

Relate

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Immigrants and people returning to Ireland accessing social welfare

Citizens of other countries who are living in Ireland and Irish people returning to live in Ireland sometimes have difficulty accessing social welfare benefits. In general, immigrants and returning Irish people are entitled to social insurance benefits in the same way as people who have lived here permanently. However, citizens of non-EU/EEA countries and some Bulgarian and Romanian citizens may have problems in getting Jobseeker's Benefit. This could arise if you are not entitled to continue to live in Ireland because your work permit has expired or because your entitlement to remain in Ireland depends on you having the right to work.

The main problems which immigrants and returning Irish people face are in respect of means-tested payments. All foreign nationals living in Ireland are required to satisfy the Habitual Residence Condition (HRC) which applies mainly to means-tested payments. Irish nationals returning to live in Ireland are also required to satisfy this condition.

Below we look at the law on the subject and the guidelines which have been issued by the Department of Social and Family Affairs for the decision-makers.

Health services

It should be noted that the residence qualification for health services, including medical cards, is different. The legislation provides that you are entitled to health services in Ireland if you are *ordinarily resident* in Ireland. This is not defined but is treated as meaning having lived in Ireland for a year or intending to live in Ireland for a year. A number of groups are also entitled to health services because of EU legislation. It is possible that you would qualify for health services, including a medical card, but not qualify for a social welfare payment which is subject to the habitual residence condition.

Habitual Residence Condition (HRC)

The law on habitual residence applies to all applicants for the payments in question. It applies to Irish citizens, EU/EEA citizens and citizens of other countries.

A total of 10,582 people were refused a social welfare payment (excluding Supplementary Welfare Allowance) on the basis of failure to meet the HRC in 2009; there were 6,297 such refusals in 2008. In 2009, 738 of those who were refused were Irish citizens; 692 were UK citizens; 826 were from the other 13 countries that were members of the EU before 2004; 6,944 were from the 12 member states that joined the EU in 2004 and later; 1,382 were from outside the EU. The vast majority of refusals related to Jobseeker's Allowance – 7,484. There were 1,918 refusals of Child Benefit; 570 of Disability Allowance; 381 of One-Parent Family Payment and 192 of Carer's Allowance.

Of the 738 Irish citizens who were refused a social welfare payment because they failed to meet the HRC in 2009, the vast majority (530) related to Jobseeker's Allowance; 98 were refused Disability Allowance, 45 Child Benefit, 33 Carer's Allowance, 23 One-Parent Family Payment and 9 were refused State Pension (Non-Contributory).

The Health Service Executive (HSE) does not maintain relevant statistics in respect of Supplementary Welfare Allowance (SWA) but the Department of Social and Family Affairs (DSFA) estimates that about 1.5% of all SWA claims are refused on the basis of failure to meet the HRC.

The law

The law is set out in Section 246 of the Social Welfare (Consolidation) Act 2005 as amended. The section has been amended twice – once by the Social Welfare and Pensions Act 2007 and again by the Social Welfare and Pensions (No. 2) Act 2009 (see *Relate*, January 2010).

Section 246 states that "it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless 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". The Common Travel Area (CTA) means Ireland, the UK, the Channel Islands and the Isle of Man.

The 2007 Act states that, notwithstanding this presumption, the person deciding the application must take into consideration all the circumstances of the case including, in particular, the following:

- The length and continuity of residence in the State or in any other 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
- The future intentions of the person concerned as they appear from all the circumstances

It should be noted that these factors must be taken into account but that does not mean that they are the only factors to be taken into account. All the circumstances must be taken into account.

The 2009 Act provides that you cannot be regarded as being habitually resident in Ireland if you are not entitled to live here. So, if you have no right to live in Ireland, you cannot meet the habitual residence requirement; being legally entitled to live here does not, of course, mean that you meet the habitual residence requirement.

The 2009 Act also provides that you cannot be regarded as habitually resident if you are seeking asylum or subsidiary protection and no decision has been made on your application or your application has been rejected. The time you spent awaiting this decision cannot be taken into account when deciding whether or not you are habitually resident. The Department of Social and Family Affairs had considered that this was always the law but a number of decisions by the Chief Social Welfare Appeals Officer held that it was not necessarily so – see the FLAC (Free Legal Advice Centres) *Briefing note on the Habitual Residence Condition* issued September 2009. www.flac.ie

The HRC applies to the following payments:

- Jobseeker's Allowance
- State Pension (Non-Contributory)
- Blind Pension
- Widow(er)'s Non-Contributory Pension
- One-Parent Family Payment
- Guardian's Payment (Non-Contributory)

- Carer's Allowance
- Disability Allowance
- Supplementary Welfare Allowance (other than once-off exceptional and urgent needs payments)
- Child Benefit
- Domiciliary Care Allowance

EU citizens and people with rights under law

As already stated, Irish citizens and other EU/EEA citizens are subject to the HRC. The law is complicated by the fact that relevant EU law overrides Irish law if there is a conflict between the two. This means that the law as set out in the Social Welfare Acts must be implemented in a way that does not conflict with EU rules on freedom of movement for workers and with EU rules on social security for migrant workers.

