

Ombudsman Investigation - Supplementary Welfare Allowance Scheme

Complaint against the Health Service Executive

Summary

This was an Investigation by the Ombudsman of a complaint about the failure of the Health Service Executive (HSE) to pay the appropriate rate of basic income to an asylum seeker and its failure to implement the decision of a Social Welfare Appeals Officer. The investigation looked at the actions of the HSE following the Appeals Officer's decision which was in favour of the applicant. The investigation also looked at the circumstances of the particular case and the effect on the applicant and her family of the failure to pay her the appropriate rate of supplementary welfare allowance (SWA). The HSE had not implemented the favourable Appeals Officer's decision on the grounds that, it believed, the applicant was not entitled to the full rate of the allowance. Following a detailed investigation, the Ombudsman upheld the complaint. She found that the HSE had no proper basis for its actions in the matter and that the failure caused significant adverse consequences over an extended period for the family. The Ombudsman found that the decisions made by the HSE were taken without proper authority, were improperly discriminatory and were contrary to fair or sound administration.

The HSE administered the SWA scheme on behalf of the Department of Social Protection until October 2011 at which point it transferred to the Department. The Ombudsman consequently made her recommendations arising from this investigation to the Department of Social Protection.

The Case

In March 2010, Ms Kileni (not her real name) complained to the Ombudsman about the rate of SWA paid to her by the HSE. She believed that the decision (made in December 2009) by the Appeals Officer was to grant her the full weekly rate of SWA of €197.80 for herself and €24.00 per week for her daughter. Following the Appeals Officer's decision, however, the HSE paid her €19.10 for herself and €9.60 for her daughter. The complainant, Ms Kileni, attempted to resolve the matter with the HSE prior to making her complaint to the Ombudsman but was unsuccessful.

SWA consists of a basic payment and/or a supplement to cover certain expenses a person may not be able to meet. The main purpose of the allowance is to guarantee a standard basic minimum income.

Ms Kileni came to Ireland in 2007 with her two daughters as an asylum-seeker. They were placed in what is known as "Direct Provision" accommodation operated by the Reception and Integration Agency which is part of the Department of Justice and Equality. Direct Provision provides food and shelter to asylum seekers while their claims for refugee/other status are being processed. They are also paid weekly allowances of €19.10 per adult and €9.60 per child.

In August 2008, the family had left Direct Provision in the west of Ireland to stay with a friend in Dublin. Ms.Kileni moved because of the deteriorating mental health of one of her

daughters and because conditions in her Direct Provision hostel were unsatisfactory in view of her daughter's circumstances. The 15-year-old girl was subsequently hospitalised following a suicide attempt and, after discharge from hospital, was placed in foster care on a voluntary basis. Ms Kileni applied for SWA in November 2008. The application was refused. She appealed the decision to the HSE, was again refused and then appealed to the Social Welfare Appeals Office.

There was an oral hearing of the case in June 2009 and in December 2009 the Appeals Officer allowed Ms. Kileni's appeal. The Appeals Officer issued a detailed statement on her decision which had regard to the exceptional medical and social circumstances of the case. However, the relevant Superintendent Community Welfare Officer (who administered the SWA scheme) queried the outcome. Despite the responses from the Appeals Officer confirming her decision, and despite the fact that Ms Kileni was not living in Direct Provision accommodation, he decided to pay Ms Kileni at the rate of €19.10 per week for herself and €9.60 per week for the daughter then living with her. This payment was at the rate payable to asylum seekers in Direct Provision.

The HSE corrected its position only following the intervention of the Ombudsman's Office. The Appeals Officer's decision was finally implemented in January 2011 when an arrears payment of €11,882 was paid to Ms Kileni, 13 months after the success of her appeal. Shortly following the implementation of the appeal decision, the HSE reviewed Ms. Kileni's entitlement and found her to be ineligible for SWA; pending the outcome of an appeal, it paid her at the reduced rates applicable to asylum seekers living in Direct Provision. Some months later, following a separate appeal, Ms. Kileni had her SWA entitlement restored.

The Investigation

It is quite rare, in the experience of the Ombudsman's Office, that a decision of an Appeals Officer would not be implemented in full and without delay. In law, the decisions of an Appeals Officer are "final and conclusive". There is a procedure for querying appeal decisions (which does not allow for the withholding of payments while a decision is being queried) but it was not followed in this case. While the case may have been unusual, the failure to implement an Appeals Officer's decision over a long period of time warranted formal investigation. It was also important to consider the consequences of the HSE's actions on the complainant and her family. The Ombudsman's investigation explores the legal and other issues raised in this particular case.

