

Social Welfare Appeals in Ireland

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Introduction

This report was commissioned by Ciaran Finlay, Legal and Policy Office of the Free Legal Advice Centre. Its objective is to evaluate the social welfare appeals system in Ireland from the perspective of the constitutional right to fair procedures. Five undergraduate students undertook the research which consists of the following:

- An overview of the legal concept of fair procedures in the Irish legal system.
- A description of the operation of the Social Welfare Appeals system by reference to the governing legislation.
- An account of the procedures employed by two similar administrative appeals systems; the UK benefit appeals system and the Irish Refugee Appeals Tribunal.
- An evaluation of the Irish system by reference to the concept of fair procedures and the practices established by the comparator systems
- Recommendations for improvement/reform of the Social Welfare Appeals system.

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Executive Summary

Based on this review, the group makes the following recommendations:

1. The Social Welfare Appeals form should be revised to include information regarding the possibility of an oral hearing and a clear check box in which applicants can indicate their wish to have an oral hearing.
2. The Social Welfare Appeals form should be revised to include information regarding the availability of interpreters for oral hearings and a check box provided in which applicants can indicate their wish to have a translator and the language required.
3. More attention should be given to potential language difficulties throughout the appeals process, with information and decisions provided in a language the applicant can understand.
4. Further investigations should be made regarding the application of the principle of consistency in decision making both within the Department of Social Protection and in the Social Welfare Appeals Office.
5. Time limits for making appeals and the process for seeking a revision of an appeal's officer's decision should be clearly indicated on the Social Welfare Appeals form.
6. Applicants for social welfare should be provided with all information upon which a decision to refuse a payment is made when the decision is communicated to them. It should not be necessary for applicants to make a freedom of information request to obtain this information. At a minimum it should be clearly communicated that this information is available and how it can be obtained.
7. Any policies and procedures adopted by the SWAO in relation to expert evidence, the criteria for exercising the discretion to grant an oral hearing, the weight afforded to medical assessors' evidence and documentation necessary and relevant to appeals should be posted on the SWAO web-site.
8. All calculations used by the Department of Social Protection and the SWAO should be clearly set out on department and appeals decision notices.

9. The SWAO should create a database of previous decisions, fully searchable and posted on their website. This would facilitate consistency in decision making, a key requirement of the rule of law and fair procedures in administrative decision making.

Fair Procedures in Administrative Decision-Making: An overview.

Introduction

Murdock's Dictionary of Irish law defines fair procedures as '[t]he rules and procedures which must be followed by all persons and bodies making decisions affecting the individual and which must be fair and be seen to be fair'.¹ This definition is vague, failing to explain what these 'rules and procedures' are. The concept of fair procedures derives its content from general principles of natural justice applying in common law systems, and particularly in the Irish context, from Constitutional concepts of fair procedures.

In *Mallack v Minister for Justice, Equality and Law Reform* Fennelly J provided a useful overview of these interlocking concepts in the context of administrative law.

The general principles of natural and constitutional justice comprise a number of individual aspects of the protection of due process. The obligation to give fair notice and, possibly, to provide access to information or, in some cases, to have a hearing are intimately interrelated and the obligation to give reasons is sometimes merely one part of the process. The overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed.²

The mechanisms of fair procedures are therefore closely connected to the more general concept of the rule of law, which requires law to be knowable and reasonably stable, facts to be ascertainable to a reasonably acceptable standard, and the making of law to be distinguishable from its application.³

Concepts of Natural and Constitutional Justice

The principle of "natural justice" is recognised and given protection amounting to a constitutional right. The effect of this protection is to guarantee the basic fairness of procedures. The two central principles of natural justice are:

¹ B. Hunt, *Murdock's Dictionary of Irish Law* (5th ed, Tottel Publishing 2009)

² [2012] IESC 59, para 52.

³ Suri Ratnapala, *Jurisprudence* (2nd edn, Cambridge University Press 2013), 241.

- *Nemo iudex in causa sua*- let nobody be a judge in their own case
- *Audi alteram partem*- hear the other side

The two principles do not depend on the laws of any state and they are not determined by the culture of any society, in this sense the principles are self-evident or axiomatic. These principles apply to “any significant determination of an individual’s rights”.⁴ Natural justice could be described as a general code of ethics which should apply in every case without question.

Constitutional justice is comprised of the same principles as natural justice, the difference being that under the Irish Constitution, Constitutional justice is considered as being one of the unenumerated rights under Article 40.3. It is generally understood that natural justice is subsumed under the broader heading of ‘constitutional justice’. The constitutional right to fair procedures and the concept of Constitutional justice were first set out in Ireland in *Re Haughey*.⁵ The applicant had been accused of an offense relating to funds transferred to the Irish Red Cross. He was denied the opportunity to cross-examine or to address the Dáil Public Accounts Committee in his defence. It was held that a (i) person is entitled to be furnished with evidence reflecting on their good name, (ii) be allowed cross-examine and address tribunal, (iii) be allowed rebut such evidence, and (iv) he should be permitted to address the committee in his own defence. The court held that the applicant’s constitutional right to fair procedures had been violated in this case.

Walsh J in, *East Donegal Co-op Ltd v AG*⁶ and *Glover v BLN Ltd*⁷ commented that when speaking in terms of the constitution ‘natural justice might be more appropriately termed constitutional justice, and must be understood to import more than the two well-established principles that no man shall be a judge in his own cause and *audi alteram partem*.’ In substance, constitutional and natural justice are the same, although it would be more appropriate to use the term constitutional justice in the Irish context given the constitutional framework.

⁴ Bloomsburyprofessionalonline.com, 'Natural And Constitutional Justice : Disciplinary Procedures In The Statutory Professions' (2011)

⁵ [1971] IR 217

⁶ [1971] IR 317

⁷ [1973] IR 388

Principles of Fair Procedures

The two main principles of fair procedure are those principles which derive from natural and constitutional justice: *nemo iudex in causa sua*, also referred to as the 'no bias' rule and *audi alteram partem*. The person or body making a decision must be without bias, and consequently must not have any pecuniary or personal interest in the matter to be decided unless so declared. A judge should discharge his duties from an objective position. As noted in *Orange Communications Limited v Director of Telecommunications Regulations*:

In law [bias] is any relationship, interest or attitude which actually did influence or might be perceived to have influenced a decision or judgement already given or which might be perceived would influence a decision or judgement yet to be given.⁸

Audi alteram partem is a fundamental principle of procedural justice, both natural and constitutional, and requires the courts to ensure that judicial processes are conducted and seen to be conducted with scrupulous fairness to both parties.⁹ A hearing must not be one sided and both parties should be given an equal opportunity to put forward their side of the case. In *Kiely v Minister for Social Welfare* Henchy J made the following statement in relation to the importance of both sides being heard in order to ensure a fair and equal hearing takes place:

Of one thing I feel certain, that natural justice is not observed if the scales are tilted against one side all through the proceedings. Audi Alteram Partem means the both sides must be fully heard... The dispensation of justice, in order to achieve its end, must be even handed in form as well as in content.¹⁰

The right to fair procedures does not imply an absolute right to an oral hearing, but it has been found that certain circumstances require that one be held. These circumstances are not specifically defined but as a matter of general principle an individual has a right to be heard by the decision maker exercising a statutory power before a decision is made when that decision may materially affect rights vested in them or impose obligations.¹¹

⁸ [2000] 4 IR 159 at 221.

⁹ *Nevin v Crowley* [1999 HC] 1 ILRM 376 and [2001] SC 1 IR 113

¹⁰ [1977] IR 267, needs pinpoint.

¹¹ Mel Cousins, *Social Welfare Appeals, Appeal Revisions and Oral Hearings*, Trinity College Dublin, Ireland., 2015, pg. 8

The Applicant in *LD v Minister of Social Protection*¹² had her application for domiciliary care allowance refused by the respondent and appealed that decision to the Social Welfare Appeals office, providing additional documentary evidence. Her appeal was dismissed without an oral hearing and she sought judicial review of this decision on the grounds that the failure to provide an oral hearing was a breach of her right to fair procedures. Peart J noted that there was no requirement for an oral hearing in the governing legislation, the decision on whether to hold one being left to the discretion of the relevant appeals officer. He noted that an oral hearing is essential from a fair procedures perspective where there are disputes of fact or differing professional opinions or in other cases of dispute, doubt or controversy that could benefit from airing at an oral hearing.¹³ In this particular instance, there was no such conflict, the applicant did not request an oral hearing and the appeals officer acted within his permitted discretion in conducting a summary, or paper based adjudication. The obligation to hear the other side does not therefore, of itself, raise an obligation to hold an oral hearing. An oral hearing is necessary only where issues of fact are in dispute and 'the resolution of such conflict/controversy could be assisted by an oral hearing where the differing parties could be heard and a resolution arrived at more satisfactorily than if a paper review only was conducted.'¹⁴

Disclosure of Relevant Material and the Right to Cross-examine

Where administrative proceedings are in contemplation, the majority or all information which will be relevant to such proceedings must be disclosed to the parties who will be affected by them in order to guarantee that an opportunity is provided for to controvert such material. In *State (Murphy) v Kiely*¹⁵ Barron J held that the applicant was entitled to see the evidence against him, along with the evidence in his favour, in order to allow him the opportunity to prepare a defence. If a decision-making body relies on material which has not been disclosed to all parties when making its decision, this will be a breach of fair procedures.¹⁶ As remarked by Denning MR *Kanda v Government of the Federation of Malaya*:

¹² [2014] IEHC 641.

