis for determining pension entitlement by combining the social insurance records held in both countries.

The appellant's grounds of appeal were that she had made a claim to Widow's Pension in 1992 and that her entitlement to pension should be assessed from that date, with arrears of pension awarded. The Department located the original claim form and confirmed the date of application stated by the appellant. The Department also outlined the procedures which had applied to claim processing at that time. Briefly, as the appellant was not entitled to a contributory pension, her claim was referred for assessment of entitlement to a non-contributory pension and a Social Welfare Inspector was asked to interview her. It transpired that the Inspector had been unable to contact her and, on that basis, a Deciding Officer determined that her Widow's Pension claim was withdrawn.

The appellant argued that no formal decision had been made in relation to her claim of 1992. In a detailed appeal submission, she drew attention to the statement outlined in the decision notice issued to her in 1992, as follows: *'If you wish to continue your claim at a later stage please contact this office.'* On this basis, she asserted that her claim should be treated as having been made in 1992.

Having carefully considered the evidence in the case, including the appellant's detailed submissions and correspondence over a lengthy period, as well as copies of papers from 1992 and details of the review carried out by the Department, the Appeals Officer concluded that there was no basis in legislation for the decision made in 1992 to withdraw the claim. She considered that the decision at issue was administrative only and that the question as to the appellant's statutory entitlement to a contributory pension had not been determined. In the circumstances, she concluded that the claim must be assessed with effect from 1 September 1993, when the Irish/USA Bilateral Agreement came into effect, to the date in 2003 when the appellant re-married. Accordingly, the appeal was successful.

**Outcome:** Appeal allowed.

## 19. Treatment Benefit – oral hearing

**Question at issue:** whether the appellant is eligible to receive Treatment Benefit with reference to his social insurance record.

**Background:** The appellant, aged 76 years, made a claim to Treatment Benefit and was disallowed as he was deemed to have had less than the 260 social insurance contributions required in his case. As a consequence, the appellant had paid the full cost of his hearing aids.

**Oral hearing:** The appellant outlined the grounds on which he sought to appeal the decision and advised that he had worked from 1948 to 1955 paying full rate social insurance, sufficient to give him 260 contributions. He said that he had also worked for three weeks at the A1 rate of contribution on his retirement from the public service and subsequently signed for credited contributions.

He stated that he had provided the Department of Social Protection with details of individuals who could verify his work record and that a Social Welfare Inspector had investigated the case. He had been paid contributory State Pension on the strength of that investigation and so was perplexed as to why the Department had subsequently denied him Treatment Benefits when his contribution record had been established.

At the request of the Appeals Officer, the Department confirmed subsequently that the appellant's case had been investigated and that a pension had been paid. It transpired that the appellant had sufficient contributions recorded to qualify for Treatment Benefit.

**Consideration of the Appeals Officer:** The Appeals Officer observed that a number of failures had contributed to the appellant's claim being disallowed: from the original non-recording of contributions in the period 1950-1952 through to the non-recording of those contributions awarded following the investigation carried out in 2002. He noted also that the Department's computer system had shown that State Pension was in payment, information which might have been expected to add some validity to the appellant's case. Further, if the contentions outlined in his letter of appeal had been investigated it would have emerged that contributions had been awarded and that his old insurance record indicated social insurance paid in the UK. He concluded that the appellant had

been badly served by the Department and he suggested that appropriate restitution be made in the case together with a suitable apology.

**Outcome:** Appeal allowed.

## Appendix 1

Social Welfare Appeals Office Organisation Chart