An obvious consequence was extreme impoverishment for both Ms Kileni and her eldest daughter (a Leaving Certificate student at the time). Another, far-reaching consequence was that the failure to provide the family with an income meant it was not possible for Ms. Kileni's daughter, who was in foster care, to be re-united with her family. This was an outcome which the HSE social workers involved in the girl's care had anticipated as a result of the Appeals Officer's decision to award the full-rate SWA to Ms Kileni. The failure to implement the Appeals Officer's decision, and the emotional and financial instability for the family which resulted from that failure, upset these plans.

The HSE defended its actions in its response to the Ombudsman's notification of the investigation. The Ombudsman did not find that the arguments made by the HSE were valid and her analysis of these arguments is outlined in the report of the investigation.

Having carried out an investigation, the Ombudsman found:

- that the Community Welfare Service of the HSE (acting for the Department of Social Protection) failed to implement correctly a decision of a Social Welfare Appeals Officer; that there was no proper basis for this failure; and that the failure caused significant adverse consequences, over an extended period, for the Kileni family;
- that, in particular, the failure to implement the Appeals Officer's decision impacted negatively on the efforts to re-unite the family being made by the HSE Child Protection Service;
- that this failure reflects actions which were taken without proper authority, were improperly discriminatory as well as being otherwise contrary to fair or sound administration.

In responding to a draft of this report, the Department of Social Protection said that, in the light of the Ombudsman's report, it had asked the HSE to write to Ms Kileni to convey its apologies for what had happened. The Department explained that it had asked the HSE to convey this apology because it was the "responsible body" at the time the claim was made. Subsequently, the HSE sent a letter of apology to Ms. Kileni.

Recommendations

In view of the significant adverse consequences suffered by Ms Kileni and her family the Ombudsman recommended to the Department of Social Protection that it make a "time and trouble" payment – or "consolatory" payment as it is known in some other jurisdictions – to Ms Kileni of €3,000.

This recommendation was made to the Department of Social Protection, rather than to the HSE, on the basis that the SWA scheme at the time in question was being administered on behalf of the Department and under its general control and direction and because, in any event, the SWA scheme has always been funded through the Department's Vote. The Department accepted "that there was an unnecessary and unwarranted delay in the payment of arrears by the HSE" in the case and implemented the recommendation to pay the recommended sum to Ms Kileni.

Investigation Report:

Appeal Overruled: A failure to provide basic income for a family seeking asylum

**An Investigation under Section 4 of the Ombudsman Act 1980
(as amended)**



Office of the Ombudsman

June 2013

Chapter 1 - Background and Preliminary Examination

The Complaint

The complaint was that the Health Service Executive (HSE) failed to pay the appropriate rate of basic income to a woman and her two children and thus failed to implement the decision of a Social Welfare Appeals Officer.

In March 2010 Ms Thandi Kileni complained to the Ombudsman that the HSE had failed to pay her the correct amount of Supplementary Welfare Allowance (SWA) following her successful appeal of the HSE's initial refusal of her application.

Ms Kileni applied for SWA to the Community Welfare Service of the HSE on 13 November 2008. Supplementary Welfare Allowance is a weekly payment designed to ensure a basic minimum weekly income. It may also be paid to deal with exceptional needs or in cases of urgent need. At the time of the application, the HSE administered SWA on behalf of the Department of Social Protection¹.

Following the refusal of her initial application, Ms Kileni appealed this decision to the HSE Appeals Office. Her appeal was unsuccessful. She then appealed further to have her case considered by a Social Welfare Appeals Officer (Appeals Officer hereafter). Decisions of Appeals Officers are, for the most part, final and conclusive. On 15 December 2009 an Appeals Officer upheld Ms Kileni's appeal. Following the Appeals Officer's decision, the Community Welfare Service commenced paying Ms Kileni what it called a 'reduced rate' of SWA of €19.10 per week for herself and €9.60 per week for her daughter.

Ms Kileni believed that the decision of the Appeals Officer was to grant her full weekly SWA of €197.80 for herself and €24.00 for her daughter. Following unsuccessful attempts to resolve the matter with the Community Welfare Service, Ms Kileni complained to the Ombudsman on 19 March 2010.

What is Supplementary Welfare Allowance?

[Supplementary Welfare Allowance](#) consists of a basic payment and/or a supplement to cover certain expenses a person may not be able to meet.