¹³ [2014] IEHC 641, para 40.

¹⁴ [2014] IEHC 641, para 41.

¹⁵ [1984] IR 458

¹⁶ *Killiney & Ballybrack Local Authority v Minister for Local Government* [1978] ILTR 69

If the right to be heard is a real right, which if it is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and he must be given a fair opportunity to correct or contradict them.¹⁷

In *Kiely*, the Supreme Court held that there was a breach of fair procedures when one party was allowed to give evidence orally and was subject to cross-examination, and the other party could give written evidence only. This was reaffirmed by Hamilton CJ in the case *Gallagher v Revenue Commissioners*, who noted that 'depriving the ... applicant of the opportunity of challenging such evidence in cross-examination, amounted ... to a deprivation of his right to fair procedures.'¹⁸

Prior Notice and the Right to a Prompt Hearing

Failure to give adequate notice may amount to a denial of an opportunity to be heard. Procedural fairness demands prior notice of administrative proceedings to allow an individual to appear at a hearing if one is to be held. This allows the party concerned to prepare their own case effectively and meet the case put forward by the other side. Such notice should include all allegations that are being made. If an oral hearing is to be held, all relevant details such as when and where it is to be held and information relating to the procedure to be followed at the hearing must be provided,¹⁹ Notice must be given of matters which may assist in the preparation of a defence.²⁰

In *State (Ingle) v O'Brien*²¹, the decision of the Garda Commissioner to revoke the licence of a taxi driver was declared invalid as no notice of the intention to revoke such licence was given to him and no opportunity was given for him to state his case against such revocation. In *Mooney v An Post Barron J*, stated that, 'certainly, the minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and make submissions.'²²

¹⁷ [1962] AC 322, at 337. Quoted by Herbert J in *Curtin V Irish Coursing Club* [2009] IEHC 175 at 14

¹⁸ [1995] 1 ILRM 241, 263.

¹⁹ *Flangan v UCD* [1988] IR 724 at 731.

²⁰ *Ryan v VIP taxi Co-operative Society Ltd* Irish Times Law Report, 10 April 1989.

²¹ [1974] 109 ILTR 7.

²² [1998] 4 IR 288, 298.

Delay

In *KM & DG v Minister for Justice*²³ Edwards J held that the principles of constitutional and natural justice include a right to have a decision made within a reasonable time. Although there is no exact definition of what constitutes such, in *KM*, Edwards J indicated that the following factors are relevant to a determination of what is 'reasonable' in this context;

- The period in question;
- The complexity of the issues to be considered;
- The amount of information to be gathered and the extent of enquiries to be made;
- The reasons advanced for the time taken; and
- The likely prejudice to the applicant on account of the delay.

In this instance the court felt that a 12 month period for the Minister to consider an application for leave to remain in the state, during which the applicant was unable to work, was reasonable given the nature and complexity of the decision. The applicant had argued that the delay amounted to both a breach of fair procedures and cruel and inhuman treatment under Article 3 of the European Convention on Human Rights. The issue of delay is of particular relevance where the matter at stake is access to a social welfare payment which constitutes the applicant's principal source of income, and this will be a material factor in determining the reasonableness of any delay in the Social Welfare Appeals process which is arguably deals with significantly less complex issues than those arising under immigration legislation.

The issue of delay and what is considered to be a reasonable timeframe has been addressed by the Council of Europe in its publication, *Social Security as a Human Right: The protection afforded by the European Convention on Human Rights*. The Council developed a list of criteria which must be considered in relation to the issue of reasonable time. The list includes, 'the complexity of the case, the behaviour of the applicant and the conduct of the competent authorities. In this last regard, account is taken of the nature of the matter at stake for the applicant.'²⁴ The question of delay on decisions relating to social welfare payments was touched on in the French case of *Mocie v France*, in which the European

²³ [2007] IEHC 234

²⁴ Council of Europe, *Social Security as a Human Right: The protection afforded by the European Convention on Human Rights* (Council of Europe Publishing 2007), 13.

Court of Human Rights stated that ‘where the matter at stake is access to a social welfare payment which constitutes the applicant’s principal source of income, this will be a material factor in determining the reasonableness of any delay.’²⁵

Right to Legal Representation

It has been established that there is no absolute right to legal representation, however, certain administrative procedures require a qualified lawyer in the preparation and conduct of a defence. In *Corcoran v Minister for Social Welfare*,²⁶ Murray J held that a tribunal exercising quasi-judicial function did not have to afford to the parties before it an opportunity to procure legal advice or to provide legal representation, as the decisions of the hearings could be appealed or reviewed on the basis of new evidence.

Publication of Case Decisions:

The constitutional right to fair procedures entitles an applicant to be informed of and provided with any reports or documentation which may be relied upon to administer a decision. Should the decision maker be relying on prior decisions in similar cases or administrative guidelines or frameworks, these must be disclosed to participants. In *Jama v Minister for Social Protection*,²⁷ Hedigan J held that that the Department of Social Protection was not obliged to make prior decisions of appeals officers available to applicants, referring in this regard to evidence from the department’s witness that decision makers did not have access to prior decisions made within the Department of Social Protection. The official gave evidence that no database of decisions was kept within the Department and therefore that the decision makers had no better information than applicants. This assertion was not challenged in cross examination. The applicant in *Jama* had relied on the Supreme Court decision in *Atanasov & Others v. Refugee Appeals Tribunal*²⁸ in which it was held that the lack of access to previous decisions of the Refugee Appeals Tribunal was a breach of the constitutional right to fair procedures. Hedigan J, nonetheless held that there was no obligation on the department to maintain a database that was available to the public. The judge referred to the applicant being in some difficulty with regard to proof that other similar decisions exist, and had not therefore made out her case for their production. He

²⁵ *Mocie v. France* [2003] ECtHR Application no. 46096/99

²⁶ [1992] ILRM133.

²⁷ [2011] IEHC 379

²⁸ [2007] 4 IR 94

then goes on to make the general point that a publically available database is not necessary. It is certainly arguable that this conclusion is obiter. The applicant in this case had not proved that she would benefit from the availability of such a database and the more general point was not therefore directly relevant to the outcome.

This case appears to have turned on the question of equality of arms between the Department of Social Protection and applicants for social welfare. The applicant argued that department officials had access to prior decisions and she did not. This issue of whether the decision makers themselves had access to, and used, a database of prior decisions was not specifically addressed by the Court. The Applicant had referred to the High Court decision of McMenamin J in *Atanasov* where it was held that consistency and conformity in decision making are essential facets of fair procedures and that these standards would be difficult to achieve in the absence of access to prior decisions. Although noted by Hedigan J, this issue was not specifically addressed by him. The applicant in *Jama* was challenging a decision regarding the starting date for child benefit in respect of her son. She argued that previous decisions must exist in relation to the point at issue, she was however unable to specifically demonstrate this, and the evidence from the respondent suggested that if such decisions did exist, they were not relied upon by the Department. This indicates that each appeals decision is made in isolation, pointing toward, at a minimum inefficiencies in administration of the social welfare system, or more problematically, a complete absence of consistency in decision making both in the Department and the appeals office.

European Convention on Human Rights

The ECHR does not necessarily add any principles to our Constitutional Right to Fair Procedures but maintains that right at a European Level. _Fair procedures is established under Article 6 of the ECHR which states, 'In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The scope of Article 6 has been broadly interpreted by the European Court of Human Rights (ECtHR). In *Ringeisen v Austria*²⁹ the ECtHR found that an administrative body, a Regional Commission, was considered to be a tribunal under Art. 6. Furthermore, the ECtHR stated there is a general rule of law that

²⁹ [1973] ECHR 1.

people whose interests are affected by a decision taken by a public authority must be given the opportunity to make their point of view known.