Family benefits

Under EU social security laws, family benefits are payable to migrant workers who are covered by EU rules in respect of family members who are habitually resident in Ireland or in another EU/EEA member state. Child Benefit, One-Parent Family Payment and Guardian's Payment (Non-Contributory) are classified as family benefits.

This means that you do not have to satisfy the HRC in order to receive one of these payments if:

- You are an EEA citizen who is currently employed or self-employed in Ireland or is receiving Irish Jobseeker's Benefit here
- You are a non-EEA national who has previously worked in another EEA state, you are currently legally employed or self-employed in Ireland and subject to Irish PRSI, and your dependants live in Ireland or in another EEA country

Supplementary Welfare Allowance

The EU rules on freedom of movement for migrant workers provide, among other things, that workers from other member states must be treated in the same way as workers in the country in which they are employed. Workers who move to another member state are entitled to the same social and tax advantages as citizens of that state.

Weekly Supplementary Welfare Allowance (SWA) is such a social advantage. So, if you are from an EEA member state and you lose income because of unemployment or illness and you are not entitled to an insurance-based payment, you may be entitled to weekly SWA without having to meet the HRC.

This does not apply if you come to Ireland to look for work and do not actually find work.

Guidelines

The DSFA has issued detailed guidelines for people making decisions about whether or not applicants for benefits meet the HRC (mainly Social Welfare Deciding Officers and Community Welfare Officers). Guidelines cannot override the legislation. Put simply, the guidelines say that each case has to be decided on its own facts.

The legislation is quite clear that, if you have not been living in Ireland (or the CTA) for the two years before you apply for one of these payments, then there is a presumption that you are not habitually resident and you have to rebut that presumption. If you have been living in Ireland for two years or more, then there is no presumption. However, the DSFA guidelines say that you are not automatically regarded as habitually resident if you have lived here (or in the CTA) for two years: "The onus is always on applicants to provide sufficient evidence to support their claims for a social welfare payment".

The guidelines also state that you are not automatically considered not to be habitually resident if you have not been living here for two years – all the circumstances have to be taken into account.

The guidelines say that the length of time you have spent in Ireland is not the determining factor. The decision-maker has to examine what degree of permanence attaches to your presence in Ireland.

If you are granted asylum, subsidiary protection or permission to remain in Ireland, then you are generally regarded as habitually resident from the date that status was granted. This is the case even if your permission to remain is subject to a time limit. You are not entitled to have any claim for payment backdated as the law is now clear that you cannot be habitually resident while you are in the asylum/protection process.

As already stated, all your circumstances must be taken into account when deciding whether or not you are habitually resident. The guidelines provide elaboration on the five specific factors that are mentioned in the legislation. These factors are, of course, interrelated. The following is a summary of what the guidelines say.

The length of time spent living in a particular country is not the only consideration. If you have a home or close family in another country you would normally retain habitual residence in that country. However, the longer you continuously live here, the more likely you are to develop your main centre of interest here and to lose the ties with your previous country of residence.

The person making the decision has to look at why you came to Ireland or why you returned to Ireland. If you came to study, for holidays, to visit friends, to look for work (as distinct from coming for an actual job), you are unlikely to be habitually resident. The decision-maker must also look at your ties with your previous country of residence and your arrangements for living in Ireland, for example, where your family live, where you have a house or other property.

Your employment record in Ireland and your previous country of residence is another factor to be considered. If you have lived here for "an appreciable period" and are working lawfully in stable employment, you may be presumed to be habitually resident here unless there are particular circumstances to rebut this presumption.

If your family has been given permission to live with you and you are in that employment for at least a month or in self-employment for at least six months, you may normally be presumed to satisfy HRC. (There are various other conditions to be met in the case of self-employment.)

In deciding where your main centre of interest is, the following should be taken into consideration: where your home is and your family are, the nature of your employment, your involvement in society here, where your financial affairs are managed, where your property is located.

