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Habitual Residence Condition – Draft Guidelines

Preliminary Comments by the NCCRI

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1. Introduction

The NCCRI welcomes the opportunity to comment on the draft guidelines/form on the Habitual Residence Condition (HRC), with an understanding that in the short time frame, a comprehensive analysis of the potential impact of these guidelines is not possible. We are also awaiting comments from at least one other source, which we will pass on in the form of further comment if necessary.

As documented in our submission to the Department of Social and Family Affairs dated 5 March 2004 the NCCRI understands the rationale adopted by the Government for bringing in such changes as the HRC arising from the Common Travel Agreement. We remain unconvinced that the UK government's decision to bring in restrictions was evidence based and we feel it was in large part a response to an emotive and xenophobic campaign in the British tabloid press.

The NCCRI believes that the implementation of comprehensive guidelines on HRC could help prevent discrimination in the implementation of the HRC and could provide a fair framework for the determination of habitual residency. However we are not convinced that these guidelines and form are close to the optimum approach necessary. We have a number of significant concerns and questions that need further clarification and discussion.

We understand the present deadlines on the introduction of the HRC. If these go ahead largely as proposed as seems likely, we would ask that they would at the very least be formally reviewed in three months and six months time in consultation with the NCCRI and key migrant groups such as the Immigrant Council of Ireland and the Migrant Rights Centre. The NCCRI would be happy to organise such a meeting in association with the Department of Social and family Affairs.

2. Intention

The draft guidelines note that the most important factors for habitual residence are the length, continuity and general nature and actual residence rather than *intention*. However throughout the draft guidelines and questionnaire the concept of intention seems to be given a level of importance which does not reflect this general approach. For example in the discussion of Factor 4, the Applicants main Centre of Interest, appears to overly rely on assumptions regarding the applicants future intentions.

In particular an over reliance on intention is problematic in cases of migrant workers who have legally come to Ireland to take up employment. It is well documented that often immigrants maintain a long-term ambition to return to their own country, and in this case an over reliance on intent may distort conclusions regarding their residence. In any case where their stay in Ireland is linked to a time limited work permit or visa it may not be appropriate for them to state their long-term intentions.

The NCCRI recommends that the Department of Social and Family Affairs consider redrafting the guidelines in order to reconcile them more clearly with the statement 'the most important factors for habitual residence are the length, continuity and general nature and actual residence rather than intention'.

For similar reason the NCCRI would recommend the deletion of question 10 of the questionnaire.

3. Perception

At times the draft guidelines appear to rely on perceptions regarding the actions of the applicant, such as ‘a person must be seen to be making a home’. In cases where an official is required to make conclusions with regard to the HRC based on their perception of the actions of an applicant additional details with regard to how such perceptions should be formulated would facilitate more equitable conclusions. In other words in the example given it may be appropriate to specify what ‘making a home’ means.

The NCCRI recommends that the Department of Social and Family Affairs provide additional detail in the guidelines, where an official is required to make conclusions based on the actions of an applicant.

4. Property

There is a concern regarding an over reliance on property ownership both in Ireland and abroad in order to draw conclusions regarding residence. For example in Factor 1 – Length and Continuity of Residence in a Particular Country, paying a mortgage or holding a long-term lease is taken as indicative of a settled intention to remain in Ireland. However this provision fails to take account of the insecure nature of the private rented sector in Ireland where long-term leases are unusual. Many migrant workers in Ireland are dependent on the private rented sector.

The NCCRI recommends that the guidelines place much less emphasis on tenure in terms of the applicants accommodation arrangements. It may be possible to review this provision when the Private Residential Tenancies Bill 2003 is enacted.

5. Periods Abroad

In the discussion of the ‘continuously present’ criteria on page 2 of the draft guidelines, the NCCRI is concerned that the provision of ‘a short holiday of 2 to 3 weeks in each year’ does not reflect the reality of the experiences for many migrants. It is common for migrants to use all their holiday to spend a longer period, of say 1 month, in their country of origin, or in fact they may return more regularly than once a year for shorter period.

The NCCRI recommends that this provision regarding holidays be amended to reflect the variety of experiences of migrants. It may be appropriate to allow for a certain degree of discretion in the interpretation of ‘continuously present’.

6. Short term contract

The guidelines state that ‘stable employment’ does not include a succession of short fixed terms contracts. Given the nature of the work permit system many migrants find themselves in the relatively insecure position of seeking work permit, residency and contract renewals on an ongoing basis. There may be cases where such an interpretation of ‘stable employment’ would not accurately reflect the habitual residency situation of individual.

The NCCRI recommends that the guidelines be amended to take into account the realities of the work permit system and the contractual nature of the employment of many migrants.

7. HRC Questionnaire

Many of the questions in Part 2 of the questionnaire are drafted from the assumption that the applicant has recently arrived in Ireland. This does not reflect the multiple situations of individuals who would answer 'no' to question 6.

At times the questionnaire is complex and not very clear for example in question 19 what are possessions, given that property is dealt with elsewhere? And question 35 what are 'things' other than bank accounts? Language barriers may cause difficulties in such cases.

The lack of clarity and open-ended nature of the questions gives the reader coming to this for the first time a sense that the Department may be fishing for information when it is not clear what that information is and for what purpose the information will be used.

The NCCRI would recommend that the questions be redrafted in order to make the form more precise and focused on the question of HRC. It should also be more accommodating of the multiple situations of applicants, for example question 20 'How do you plan to support yourself in Ireland?' could read 'How have you, or do you plan to, support yourself in Ireland?'

All questions should be tested in order to assess clarity and interpretability.

Strong commitments on data protection should be included on the form and in the guidelines to give reassurance that the information collected will not be used beyond its stated purpose.

8. Further clarification

- Is it possible for an individual to be habitually resident in more than one country?
- What is the position where an employee is posted to work in Ireland on a relatively long-term basis?
- In considering the applicants plans for the future it is not clear that the purchase of a one-way ticket is an appropriate criteria, often an individual may buy a return ticket because it is cheaper.
- It is not clear that perceptions regarding the reputation of the employer, 'well known for employing casual labour' can be used to make conclusions regarding an individual applicant.
- Where an individual came to Ireland with a job offer and commenced this employment, but for whatever reason happens to be seeking employment at the time of application, will this undermine the HRC?
- In question 12 of the questionnaire the concept of immediate family should be fully defined.
- During the investigation of a claim which may be quite complex will the claimant receive SWA?

- What will be the position of asylum seekers from accession countries after 1st May - will time spent here already be taken into account? What if they have been working illegally?
- Will the Department provide applicants with details on sources of further information?
- Will the form be made available in other languages?

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