The Irish Social Welfare Appeals System

Comparing the Law with the Process

The following is an account of the Social Welfare Appeals process that we identified from a combination of the Citizens Information, Social Welfare Appeals Office and Department of Social Welfare websites. We have referenced the legislation from the Social Welfare Consolidation Act 2005 and the 1998 & 2011 Social Welfare (Appeals) Regulations that apply to each stage. There is also a review of the Social Welfare Appeals Office (SWAO) Annual Report from 2014 which considers whether the SWAO have delivered their decisions in a 'prompt and fair manner', as promised.³⁰

Within the text we have highlighted any areas that we feel have fallen short of this obligation. We have also highlighted where the Social Welfare Appeals System has made improvements or noticed the need for improvement through the Chief Appeals Officers Annual Reports. For instance, in 2014 the report specifically mentions oral hearings.³¹ In 2012 the reports began referencing published cases e.g. 2012/01, 2013/04, 2014/06, and in the 2007 Report, language difficulties and the need to provide interpreters at oral hearings was noted.³²

The Social Welfare Appeals Process

An application for supplementary welfare allowance/social welfare payment is first considered and the decision made by a deciding officer.³³ Deciding officers (DO) are appointed by the Minister for Social Protection.³⁴ The appeals process applies to the following and an appeal is decided, in the first instance, by a DO:³⁵

- Jobseekers Benefit
- Jobseekers Allowance
- Disability Allowance
- Illness Benefit

³⁰ 1998 Social Welfare (Appeals) Regulations SI No. 108/88

³¹ www.socialwelfareappeals.ie/uploads/annrep14.pdf , page 18

³² Ibid, 12.

³³ s 299(2) Social Welfare Consolidation Act 2005.

³⁴ s 299(1) Social Welfare Consolidation Act 2005

³⁵ s 300 Social Welfare Consolidation Act 2005

- Invalidity pension
- Carer's allowance
- Carer's benefit
- One parent Family Payment
- Child Benefit³⁶
- Family income Supplement (FIS)³⁷
- Habitual Residence Condition (HRC)
- Supplementary Welfare Allowance (SWA)
- Basic Allowance
- Rent and Mortgage interest supplement
- Old Age Contributory Pension³⁸

The Social Welfare Appeals Office (SWAO) operates independently of the Department of Social Protection. It decides on appeals in cases where a person is not satisfied with a decision of the Department. The Minister of Social Protection appoints the appeals officers (AO)³⁹ and one of the AO's as Chief Appeals Officer (CAO).⁴⁰ The CAO may refer a question to the High Court.⁴¹ If the CAO is of the opinion that the ordinary appeals procedure set out is inadequate to effectively deal with a certain appeal, he/she may refer it to the Circuit Court and the Circuit Court may affirm or substitute the DO's decision.⁴² The CAO must make an annual report to the Minister.⁴³

A person who is unhappy with the decision of a deciding officer and who wants to take an appeal must give notice in writing to the CAO.⁴⁴ An appeal may be made up to 21 days after the decision of the deciding officer,⁴⁵ however, the CAO may make an exception if more than 21 days have elapsed.⁴⁶ There does not appear to be a list of conditions or circumstances where the CAO will extend the time limit, it is purely at the discretion of the

³⁶ Social Welfare Consolidation Act 2005 S 300(2)(c) Part 4

³⁷ Social Welfare Consolidation Act 2005 S.300(2)(e) Part 6

³⁸ Social Welfare Consolidation Act 2005 S.300(10)

³⁹ Social Welfare Consolidation Act 2005 S s 304

⁴⁰ Social Welfare Consolidation Act 2005 S 305.

⁴¹ Social Welfare Consolidation Act 2005 S 306

⁴² Social Welfare Consolidation Act 2005. S 307

⁴³ Social Welfare Consolidation Act 2005.S 308.

⁴⁴ Part 3 9(1) 2011 Social Welfare (Appeals) Regulations

⁴⁵ Part 3 9(2) 2011 Social Welfare (Appeals) Regulations

⁴⁶ Part 3 9(3) 2011 Social Welfare (Appeals) Regulations

CAO. The notice of appeal must contain a statement of the points/facts that the appellant relies on in support of their appeal⁴⁷ and any evidence or documents in support of their appeal.⁴⁸ It should be noted at this point that the SWAO states that the appellant *SHOULD* submit information in support of his/her appeal, however the Regulations use the word *WISHES* – this difference in words used implies to us that the appellant can if they want (*wishes*) as opposed to being obliged to (*should*) submit documentation in support of their claim. It is, however, difficult to make a decision if the appellant does not advise the AO of their difficulty and submit documentation that is required to be relied upon.

The SWAO also states that a copy of the letter from the DO should be enclosed in the application for appeal. There is a link on the SWAO website under the heading ‘*Freedom of Information Act 1997 – 2003*’ that states how the appellant can obtain copies of the documents the DO uses to reach their decision. It advises that the appellant should contact the relevant area of the Department of Social Protection and tell them they need the information in order to make an appeal. It is unclear how long it takes to obtain this information, but Freedom of Information legislation provides for a 4 week period. The time-limit for making an appeal is 21 days. It must therefore be assumed that applicants must make a decision on whether to appeal or not without the benefit of seeking all of the information upon which the decision was made. The English High Court *Crake v Supplementary Benefits Commission*⁴⁹ held that the failure to give reasons for an administrative decision is, of itself, an error of law, suggesting that full information ought to be provided to applicants with the appeals decision rather than following an additional process.

An acknowledgement of receipt of the application is issued by the SWAO and the appellant is given a reference number for their appeal. The CAO will also be provided with a statement from the deciding officer setting out the facts of the first decision,⁵⁰ and any documents or relevant information.⁵¹ The CAO will then give notice to those concerned that the appeal

⁴⁷ Part 3 9(4) 2011 Social Welfare (Appeals) Regulations

⁴⁸ Social Welfare (Appeals) Regulations 2011 9(5)

⁴⁹ [1982] 1 ALL ER 498

⁵⁰ Reg 10(a)

⁵¹ Reg 10(b)

has been submitted.⁵² According to the FLAC report,⁵³ the Applicant's file may not be sent to the Applicant prior to the hearing/ decision making unless it is specifically requested under the Freedom of Information Act.⁵⁴

The DO is asked by the Tribunal to comment on the grounds of the appeal⁵⁵ and can decide whether to revise their original decision or not. If they revise the decision but the result remains one that the applicant is unhappy with, they can still appeal the decision to an Appeals Officer (Section 303 and 311). If the DO does not revise the decision, the DO must send the case to an Appeals Officer (AO) to decide.⁵⁶ An AO, when deciding a question referred to them, is not confined to the decision of the DO and may decide the question as if it was being decided for the first time.⁵⁷ The AO can decide whether the appeal will be by way of oral hearing or can be dealt with by written evidence provided.⁵⁸ The AO, to whom the appeal has been referred, may require the appellant, the Designated Person or anyone else concerned to provide her with further information regarding the appeal.⁵⁹ A designated person according to the Act is a person appointed by the Minister for the purposes of the determination of the entitlement of any person to supplementary welfare allowance.⁶⁰ Appeals or statements may be amended during the proceedings.⁶¹ If the AO is of the opinion that the case can be decided without an oral hearing he may make a decision based on written submissions only.⁶² The SWAO website refers to the fact that an oral hearing will be provided if it is requested. The CAO, Geraldine Gleese, in her annual report of 2014 states that it is the 'policy of this office to grant an oral hearing where it is requested.'⁶³ Ms Gleese also notes that oral hearings are beneficial for the applicant as, in the case of disability related payments, the appellant's disability is more evident to the AO than if the

⁵² S 11 2005 Act

⁵³ FLAC Report, 'Not Fair Enough- Making the Case for Reform of the Social Welfare Appeals System', October 2012, Page. 13

⁵⁴ <http://www.atlanticphilanthropies.org/sites/default/files/uploads/report-not-fair-enough.pdf> , page 25 & page 34.

⁵⁵ SWCA 2005 s301(1)

⁵⁶ SWCA 2005 s303, s311 covers claims under s196, 197, 198

⁵⁷ SWCA 2005 s311 (3)

⁵⁸ SWCA 2005 s326 and Article 13 & 14 of S.I. no 108 of 1998 Regulations

⁵⁹ SWCA 2005 S 12 B

⁶⁰ SWCA 2005 s299(2)

⁶¹ SWCA 2005 S 12 B

⁶² SWCA 2005 S 13

⁶³ www.socialwelfareappeals.ie/uploads/annrep14.pdf, Social Welfare Chief Appeals Officer Report 2014, pages 4-5.

appeal were decided on written submissions. ‘...where the impact of a disability may be very obvious when the person is seen in person but not so readily apparent from a review of claim papers.’⁶⁴

However, the SWAO do not make it obvious on the Appeals Application Form (SWAO1) that an oral hearing may be requested nor does it indicate on the form that it is SWAO policy to provide an oral hearing if requested.⁶⁵ The circumstances in which an oral hearing is required are not specified in legislation. In *Kiely v Minister for Social Welfare (S.C. 1997 I.R. 267)* the Court stated that:

An appeal is of such a nature that it can be determined summarily if a determination of the claim can fairly be made on a consideration of the documentary evidence. If, however, there are unresolved conflicts in the documentary evidence, as to any matter essential to a ruling of the claim, the intention of the Regulations is that those conflicts be resolved by oral hearing.