According to the Department of Social Protection's website, the main purpose of the allowance is:

- to guarantee a standard basic minimum income;
- to provide a residual and support role within the overall income maintenance structure;
- to provide immediate and flexible assistance for those in need who are awaiting decision on payment of other State schemes;

¹ On 1 October 2011, the Community Welfare Service transferred to the Department of Social Protection. The service and the staff are now part of that Department.

- to provide people with low incomes with a weekly supplement to meet certain special needs (e.g. rent and mortgage interest payments) or a payment to help with the cost of any exceptional needs they may have;
- to help those whose needs are inadequately met under the major schemes;
- to help those confronted with an emergency situation.

Background to the Complaint

Ms Kileni arrived in Ireland from South Africa in April 2007 with her two daughters then aged 14 and 15 years. Ms Kileni sought asylum in Ireland because, she says, she fears for the safety of her family following the murder of her husband in South Africa. The family was sent to asylum accommodation in County Mayo.

Ms Kileni and her two daughters were placed in what is known as ‘Direct Provision’ accommodation. Direct Provision is a means of meeting the basic needs of asylum seekers for food and shelter while their claims for refugee status, or leave to remain/subsidiary protection, are being processed. In addition to food and shelter, people in Direct Provision receive weekly personal allowances of €19.10 per adult and €9.60 per child. These cash allowances are paid by the Community Welfare Service. These arrangements were introduced in April 2000 and are operated by the Reception and Integration Agency which is part of the Department of Justice and Equality. The rates of the weekly payments have not changed since 2000.

In August 2008 the family left Direct Provision in Mayo to stay with a friend in Dublin. Ms. Kileni says she moved because of serious concerns about the mental health of one of her daughters and because conditions in her Direct Provision hostel were unsatisfactory – particularly in view of her daughter’s mental health issues.

In October 2008 Ms Kileni’s 15-year-old daughter was hospitalised following a suicide attempt.² Following her daughter’s discharge from hospital, the HSE’s child protection service became involved and Ms. Kileni’s daughter was placed in foster care on a voluntary basis. In order to be able to avail of medical and other care for her daughter, Ms Kileni applied for a medical card. She says she was informed that she might qualify for a medical card if she was getting a social welfare payment such as Supplementary Welfare Allowance. Thus, she applied for Supplementary Welfare Allowance.

By this stage, Ms Kileni’s asylum application had been refused and she and her two daughters were awaiting a decision from the Department of Justice and Equality on their applications for humanitarian leave to remain and subsidiary protection.

On 24 November 2008 Ms Kileni’s application for SWA was refused by the Community Welfare Service on the basis that she had “*voluntarily left direct provision accommodation*”.

In December 2008 Ms Kileni appealed this refusal to the HSE Appeals Office. On 19 March 2009 her appeal was refused on the ground that she was not habitually resident in the State. In notifying Ms Kileni of her decision, the HSE Appeals Officer made no reference to Ms.

² At her social welfare appeal hearing in June 2009, Ms. Kileni told the Appeals Officer that there had been a previous such attempt while living in Direct Provision in Mayo.

Kileni having left Direct Provision accommodation. In her letter, the HSE Appeals Officer stated that she had been informed by the Superintendent Community Welfare Officer (SCWO) that the application had been refused as Ms Kileni was not habitually resident in the State.

What is Habitual Residence?

In the case of some social welfare payments, including SWA, one of the requirements is that the applicant must be habitually resident in the State at the time of the application. The term "habitually resident" is not defined in Irish law, but it conveys a degree of permanence – meaning that a person has been here for some time and is intending to stay for a period into the foreseeable future. Generally, proving habitual residence relies heavily on the facts of the case. But since December 2009 people awaiting decisions on asylum applications, or on applications for humanitarian leave to remain, are regarded in law as not being habitually resident.

The relevant legislation is at section 246 of the Social Welfare Consolidation Act 2005 [as amended by Section 30 of the Social Welfare and Pensions Act 2007 and Section 15 of the Social Welfare and Pensions (No. 2) Act 2009].

It is fair to say that the habitual residence rule has proved controversial as well as being difficult to operate in practice.

Appeal to the Social Welfare Appeals Office

On 2 April 2009 Ms Kileni appealed the HSE's decision to the Social Welfare Appeals Office. On 2 June 2009 the Appeals Officer to whom the appeal was assigned held an oral appeal hearing. On 12 December 2009 the Appeals Officer issued her decision which was to allow Ms. Kileni's appeal. The Appeals Officer sent a copy of her appeal decision also to the HSE's Community Welfare Service.