Simply stating that it is your intention to remain in Ireland is not enough. The decision-maker is required to examine whether your stated intention is consistent with your actions.

The full guidelines may be accessed at: www.welfare.ie
Further information on the rights of migrant workers may be obtained from: Migrant Rights Centre Ireland, www.mrci.ie; Immigrant Council of Ireland, www.immigrantcouncil.ie; or www.citizensinformation.ie.

Civil Partnership Bill

The Civil Partnership Bill 2009 proposes to introduce a statutory civil partnership registration scheme for same-sex couples. It also sets out the rights and obligations that such couples would have towards each other. These are broadly the same as the rights and obligations of married couples towards each other (below we draw attention to the areas where the treatment of married couples and civil partners will be different).

The Bill also proposes a redress scheme for opposite-sex cohabiting couples who are not married and same-sex cohabiting couples who are not registered in a civil partnership. The redress scheme provides for a broadly similar range of orders as are available to married couples when they separate or divorce. The aim is to provide protection for a financially dependent member of the couple if a long-term cohabiting relationship ends either through death or separation.

The Bill is currently being discussed by the Oireachtas so changes may be made before it is finally enacted. The following is a very brief summary of a complex Bill.

The February 2008 issue of *Relate* sets out the law as it applies to same-sex cohabiting couples at present.

Children

The Bill proposes to amend a wide range of laws including those dealing with registration of life events, maintenance, succession, housing, domestic violence and equality. It does not propose to change the law on issues relating to children, for example, guardianship, adoption, custody, access or maintenance. (See *Relate*, November 2009 for a summary of the law as it affects children.)

Tax and social welfare

The Bill does not deal with tax and social welfare. However, it is the intention that people in civil partnerships will be treated in the same way as married couples. The necessary changes to the social welfare and finance legislation will be made when the civil partnership scheme is established.

It is not the intention that cohabiting couples (whether same sex or opposite sex) will be treated in the same way as married couples or civil partners for tax purposes. Cohabiting opposite-sex couples are already treated the same way as married couples in the social welfare system.

Immigration

The Bill does not provide for any changes to the immigration legislation but it is intended to amend the Immigration, Residence and Protection Bill 2008 to ensure that registered civil partners or equivalent relationships will be treated in the same way as spouses. (It is not clear whether these proposed changes will be included in the Civil Partnership Bill or in the Immigration Bill itself.)

Registration of civil partnerships

When the Bill is enacted, same-sex couples may register their relationship as a civil partnership. The Registrar-General will be obliged to maintain a register of civil partnerships, a register of decrees of dissolution of civil partnerships and a register of nullity of civil partnerships. The registration rules and processes are broadly similar to those for the registration of a civil marriage and of annulments of marriage and divorce. Civil partnerships may simply be registered; there will not be any necessity to have a civil partnership ceremony, unlike marriages which require a marriage ceremony. Civil partners may choose to have a ceremony and, if they do, the requirements will be similar to those that apply to marriage ceremonies. The courts will have the power to declare a civil partnership to be valid or invalid. The courts already have such a power in relation to marriage. An application for a declaration on the validity of a civil partnership could arise, for example, if one of the couple had been in a previous civil partnership or had been married and there was doubt about whether or not that civil partnership or marriage had been legally ended.

The Bill provides that the Minister for Justice, Equality and Law Reform may make orders recognising classes of legal relationships which are registered as civil partnerships in other countries and which meet certain criteria.

There are various reasons why you may not be allowed to marry – legally, these are known as impediments.

The main ones are age, consanguinity (close blood relationship) and an existing valid marriage. An existing valid civil partnership will also be an impediment to marriage. Similar impediments also apply to civil partnerships.

If a civil partner dies, the main responsibility for registering the death will be on the surviving partner.

Formalities for registration

The formalities will be broadly similar to the formalities for marriage. Among other things, this means that you must give three months' notice of your intention to enter into a civil partnership. There is provision for an exemption from this requirement – you may apply to the Circuit Court or the High Court for such an exemption. You must be free to enter into a civil partnership, that is, there must be no impediments to your doing so. A civil partnership ceremony must be held at an approved venue.

Civil partnerships may be registered only by civil registrars; marriages may be registered by registered religious solemnisers.

The rules about who may enter a civil partnership will be similar to the rules about who may marry. In general, that means you must be aged 18 or over, not be already married or in an existing valid civil partnership, not be closely related and be capable of consenting to entering the relationship.