In *Galvin v. the Chief Appeals Officer and the Minister for Social Welfare, H.C. 1997 3 I.R. 240*) the High Court noted that:

There are no hard and fast rules to guide an Appeals Officer or, on an application for judicial review, this court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting and the subject matter with which he is dealing and account should also to be taken as to whether an oral hearing was requested.

The High Court Proceedings noted in the SWAO CAO Report of 2014 also refers to oral hearing.⁶⁶

When the AO is of the opinion that an oral hearing is required, he will organise a date and place for it to be held that is convenient to the appellant. Hearings are held in private and are informal. The AO gives notice to the appellant, the deciding officer and anyone else concerned with the appeal.⁶⁷ An AO has power to take evidence on oath, so he may

⁶⁴ www.socialwelfareappeals.ie/uploads/annrep14.pdf, Social Welfare Chief Appeals Officer Report 2014, page 4

⁶⁵ Appendix 2 Social Welfare Notice of Appeals Form SWAO1, <http://www.socialwelfareappeals.ie/uploads/SWAO1.pdf> Appendix 2, <http://sowa.dev.fbi.ie:32445/uploads/SWAO1.pdf>

⁶⁶ L.D. & Chief Appeals Officer, Social Welfare Appeals Office and Minister for Social Protection. Judgement delivered by Mr Justice Peart on 19 December 2014.

⁶⁷ Social Welfare (Appeals) Regulations S14.

administer oaths to persons attending as witnesses at the hearing.⁶⁸ An AO may also require witnesses from the Department of Social Protection such as a DO or Social Welfare Inspector to attend hearings to give evidence or produce documents and he must notify them by giving written notice.⁶⁹ If a person who has been given notice to attend or produce a document fails to do so, they are guilty of an offence and are liable on summary conviction to a fine of up to €1,500.⁷⁰ The AO may also apply to the District Court for an order directing a person to attend or to produce documents.⁷¹ As noted above, the Applicant's file may not be sent to the Applicant prior to the hearing/ decision making unless it is specifically requested under the Freedom of Information Act⁷².

An appellant can bring a person with them such as a family member, friend or representative or a solicitor. Legal expenses must, however, be discharged by the appellant.⁷³ It is not noted or made clear in the legislation or the SWAO website that the appellant can call witnesses. However, the appellant can cross-examine witnesses called by the AO⁷⁴. In *State (Murphy) v Kielty*,⁷⁵ Barron J held that the applicant was entitled to see the evidence against him, along with the evidence in his favour, in order to allow him the opportunity to prepare a defence. If a decision-making body relies on material which has not been disclosed to all parties when making its decision, this will be a breach of fair procedures.⁷⁶

In relation to costs, an AO may make an award of expenses, but only in relation to travel expenses.⁷⁷ Representation costs will not be paid regardless of the decision.⁷⁸ Assessors may be paid expenses for loss of remunerative time.⁷⁹ The CAO may appoint a person to sit with an appeals officer as an assessor in cases where she believes an assessor's assistance is

⁶⁸ SWCA 2005 s313

⁶⁹ SWCA 2005 s314

⁷⁰ SWCA 2005, s314(3)

⁷¹ SWCA 2005, s314 (4)

⁷² FLAC Report, 'Not Fair Enough- Making the Case for Reform of the Social Welfare Appeals System', October 2012, Page 25 & 34.

⁷³ SWCA 2005, s316

⁷⁴ <http://www.welfare.ie/en/Pages/Appeal-Submission-Guidelines---Guidelines-for-submitting-app.aspx>

⁷⁵ [1984] IR 458

⁷⁶ *Killiney & Ballybrack Local Authority v Minister for Local Government* [1978] ILTR 69

⁷⁷ SWCA 2005, s316 2 a

⁷⁸ SWCA 2005, s316 1. a

⁷⁹ SWCA 2005 s 3

needed.⁸⁰ In practice these only appear to be medical assessors. When an AO makes a decision, it must be sent in writing to the CAO⁸¹. If the decision is not favourable to the appellant, the AO must include the reasons why their appeal was not successful⁸². The CAO will then draw up a memorandum of the decision⁸³ outlining the reasons why⁸⁴ the applicant was not successful. This will then be sent to the appellant and any other persons concerned including the Minister.⁸⁵ Any relevant notice or document will be seen as duly sent if it is sent by post to the persons workplace or home address.⁸⁶

An AO's decision is usually final.⁸⁷ However, one AO can revise a decision of another AO if he believes that the decision was erroneous in light of new evidence or facts that emerge after the first decision,⁸⁸ for example, a change of circumstances in the intervening period.⁸⁹ The CAO may also revise an AO's decision if she believes that the decision was erroneous by reason of mistake of law or fact.⁹⁰ A DO can also revise an AO's decision as per Section 301(b) SWCA 2005.⁹¹ A designated person may also review the decision of a AO.⁹² Finally, an applicant who is dissatisfied with the decision of an AO and the revised decision of a CAO can request that the decision be revised.⁹³

It is important to note that there is no clear time limits set for the review of any decision of an AO nor for how long an appellant can wait for a decision. The review can be based on any new evidence that has come to light and the applicant must enclose any new evidence in their request for a review. It should be further noted that there is no provision for an oral hearing on the review of an AO decision.⁹⁴ A CAO's revision of an AO's decision where it appears to the CAO that the decision was erroneous by reason of a mistake that is made as

⁸⁰ SWCA 2005, s309

⁸¹ SWCA 2005 s19 (1)

⁸² Social Welfare (Appeals) Regulations s.19(1)

⁸³ Social Welfare (Appeals) Regulations s.19(2)

⁸⁴ Social Welfare (Appeals) Regulations s.19(3a)

⁸⁵ Social Welfare (Appeals) Regulations s.19 (3b)

⁸⁶ Social Welfare (Appeals) Regulations s.20.

⁸⁷ SWCA 2005, s320

⁸⁸ Social Welfare and Pensions Act(No.2) Act 2013 Part 2 317(1)

⁸⁹ Social Welfare and Pensions Act(No.2) Act 2013 Part 2 317(1)b (ii)

⁹⁰ SWCA 2005, s318

⁹¹ SWCA 2005, s301 (1)(b)

⁹² SWCA 2005, s324(1)(b)

⁹³ SWCA 2005, s327

⁹⁴ FLAC Report, 'Not Fair Enough- Making the Case for Reform of the Social Welfare Appeals System', October 2012, page 29

to 'law' or 'fact'.⁹⁵ The applicant must state the reasons why they believe a mistake has been made regarding the law or facts. It may be very difficult for a lay person to recognise a mistake of law and many applicants may not be speak English, making the process more difficult. There is no provision in the legislation for a translator and was only mentioned in the Chief Appeals Officer Annual Report of 2007 as being a difficulty that arose at the time of oral hearings⁹⁶.

The CAO may, where she considers it appropriate, refer any question which has been referred to an appeals officer for the decision of the High Court⁹⁷. Where an appeal is redirected to the Circuit Court there is no appeal from the decision of the Circuit Court.⁹⁸

An Applicant dissatisfied with any of the following can make a complaint to the Ombudsman

- undue delays caused by the SWAO.
- failures of the SWAO in answering the appellant.
- Incorrect or misleading information provided by the SWAO.
- the conduct of Appeals and the quality of the service.

A request for review by the Ombudsman must be made within 12 months of the case being brought and no cases subject to legal proceedings can be brought to the Ombudsman attention.

Annual Reports

The CAO must deliver an annual report to the Minister not later than 6 months after the end of each calendar year.⁹⁹ Both the CAO in their Annual Report and the Ombudsman through the publication of his quarterly casebook, publish details of cases they have considered. This year the CAO published 24 cases out of the 31,211 appeals that were finalised in 2014. While the Ombudsman reported on 29 cases in total relating to Social Welfare issues in its Summer and Spring 2015 and Winter 2014 casebooks.

The SWAO CAO 2014 Report also notes that the average processing time for all appeals finalized during 2014 was 24.2 weeks. This timeframe had reduced from 28 weeks in 2010,

⁹⁵ Social Welfare Consolidation Act 2005, s.318

⁹⁶ www.socialwelfareappeals.ie/uploads/annrep07.pdf, Social Welfare Chief Appeals Report 2007, page 12.

⁹⁷ Social Welfare Consolidation Act 2005, s.306

⁹⁸ Social Welfare Consolidation Act 2005, s.307(3)

⁹⁹ Social Welfare Consolidation Act 2005, s. 308 (1)

32.5 weeks in 2011, 33.1 weeks in 2012 and 29 weeks in 2013. The SWAO CAO 2014 Annual report notes that “3934 appeals received where it appeared to us that the reason for the adverse decision may not have been fully understood by the appellant.”¹⁰⁰ It is important to note here whose opinion it is that the reason for the adverse decision may not have been fully understood and whether the decision was then explained. The report notes that 812 of the 3934 appeals mentioned above were subsequently registered as formal appeals – this is still a high number of appeals that the SWAO originally considered that the ‘the adverse decision may not have been fully understood’. The 2014 Annual Report recognises the need and focus on consistency in decision making

Conclusion

The above highlights a number of difficulties created by the SWAO in the appeals application process. The information provided to potential appellants is often inadequate and not provided in a manner that is easy to understand. In particular, the appeals form SWAO1 is available only in English or Irish and it does not clearly state that the applicant can request an oral hearing nor provide a way to communicate a request for an oral hearing. Information in relation to gathering evidence for the appeals application is not clear, appellants must make efforts to understand both the Social Welfare Appeals System and the Freedom of Information System in order to gather the information necessary to ground their appeal. There is no indication on the information provided by the SWAO that the appellant can call witnesses and it is unclear whether the assessors are acting as independent experts or as witnesses for the Department. No provision is made for the payment of expenses or for legal advice or representation. The legislation and regulations are being observed but the system as operated creates obvious imbalances between the Department of Social Protection and individual welfare applicants.

¹⁰⁰ www.socialwelfareappeals.ie/uploads/annrep14.pdf, Geraldine Gleeson, Social Welfare Chief Appeals Officer Report 2014.

Other Systems of Administrative Decision Making

The Refugee Appeals Tribunal

The Refugee Appeals Tribunal is an independent body which decides asylum appeals against the negative recommendation of the Office of the Refugee Applications Commissioner in applications for refugee status. The Refugee Appeals Tribunal also decides appeals with regard to decisions of the Office of the Refugee Applications Commissioner under the Dublin II Regulation and decisions to refuse subsidiary protection. Asylum and subsidiary protection applications have recently been amalgamated into a single procedure by the International Protection Act 2015 which also makes some changes to the procedures of the Tribunal¹⁰¹. The Tribunal was established in 2000 by the Refugee Act 1996. It is independent of the Office of Refugee Applications Commissioner and issues binding recommendations to the Minister for Justice and equality. Applications for Refugee status have been declining in recent years and in 2014, 1004 appeals were received by the Tribunal.

It is difficult to draw direct comparisons between the Refugee Appeals Tribunal the Social Welfare Appeals system for a number of reasons. First, the volume of appeals is significantly less. Second, legal aid is available for appellants to the tribunal and most applicants are legally represented. Historically most RAT decisions were subject to judicial review, however since the introduction in 2014 of a new decision making template, the number of judicial review applications has substantially reduced. Prior decisions of the RAT are available to legal representatives (and to others on request) through an online searchable database.

Not every applicant who appeals their case to the Refugee Appeals Tribunal has the right to an oral hearing. S 42 of the International Protection Act 2015 provides that the Tribunal will hold an oral hearing where the applicant has requested one or where the Tribunal is of the opinion that one is necessary. However, an appeal can be determined without an oral hearing if one is not requested. Oral hearings are held in private.¹⁰² The 2015 Act also sets out the basic procedure at the Tribunal confirming that the applicant is to be present, and

¹⁰¹ Some provisions of the International Protection Act 2015 have been commenced at time of writing, but not those relating to the operation of the Tribunal. See International Protection Act (Commencement) Regulations 2016, SI 26/ 2016, and International Protection Act (Commencement)(No 2) Regulations 2016, SI 133/2016.

¹⁰² S 42(4) International Protection Act 2015

may engage legal representation. Translation services must be provided by the tribunal if necessary, the proceedings are to be as informal as possible and the Tribunal must allow witnesses to be examined and cross-examined.

When making the application, the applicant can request the attendance of witnesses and the tribunal will decide whether to issue a direction to that person to attend having regard to the nature and purpose of the evidence proposed to be given by the witness. The 2015 Act, at s 46, sets out specific matters that the tribunal must consider and provides that the tribunal shall furnish to the Applicant or his/her legal representative with copies of any 'reports, observations, or representations in writing or any other document furnished to the Tribunal by the Minister' together with an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of the appeal.¹⁰³ The privacy of the Applicant is protected by s 26 of the 2015 Act, which provides that no information that could identify an applicant is to be published by any person without the consent of the applicant.

Comprehensive information for applicants is available on the Tribunal website. Applicants are specifically advised to contact a solicitor as soon as they decided to appeal and that they should have their solicitor assist them with completion of the Notice of Appeal Form. A link is provided to the Refugee Legal Service, which provides specialised legal assistance to applicants. Although an interpreter must be provided, if necessary, at the Tribunal hearing, no translation services are provided to assist in completing the Notice of Appeal or consulting with legal representatives. These services are, however, provided by the Refugee Legal Service. The Tribunal gives no indication as to the time it will take to reach a decision, there is no rough time frame, it simply states '[a]s each case is different, it is difficult to say how long will it take before a decision is reached and notified.'

The Tribunal's information page also provides an overview of what the applicant can expect at a hearing. The information given states, '[t]he hearing is intended to be as informal as possible. You, the interpreter and your legal representative will sit down at one side of the table, the Presenting Officer at the other side of the table, and the Member of the Tribunal who will make the decision on your case will sit in the middle. Your legal representative and

¹⁰³ S 46 International Protection Act 2015.

the Presenting Officer will ask you questions about your refugee application, and the Member of the Tribunal may also ask questions as well.'

The RAT and SWA compared

The notice of appeal form for the RAT is significantly more user friendly and understandable than the SWAO. In relation to oral hearings, there is heading set out with a clear tick box on the RAT form. As with the SWAO, all applicants are entitled to an oral hearing if one is requested, but this is not indicated on the SWAO application form.

The notice of appeal form for RAT allows the applicant to request translation services and to specify the precise language or dialect. The Tribunal has stated that they will endeavour to have a professional interpreter of the applicant's language present at the hearing, if the applicant has requested in their Notice of Appeal. The interpreter's role is to translate what is said by the parties involved only. The interpreter will not facilitate in aiding an applicant in filling out their notice of appeal form. This option is not available on the SWAO form

Applicants to the RAT can avail of a dedicated Refugee Legal Service. RAT strongly encourages applicants to have legal representation which they can provide if an applicant cannot afford themselves. This is in contrast to the social welfare appeals office who merely mention that one can have legal representation, which is at the cost of the applicant, but that a family member, guardian, or the applicant alone will suffice.

A full archive of previous decision is available for Applicants to RAT and their legal advisors. With regard to the SWAO, only a certain amount of cases are published each year in annual reports. In *Jama v Minister for Social Protection* the High Court held that having a database to access previous decisions would be too costly. It can be argued that the RAT deals with more severe matters, as an applicant may be deported, but the SWAO deals with peoples' livelihood. Further the absence of a database of decisions indicates that the SWAO itself does not refer to previous decisions, suggesting an inconsistent approach to decision making.

Social Welfare Appeals in the United Kingdom

The United Kingdom operates a unified benefit and tax credit system incorporating the functions of the Department of Work and Pensions (DWP) and Her Majesty's Revenue and Customs (HMRC). Welfare benefits and tax credits are determined on the basis of an holistic picture of individual circumstances. The appeals process involved will depend on whether the benefit in question is granted by DWP or HMRC; this section focuses on the DWP appeals system.

If an applicant is unhappy with a decision regarding benefits, they must first ask for a "mandatory reconsideration". This must usually be done within one month of the date of the original decision. When asking for a mandatory reconsideration, the applicant must write to the Department that gave the decision explaining why they think the decision was wrong and including any evidence they have to support this. The original decision will be reconsidered by the department that made it and the applicant will then receive a mandatory reconsideration notice, also known as a "written statement of reasons" telling them whether the decision has been changed or not. If the applicant is still unhappy with the outcome, they can appeal to an independent tribunal operated by HM Courts and Tribunal Service. The tribunal is therefore fully independent of the DWP and the appeal will be heard by a tribunal judge.¹⁰⁴

The appeal form, SSCS1, grounds the appeal and requires the applicant to provide the following information:

- Whether they want an oral hearing.
- Whether they can present the case to the tribunal themselves
- Whether they want their appeal decided on the basis of the application form and supporting documents only (no oral hearing)
- Whether an interpreter is required.