Ending a civil partnership

The courts will be able to grant a decree of nullity of civil partnership in broadly the same way as decrees of nullity of marriage are granted. The courts will also be able to dissolve civil partnerships in a similar way to the granting of divorce. However, the rules governing the dissolution of civil partnerships will be different. A dissolution may be granted if the civil partners have lived apart for a total period of two years during the previous three years and proper provision has been made for each of them (divorce may be granted if a married couple have lived apart for a total of four years out of the previous five). Orders such as protection orders, maintenance orders and pension adjustment orders may be made in the course of court proceedings for the dissolution of civil partnerships in the same way as such orders may be made in judicial separation and divorce proceedings.

Property adjustment orders may also be made during or after the proceedings but they may not be made in favour of a former civil partner who has registered in a new civil partnership or has married. A property adjustment order may not be made over a shared home in which one of the former civil partners lives with a new civil partner or a family home in which one of the former civil partners lives with a spouse.

Unlike divorce proceedings, the civil partners' legal advisers will not be required to discuss the possibility of reconciliation, mediation or other alternatives to dissolution. The court may, however, adjourn proceedings in order to facilitate such alternatives.

Consequences of a civil partnership

The legal consequences of entering into a civil partnership will be broadly similar to the legal consequences of getting married but there are some differences. In a wide range of legislation dealing with spouses, the term spouse or widow/widower will be replaced by civil partner or surviving civil partner. In general, married couples may not opt out of their obligations towards each other in respect of, for example, maintenance; this will also be the case with civil partners. However, the proposed new arrangements for cohabitants will allow them to opt out of such obligations (see page 8).

Former spouses who enter civil partnerships

Former spouses who enter into civil partnerships will effectively lose their status as former spouses. Under the divorce legislation former spouses continue to have the right to apply to the courts for maintenance and property orders. However, once they enter into a civil partnership, this will change. Maintenance orders and pension adjustment orders in favour of a former spouse lapse if that spouse enters into a civil partnership. A property adjustment order may not be made for the benefit of a former spouse if that spouse has registered in a civil partnership.

Shared home protection

Under the Family Home Protection Act 1976, a spouse's consent is required for the selling or mortgaging of the family home. The Act also provides that a spouse may apply to the court for an order to enforce his or her right to remain in occupation, to exclude the other spouse or to regulate the occupation of either or both of them.

The Bill provides that broadly similar provisions will apply to the shared home of a couple in a civil partnership. There are also similar provisions for the courts to dispense with the other partner's consent where it considers that the withholding of consent is unreasonable. A civil partner will also be able to apply to the courts for orders restraining a partner from doing anything that might reduce his or her interest in the shared home or make it unsuitable to live in. If repossession proceedings are taken against one partner because of mortgage arrears, the court may decide to give the other partner the opportunity to take over the mortgage repayments.

A civil partner may inform the Property Registration Authority that he or she is the civil partner of a property owner. A notice to that effect will then be registered. There is no charge for such a registration. There is no requirement to enter such a registration and its absence does not affect the rights of a civil partner.

The provisions of the Residential Tenancies Act 2004 in relation to spouses will also apply to civil partners. Among other things, that means that a civil partner may be able to take over a tenancy on the death of the other partner.

Maintenance

Civil partners will be able to claim maintenance from the other partner in broadly the same way as spouses can. Among the factors to be taken into account when a court is deciding whether or not to make a maintenance order include: the income and assets of each partner; their responsibilities to each other and to any dependent children of either and to any former spouse or former civil partner; and the conduct of each of them if it would be unjust not to take that into account. Attachment of earnings orders will also be available for the enforcement of maintenance orders. The general arrangements for enforcement will be the same as for enforcement of maintenance orders by spouses.

Written agreements about maintenance made by civil partners may be made into enforceable court orders in the same way as similar agreements between spouses.

Succession

The Bill provides that civil partners will have the same legal right to inherit as spouses and the same rights on intestacy. A will is automatically revoked when you marry unless it was made in contemplation of marriage.

Similarly, a will will be revoked when you register a civil partnership unless it was made in contemplation of that registration.

A bequest in a will to a person who is a witness to the will or to that person's spouse is void. This will also apply to the civil partners of witnesses.

Children have no automatic right to inherit from their parents but they may apply to court if they consider that proper provision has not been made for them. The court may order that some provision be made for a child or children from the estate of the deceased. Such an order cannot reduce the entitlement of a spouse to a legal right share but it can reduce the entitlement of a civil partner.

Domestic violence

The arrangements for safety orders and barring orders will apply to civil partners in the same way as to spouses.