If the applicant chooses an oral hearing route, they must state on the form whether they will have a representative at the hearing, whether they need special arrangements due to mobility or health issues and whether there are any days they cannot attend a hearing.

¹⁰⁴ The tribunal must follow the procedures set out in Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

There is a one month time limit usually on appeals, however late appeals can be accepted up to 13 months after the date of the original decision if the applicant is ill or in hospital, coping with a bereavement or unable to send their appeal form because of a postal strike.

Once the application is received, they DWP will be asked to respond and the applicant must bring this response to the hearing. The tribunal will contact the applicant with a hearing date, which will take place at the nearest tribunal to where the applicant lives. The applicant must send their evidence to the tribunal before the hearing so that it can be sent to the other party. At the hearing, the applicant may be asked questions by their representative, the DWP representative (“presenting officer”), a panel of experts (who they are depends on what the case is about), or the judge.

If the applicant has requested an interpreter, the tribunal will provide one. The translator may translate what happens during the hearing, however they cannot represent the applicant or give them legal advice. An applicant may claim certain expenses for going to the tribunal. These include travel expenses, meals, loss of earnings and care expenses. The applicant will hear the tribunal’s decision either at the hearing or by post. If they are unhappy with the decision they can either get the decision “set aside” or they can appeal to the Upper Tribunal (Administrative Appeals Chamber). If an applicant thinks there has been a mistake in the process, the applicant will be told how to get a decision “set aside” (cancelled). An applicant can only appeal to the Upper Tribunal (Administrative Appeals Chamber) if they think the decision was wrong for a legal reason, for example if the tribunal did not give proper reasons for its decision, back up the decision with fact, or apply the law properly. The applicant must ask the Tribunal for a full statement of written reasons within one month of the date of the decision. Then, they must ask the Tribunal for permission to appeal to the Upper Tribunal. If the Tribunal refuses, the applicant may ask the Upper Tribunal for permission to appeal.

The introduction of mandatory reconsideration in 2014 resulted in a drop in the average wait time for disputes against benefit decisions from over 6 months to under a fortnight on average. The streamlining of the disputes process was part of the government’s long term plan to reform welfare provision. The Minister for Work and Pensions, Mark Harper, said that cutting the waiting time to resolve benefit disputes was not only good news for claimants, but also for the taxpayer. “Fewer appeals going to tribunal avoids protracted and

costly procedures for the taxpayer and the claimant". Recent statistics show that the proportion of people appealing to a tribunal had dropped by 86% between July and September 2014, compared to the same period in 2013.¹⁰⁵

Decisions of the Upper Tribunal are published, with applicant's names redacted, on the website of the UK equivalent of the Court's Service. The index of decisions is fully searchable and those considered of particular interest are highlighted on the website. Each decision is in the format of a court judgment setting out the facts of the case, the applicable law, the procedural history and a decision.¹⁰⁶

¹⁰⁵ We need a reference for this and also a reference to the governing legislation

¹⁰⁶ <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/tribunals/tribunal-decisions/osccs-decisions/> last accessed 29/03/2016.

Evaluating the Irish System

Information Sharing

The social welfare appeals system, as currently constituted, has an inadequate process for the sharing of information between the Department of Social Protection and an appellant prior to a hearing. The appellant will receive a notice of refusal of his benefit but must make a freedom of information request in order to receive copies of the evidence upon which the determination was made. The Freedom of Information Acts allow a period of 4 weeks to respond to such a request, whereas the time limit for making an appeal is just 21 days. An appellant must therefore complete his notice of appeal based only on the decision notice. It is unclear whether an amended notice of appeal can be submitted and on what grounds.

Delay

Cases referred to the Social Welfare Appeals System can take up to 32 weeks from application to decision, and sometimes more, depending on the process. Cases involving oral hearings often take a longer period of time to be dealt with. With the current delays in the appeals process, a person may not receive the payment to which he or she is actually entitled for more than a year after applying for it. If that person is solely reliant on that payment, with no access to any other income, or is not granted Supplementary Welfare Allowance in the interim, he or she could end up in a precarious position, accruing debt and/or facing destitution.¹⁰⁷

Legal Representation

An appellant has no absolute right to legal representation at an appeal hearing and the system of legal aid currently in place does not extend to social welfare appeals. Social welfare appeals are often very complex and particularly where a point of law is in issue, beyond the reasonable capacity of those affected. A survey showed that only 10% of applicants were accompanied by representation (legal representatives, witnesses, advocates) during oral hearings. Some limited advocacy services are available through a national network of Citizens' Information Centres, but this service does not have the resources to assist even a small minority of social welfare applicants.

¹⁰⁷ FLAC, "Not Fair Enough", Making the case for reform of the social welfare appeals system'

Oral Hearings

Oral hearings are not a fixed part of the social welfare appeals process, appellants must request in writing, but such a request is not always granted. The process is largely based on written communication which can prove limiting to those who may not be able to read and/or write. It was also noted that written communication is not as effective as an oral hearing where for example the extent of a person's disability would not be as apparent as with written communication it is simply ticking a box, whereas with an oral hearing depending on the type of disability it would be more apparent. In relation to this aspect of the appeals system it would appear that fair procedure has not been applied in the sense that an oral hearing is not guaranteed.

Section 313 of the 2005 Act refers to the holding of oral hearings for the purpose of entering evidence into oath, suggesting that an oral hearing is obligatory where evidence beyond the information on the original application is tendered, whether requested or not. Section 317, which allows an appeals officer to revise a previous decision in light of new information, does not include any provision for oral hearings, but could be interpreted to allow oral hearings to deal with such new information whether requested by the applicant or not.

Audi Alteram Partem

Under the meaning of Fair Procedures, it is only just to allow both parties of any claim be heard. This means that all information, evidence, witnesses and facts should be disclosed prior to hearing of a case. Furthermore, adequate notice should be given to the applicant prior to the hearing of their case or appeal. It appears the Social Welfare Appeals Office (SWAO) does not comply with such procedures. An applicant has 21days, from being denied social welfare, to appeal the decision to the Chief Appeals Officer. The applicant must supply, along with the notice of appeal, any evidence or documents they wish to rely on to support their appeal. Furthermore, the SWAO states that a copy of the letter from the DO should be enclosed in the application for appeal. There is a link on the SWAO website under the heading '*Freedom of Information Act 1997 – 2003*' that states how the appellant can obtain copies of the documents the DO uses to reach their decision. An issue may arise in this instance as to how long it takes to obtain this information as this could have an impact of the time limit, of 21days, to make an appeal.

The CAO will also be provided with a statement from the deciding officer setting out the facts of the first decision, and any documents or relevant information. The CAO will then give notice to those concerned that the appeal has been submitted. According to the FLAC report, the Applicant's file may not be sent to the Applicant prior to the hearing/ decision making unless it is specifically requested under the Freedom of Information Act.

It appears that the applicant has to provide a significant amount of information to apply for their appeal, along with having to apply for the DO information which is not provided for already. It seems one sided as the claimant must seek out all information necessary in order to make a notice of appeal, while the office does not provide information on their end unless sought for under the Freedom of Information Act 1997.

Disclosure of Information/Witnesses

An applicant is entitled to know the case that is against them. This refers to any information, witnesses or documents that they will have to face in relation to their appeal. The SWAO does not comply with such rights as a claimant must request to see certain information under the Freedom of Information Act 1997. Furthermore, with regards oral hearings, which can be proven to be difficult to request and be granted, the applicant is not informed of any witnesses they may face at the hearing brought in by the SWAO. This is problematic as no legal representation is provided for, if an applicant cannot afford representation and wishes to represent themselves, how can one be expected to cross-examine unknown witnesses and controvert anything they may say without prior notice. This is a clear breach of fair procedures. A claimant is entitled to know any information that is against them, as well as in the favour so as to give them the right to cross-examine adequately and make sure their case is heard fairly.

Review of Case law, Chief Appeals Officer Report 2014, Ombudsman Casebook Issue 1 2014 – Issue 4 2015.

Superior court decisions involving the Social Welfare Appeals Office (SWAO) indicate it adheres strictly to statutory definitions when making decisions to grant Social Welfare or Supplementary Welfare Allowance payments. However, the Chief Appeals Officer Reports, and those of the Ombudsman indicate that the Office is neither rigorous nor consistent in its decision making process. Some specific issues of concern relate to the status of medical evidence, the (non) publication of guidance notes and administrative errors.

1. *Medical Evidence:*

Medical evidence is often required to support an application for a welfare payment. The Department of Social Protection will produce its own medical assessors report and an applicant may also provide their own information. The status afforded to the applicant's evidence has been called into question in a number of cases with the Ombudsman noting on several occasions that it had been ignored or over looked.¹⁰⁸ Failure to afford appropriate consideration to the applicant's medical evidence had led to the refusal of a payment to which the applicant was entitled. A further difficulty arises in that medical reports may not adequately communicate the extent of a disability. The CAO's 2014 report refers to a written assessment by a general practitioner that was 'far removed from the reality of [the applicant's] condition as ... observed at oral hearing.'¹⁰⁹ There does not appear to be any absolute requirement for medical evidence to support a claim for an illness or disability payment. As reported by the CAO in 2014, however, an oral hearing should be arranged where medical evidence is not available.¹¹⁰ Even where medical evidence is available, an oral hearing can help to confirm the opinion of the clinician.¹¹¹

The threshold at which a disability or illness will be sufficient to create an entitlement is unclear, with significant inconsistency in decision making. For example, an applicant self-medicating but without medical evidence was deemed eligible for a [disability payment] whereas others with medically certified difficulties were not.¹¹²

2. *Guidelines and policies*

No guidelines are provided by the SWAO in relation to the circumstances in which they will extend the time limit for appeal beyond 21 days. A refusal to extend the period has resulted in a number of complaints to the Ombudsman. For example the SWAO was directed to allow

¹⁰⁸ See for example Ombudsman Casebook Issue 1 Autumn 2014 Carer's Allowance C22/13/1537 and Ombudsman Casebook Issue 2 Winter 2014/15. Ombudsman Casebook Issue 1 Autumn 2014 Carer's Allowance C22/14/0447

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¹¹⁰ CAO Report 2014/05

¹¹¹ CAO Report 2014 /20 Dystonia – '*The appellant's physical presentation at the oral hearing was consistent with the symptoms and restrictions she described*'.

¹¹² One case from CAO report 2014/18, even indicated that no medical evidence had been provided due to financial difficulty and the applicant was taking self-prescribed medication, the appeal was allowed. While in previous and subsequent cases documented in the 2014 report even where medical evidence is provided it is sometimes not enough for a claim to proceed (Case 2014/19 Depression, Low Back Pain).

an appeal to proceed where an applicant for disability allowance was prevented from meeting the deadline as a direct result of his disability.¹¹³

There is ambiguity regarding whether Applicants are entitled to receive a payment backdated to the point at which they first became eligible. The Ombudsman's 2014/5 report refers to an applicant for carers allowance who was refused a backdated payment. The Ombudsman made a case for backdating on the grounds that the Applicant was not aware that she was entitled to the allowance and could not leave her elderly mother to pursue the claim.¹¹⁴

In The Ombudsman Casebook Issue 2 Winter 2014/15 Carer's Allowance C22/14/0224, the Ombudsman made the case for the applicant that she did not have the opportunity to apply for the allowance as she 1. Was not aware that she could claim Carer's Allowance onto of the State Pension and 2. She had no time to leave her ill mother that she was caring for at the time. Similarly the Ombudsman made a case for backdating where the Applicant was too busy pursuing an ultimately unsuccessful claim with the Department to attend expeditiously to an additional claim.¹¹⁵

The lack of administrative guidance was also in issue in a housing support claim reported in 2014. The payment was refused by SWAO because the applicant had failed to produce certain documents demanded by the Department. The Ombudsman pointed out that there was no policy or protocol in place with the Department that required these documents and therefore the payment could not be refused on the grounds of failure to produce them.¹¹⁶

3 *Administrative Errors:*

The Ombudsman's reports evidence a significant number of administrative errors resulting in adverse outcomes for applicants. The Ombudsman identified errors in the calculation of overpayments, an absence of detailed calculations and the stopping of payments without notice to the applicant. One case identified an error of €8,500 between the amount

¹¹³ Ombudsman's Casebook Issue 3 Spring 2015 Disability Allowance C22/14/1705,
¹¹⁴

¹¹⁵ Ombudsman's Casebook Issue 3 Spring 2015 disability Allowance C22/14/1694,

¹¹⁶ Casebook Issue 2 Winter 2014/15 Rent Supplement C22/12/1964

demanded for overpayment and the actual amount due.¹¹⁷ Another case involved an administrative error in recording the outcome of an appeal, resulting in arrears of €4278. The error was identified by the Ombudsman when he took up the file for review.¹¹⁸ In *Flora Gusa v. Minister for Social Protection, Ireland and Attorney General*¹¹⁹ the High Court noted a failure to date an appeal decision, despite a statutory requirement to do so.

The seemingly basic nature of many of these complaints raises worrying questions regarding the decision making processes within the SWAO. No guidelines appear to exist within the SWAO for issues, such as necessary supporting documentation, the holding of oral hearings or backdating and calculating of overpayments, which must arise on a daily basis. There were 26,069 appeals received by the SWAO in 2014 with few, if any systems in place to ensure consistency in decision making, a basic principle of fair procedures and the rule of law.

¹¹⁷ The Ombudsman's Casebook, Issue 4 Summer 2015 Jobseeker's Allowance C22/14/1449).

¹¹⁸ Ombudsman's Casebook Issue 4 Summer 2015 Supplementary Welfare Allowance Scheme C22/41/1570

¹¹⁹ 2013 No. 140 JR]

Recommendations:

1. The Social Welfare Appeals form should be revised to include information regarding the possibility of an oral hearing and a clear check box in which applicants can indicate their wish to have an oral hearing.
2. The Social Welfare Appeals form should be revised to include information regarding the availability of interpreters for oral hearings and a check box provided in which applicants can indicate their wish to have a translator and the language required.
3. More attention should be given to potential language difficulties throughout the appeals process, with information and decisions provided in a language the applicant can understand.
4. Further investigations should be made regarding the application of the principle of consistency in decision making both within the Department of Social Protection and in the Social Welfare Appeals Office.
5. Time limits for making appeals and the process for seeking a revision of an appeal's officer's decision should be clearly indicated on the Social Welfare Appeals form.
6. Applicants for social welfare should be provided with all information upon which a decision to refuse a payment is made when the decision is communicated to them. It should not be necessary for applicants to make a freedom of information request to obtain this information. At a minimum it should be clearly communicated that this information is available and how it can be obtained.
7. Any policies and procedures adopted by the SWAO in relation to expert evidence, the criteria for exercising the discretion to grant an oral hearing, the weight afforded to medical assessors' evidence and documentation necessary and relevant to appeals should be posted on the SWAO web-site.
8. All calculations used by the Department of Social Protection and the SWAO should be clearly set out on department and appeals decision notices.

9. The SWAO should create a database of previous decisions, fully searchable and posted on their website. This would facilitate consistency in decision making, a key requirement of the rule of law and fair procedures in administrative decision making.

Recent Judicial Review Cases involving the Department of Social Protection

CP v Chief Appeals Officer, Social Welfare Appeals Office & the Minister for Social Protection [2013] IEHC 512.

These judicial review proceedings concerned the circumstances whereby an adverse decision of an appeals officer refusing domiciliary care allowance could be re-opened under section 317 of the Social Welfare Consolidation Act 2005. The applicant, CP, applied to the Minister for Social Protection for domiciliary care allowance in April 2011 in respect of her daughter, K. K, was 10 years old at the time of the proceedings, and had been diagnosed with autism spectrum disorder and attention deficit hyperactivity disorder. She was characterised as having special educational needs. Domiciliary care allowance is a statutory payment made in relation to children with a disability, and who require “care and attention” in excess of what would be required for a child of the same age without the disability. The application in respect of K was refused on the basis that the statutory test was not satisfied.

The applicant sought further evidence, and obtained reports from K’s GP, a specialist nurse as well as the school principal and special needs teacher. Moreover, a letter was written to the Department of Social Protection in May 2013 which explained the additional home supervision required by K, and sought to appeal the refusal of domiciliary care allowance. The Department responded, stating that the matter was considered closed as it had been “through the appeals process”, but that CP was welcome to submit a new application. The applicant, however, wrote to the Chief Appeals Officer, drawing attention to section 317 of the 2005 Act which provided for the “furnishing of new evidence or of new facts ‘at any time’ following a decision on appeal so that a statutory revision of [the] decision can be considered”, and requested a reconsideration of the decision. The Social Welfare Appeals Office responded on the 22nd of July in what was essentially a “steadfast refusal to entertain an application for revision” which ignored the section 317 provision. As such, it was apparent that where an application was considered to be “closed”, it was not considered as available for re-opening under section 317.