Equality

Discrimination on the grounds of sexual orientation is already prohibited. The Bill proposes to amend the equality legislation to provide for the prohibition of discrimination on the grounds of "civil status". This will replace "marital status" as a ground of discrimination and will include both marital status and civil partnership status. The effect is that you may not be discriminated against on the ground that you are or were in a registered civil partnership.

Other consequences of civil partnership

Various pieces of legislation which deal with requirements to declare interests or with conflicts of interest, for example, the Ethics in Public Office Act 1995, provide that connected people or connected relatives are also subject to the same requirements.

The Bill provides that civil partners are to be treated as connected people in the same way as spouses.

Civil liability: a civil partner will be added to the list of dependants in respect of whom a person may sue for damages for wrongful death.

Pensions: a pension scheme that provides a benefit for a spouse will be deemed to provide a benefit for a civil partner.

Mental health: civil partners will have the same role in relation to involuntary admission to psychiatric hospitals as spouses have.

Power of attorney: a civil partner must be informed of the registration of an enduring power of attorney in the same way as a spouse. Similarly, an enduring power of attorney in favour of a civil partner will cease to be valid if the partnership is dissolved or there is a safety or barring order against the civil partner.

Property disputes: a civil partner may apply to the courts for a decision in relation to disputes over property with his/her partner.

Cohabitants

Cohabitants are defined in the Bill as two same-sex or opposite-sex adults who are:

- Not married to each other and
- Not in a registered civil partnership and
- Not related within the prohibited degrees of relationship (broadly speaking, relationships which would make them ineligible to marry each other) and
- Living together in an intimate and committed relationship

Orders for redress

A financially dependent cohabitant may be able to apply to the courts for redress if the relationship ends by death or otherwise. In order to apply for redress you must be a qualified cohabitant, that is, you must have been a cohabitant for at least three years or for two years if you have a child with your partner. However, if one of you is still married, then neither of you may be a *qualified cohabitant* until the married person has been living apart from his/her spouse for at least four of the previous five years – in effect, until he or she is entitled to seek a divorce.

The redress arrangements will apply only to those qualified cohabitants whose relationship ends after the Bill becomes law but the time spent cohabiting before that may be taken into account.

If you are a qualified cohabitant, you may apply for orders such as maintenance orders, property adjustment orders, and pension adjustment orders and related orders such as attachment of earnings orders. You may also apply for provision to be made from the estate of a deceased cohabitant. You do not have any automatic right to get such orders. The court may make such orders if it is satisfied that you were financially dependent on your cohabitant partner.

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In making a decision, the courts must take into account a number of factors including the financial circumstances, needs and obligations of each cohabitant, the rights of others (including the rights of spouses, former spouses, civil partners, former civil partners and dependent children of either partner), the duration and nature of the relationship, and the contribution made by each, financial and otherwise. Such orders may not affect the rights of spouses or former spouses. In general you must apply for such orders within two years of the end of the relationship but an application for provision from the estate of the deceased partner must be made within six months of an application for a grant of probate. In general, such orders will lapse and will no longer be available if you marry or enter a civil partnership.

Voluntary agreements

Agreements on financial matters between cohabitant partners may be regarded as valid only if

- Each has had independent legal advice or they have received legal advice together and have waived the right to independent legal advice
- The agreement constitutes a contract
- The agreement has been signed by each

Such an agreement may include a provision that the redress scheme does not apply to them. This is different from similar agreements by married couples. Agreements between a married couple may not validly exclude either party's right to apply to the courts for various orders (for example, a maintenance order). A court may set aside or vary a cohabitants' agreement in exceptional circumstances if its enforcement would cause serious injustice. Agreements entered into by cohabitants before this Bill becomes law will be enforceable.

Other rights

The Bill proposes to amend a number of laws where rights are already available to opposite-sex cohabitants in order to make such rights available to same-sex cohabitants.

These include:

- The Residential Tenancies Act 2004 is to be amended to provide that a same-sex cohabitant of a deceased tenant has the same entitlement to inherit a tenancy as an opposite-sex cohabitant of a deceased tenant currently has
- The Civil Liability Act 1961 is to provide that a same-sex cohabitant of a deceased person has the same entitlement that an opposite-sex cohabitant currently has to sue for damages in the event of the cohabitant's wrongful death
- The Domestic Violence Act 1996 is to provide that the same-sex cohabitant of a person has the same entitlement as an opposite-sex cohabitant to apply for a safety or barring order; a cohabitant may apply for a safety order without a minimum period of cohabitation

Qualified cohabitants will be entitled to be informed about the registration of an enduring power of attorney under the Enduring Powers of Attorney Act 1996.

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