Hogan J held that the case turned on the proper construction of section 317. It was held that the Oireachtas recognised, given the nature of social security claims and the constantly changing circumstances of claimants, that the Appeals officer should have the power to re-open appeals. It was also held that the role of the Court was to give effect to the intention of the Oireachtas, and that the meaning of section 317 was clear, unambiguous and not absurd. It was therefore concluded that in the circumstances, the Department failed to operate the section in the way clearly intended by the Oireachtas. The decision not to reconsider the application had no basis in law and therefore, in refusing to entertain the application for a review of the earlier decision, the Appeals Office erred in law as section 317 clearly provided this jurisdiction.

The court therefore made an order of certiorari quashing the decision of the Appeals Office on the 22nd of July declining revision of the earlier decision to refuse domiciliary care allowance. An order of mandamus was also made directing the Chief Appeals Officer to consider this review under section 317 of the 2005 Act.

B v Minister for Social Protection 2014

By decision dated May 16, 2013, a deciding officer for the Minister for Social Protection decided that B's son was not a qualified child on the basis that the medical evidence provided did not indicate that the extra care and attention required by him is substantially in excess of that required for a child of the same age who does not suffer from the same condition. The medical assessor, by opinion dated May 3, 2013, had stated that the medical evidence submitted to date did not indicate a disability so severe as to require substantial extra care.

Section 186C(2) provides that a Department of Social Protection medical assessor shall (a) assess all information provided to him or her in respect of an application for domiciliary care allowance, and (b) provide an opinion as to whether the child satisfies the required fields

Section 186C(3) provides that:

“In determining whether a child satisfies paragraphs (a) and (b) of subsection (1), a deciding officer shall *have regard to* the opinion, referred to in subsection (2)(b), of the medical assessor.”

The court pointed out that the deciding officer may refer to the medical assessors opinion, but does not state that the deciding officer must follow this opinion. However in this case it was found that the deciding officer had agreed with the medical assessor's opinion in 3,806 cases. This suggested that the deciding officer had abdicated his statutory duties.

The court stated the following in relation to this issue:

the court considers that the policy whereby deciding officers generally defer to the opinions of department medical assessors in the manner and circumstances described has yielded a situation in the instant case in which there has been an abdication of statutory duty by the deciding officer who decided B's initial application. the deference manifested by this particular deciding officer to the opinion of medical assessors has been proven to be so great that the court concludes that the medical assessor's opinion volunteered in the course of the consideration of B's initial application was in fact determinative of that application, thus resulting in a contravention of s.300 of the Social Welfare Consolidation Act 2005, thereby tainting the decision-making process.

Given the foregoing conclusions, the court orders that the decision made in relation to B's initial application be remitted to the Department of Social Protection for fresh consideration.

MD v Minister for Social Protection [2015] IEHC 206

In this case, the applicant applied for domiciliary care allowance for her son under a scheme of the Social Welfare Consolidation Act 2005. The applicant was refused allowance, with the deciding officer stating her son was not a "qualified child" within the meaning of the provisions. The applicant lodged an appeal of the decision to the Social Welfare Appeals Office. The applicant lodged a large body of supportive medical records, including reports from a physiotherapist, speech therapist, occupational therapist and a psychologist. On 5th of March 2015, the solicitor for the applicant asked for an "independent physical assesment" to resolve the "conflict of medical evidence. The deciding officers refused this, stating that they had considered the medical evidence and the child did not qualify. On appeal, the decision remained unchanged.

Upon judicial review, Ms Justice Baker found that the respondent had "erred in law and breached fair procedures and natural constitutional justice by failing to consider all of the evidence furnished by the applicant"

Aidan Smith v Chief Appeals Officer Social Welfare Appeals Office Minister for Social Protection [2014] IEHC

In this case, the applicant was in receipt of illness benefit from 12 of January 2012 until March 13 2014. He had been employed by Aer Lingus for over 39 years. He retired on medical grounds following four hip operations, two of which were defective. In April 2013, he applied to the Minister of Social Welfare for an invalidity pension which was refused. He sought a revision which was also refused. On the 7th of August 2013, he lodged an appeal which was acknowledged by the Appeals Office on 14 August. By January 2014, there was still no decision. The applicant sought an update on 6th of January and only on the 30th of January did he receive notice that his appeal had been disallowed, without an oral hearing, on a summary basis, despite his request of an oral hearing. Part of his materials furnished as evidence was a letter from his consultant Orthopedic Surgeon from May 2012 stating he would be unfit for any job presently or in the future. Clearly, this was a case where an oral hearing would have assisted in resolving the case. The applicant's solicitor threatened the respondents with Judicial review. It was only then that the Chief of Appeals Officer offered an oral hearing. Upon judicial review, the judge refused judicial review, due to the fact that the SWAO offered to do an oral hearing. How is this fair? Only with the threat of judicial review did the SWAO show any interest in resolving the applicant's issue.

Malone v. Minister for Social Protection [2014] IECA 4

Appeal was dismissed on the basis that the issue was moot i.e. there was no dispute remaining between the parties and the relief sought, even if granted, would have no impact on the parties involved. The Applicants original application for a domiciliary care allowance ('DCA') in respect of her autistic child. The application had been refused by the first DO based on the fact that the child did not meet the requisite statutory criteria.

The Applicant submitted additional evidence in support of her application and the second DO agreed with the first DO's decision. The Applicant then sought and obtained leave from the HC to apply by way of JR to quash the decisions made by the respondent through the DO's. The Applicant asked for the following to be reviewed:

A declaration that the respondent was obliged by statute and/or fair procedures and/or by way of natural and constitutional justice, to carry out medical examination on the autistic child given the alleged existence of a conflict in the medical evidence. Hanna J. found that while the statutory scheme provided for the power to carry out a medical examination, having regard to the fact that there was no dispute on the medical evidence, there was no duty on the respondent, on the facts of this case, to conduct such an examination on the autistic child.

A declaration that the respondent, in failing to disclose how the conflict in the medical evidence had been resolved, had erred in law and/or was in breach of statutory duty and/or of fair procedures and/or natural and constitutional justice.

A declaration that the said decisions were unlawful and/or invalid and in breach of fair procedures and/or natural and constitutional justice, in so far as reasons were not furnished in support of the said decisions.

Hanna J noted that the reason underlying the decisions of the respective DO's was clear and unambiguous. Hanna J noted that the applicant's true remedy, having regard to the comprehensive appeals mechanism provided for in the legislation, lay not in JR but in her entitlement to appeal the decisions of the DO pursuant to s.311 of the 2005 Act. The applicant did exactly this and was successful in receiving DCA. However the Applicant pursued the decision and judgement of Hanna J above and it is this action that was found to be moot.

The Applicant wanted to confirm going forward that the 'importance of a determination as to whether the DO is required to give reasons beyond those that were actually given and whether, in the event of a dispute on the medical evidence, that conflict must be resolved by reference to a medical examination.

It was noted that the Notice of Appeal was never about the Applicant's right to DCA but more concerned with the decision making process of the SWA system. However the Court held against the applicant due to the basis that her claim was moot and they could not decide a case based on what may or may not happen to the Applicant in a similar application in the future.

Galian Genov, Florae Gusa v. Minister for Social Protection & ORs [2013] IEHC 340

In this case the Applicants were not entitled to job seekers allowance. The Arguments put forward were in relation to whether the Applicants had a Right to Reside and whether this right could be discriminatory against non citizens or whether each individual Member State could have a restriction on who could avail of the Right to Reside for EU citizens. .

The second argument put forward was in relation to whether the applicants were ever employed and seeking work or whether they were self employed. This would determine whether they were entitled to the job seekers allowance i.e. social security v. social assistance. Points to note from reading the case is that the DO decision was **undated!** The Applicant noted that it had been received but undated on 5 February 2013!

Kelly v. The Minister for Social Protection [2013] IEHC 260 (29 May 2013)

The Applicant sought illness benefit - however argument between whether the illness benefit should be sought and obtained from Republic of Ireland or from where she had her most recent employment i.e. in Northern Ireland where she only worked for a total of 4 months in Northern Ireland. Findings was that the 2 questions were sent to Court of Justice for Judicial Review - the eligibility of the Applicant to social insurance after working in two member states.

Appendix One

Chief Appeals Officer Annual Report Statistics 2007 - 2014

Appendix Two

Social Welfare (Consolidation) Act 2005 – Appeals Sections, updated

Appendix Three

Irish Social Welfare Appeals Form

Appendix Four

UK Benefits Appeal Form