Following this favourable appeal decision Ms Kileni was initially (for about four weeks) paid the full basic rate of SWA (€221.80 per week) for herself and the daughter then living with her. Arrears of SWA, back to the original date of claim in November 2008, were not paid. However, the relevant SCWO then queried the appeal decision of the Appeals Officer and, as a result, decided to pay Ms Kileni at the rate of €19.10 per week for herself and €9.60 per week for the daughter then living with her. On 14 January 2010, the SCWO wrote to Ms Kileni stating that she would be paid this 'reduced rate' of SWA which would be backdated to her application on 13 November 2008. In his letter also he said he intended to review her habitual residency status in order to determine her continued entitlement to Supplementary Welfare Allowance.

On 3 February 2010 Ms Kileni wrote to the Appeals Officer complaining that her decision had not been implemented correctly. On 1 March 2010 the Appeals Officer replied that implementation of the appeal decision was a matter for the HSE and that Ms Kileni should contact her "*local Superintendent/ Community Welfare Officer*" if she considered that "*the appeal is not being correctly implemented*". The Appeals Officer also told Ms Kileni that the

appeal decision was that she was entitled to the “*Supplementary Welfare Allowance rate appropriate to your need less any means you may have*”.

On 19 March 2010 Ms Kileni complained to the Ombudsman about the way in which the SCWO had implemented the decision of the Social Welfare Appeals Officer.

Preliminary Examination

It is quite rare, in the experience of the Ombudsman’s Office, that a decision of an Appeals Officer would not be implemented in full. In law, the decisions of a Social Welfare Appeals Officer are “final and conclusive”.³ While there are some grounds on which a review of an Appeals Officer decision may be sought – discussed later in this report – the Appeals Officer decision must be implemented immediately where it is favourable to the appellant. It was against this background that the Ombudsman’s Office conducted a preliminary examination of Ms Kileni’s complaint.

The factual situation, at the point of receiving Ms Kileni’s complaint, was that 13 months after her SWA application, and three months after an apparently favourable appeal decision, Ms Kileni had not received her proper SWA entitlements. Furthermore, there were no obvious grounds on which the SCWO could decide not to implement the Appeals Officer decision in full.

Having carried out a preliminary examination of the complaint, the Ombudsman’s Office asked the HSE to review its position with a view to implementing the decision of the Appeals Officer in full.

The HSE then reviewed its decision and decided to pay Ms Kileni arrears of full rate SWA back to the date of her application in November 2008. However, these arrears (amounting to €11,882) were not paid to Ms Kileni until January 2011 which was

- 26 months after her SWA application,
- 13 months after the success of her appeal, and
- nine months after she had complained to the Ombudsman.

In fact, the arrears were paid only up to February 2010 as, at that point, the SCWO had made a further decision that Ms Kileni was not habitually resident in the State and, for that reason, was not entitled to any SWA payment. Ms Kileni appealed this decision on the habitual residence issue and, in August 2011, an Appeals Officer (not the Officer who dealt with the earlier appeal) upheld her appeal and determined that she was habitually resident in Ireland. The issue of habitual residence is not an issue dealt with in this present report.

The Ombudsman’s Office requested the Department of Social Protection⁴ and the HSE to issue guidelines to staff highlighting the importance of implementing the decisions of Appeals Officers promptly and in full. The Ombudsman also suggested to the HSE that it

³ Section 320 Social Welfare (Consolidation) Act 2005

⁴ At this stage the staff of the Community Welfare Service had been seconded to the Department of Social Protection pending transfer to that Department. However, the staff remained employees of the HSE.

issue an apology to Ms Kileni for the delay of over a year in implementing the Appeals Officer decision.

On 10 June 2011 the HSE replied to the Ombudsman's Office saying, amongst other things:

*"... there is no evidence that, in general,[appeal] decisions are not implemented immediately. This case was exceptional and complex.
[...]"*

I wish to clarify that Ms Kileni applied to the CWO for the continued payment of Direct Provision Allowance and not the full rate of SWA as stated in your letter. This has been verified through her application form, of which you have a copy. [...]"

... On considering the [Appeals Officer's] decision forwarded to him, there were a number of matters on which the SCWO required clarification to establish if the case should be re-submitted to the Chief Appeals Officer for review i.e. the amount to be paid and the legislative basis for the decision, having regard to Ms Kileni's status as an asylum seeker awaiting the decision of the Minister for Justice, Equality and Law Reform. The SCWO did not act outside the law in this case.

... While awaiting this clarification the SCWO implemented the decision of the Appeals Officer as understood by him, the amount that was paid was based on the application form and the amount applied for in that application. [...]"

*At no time was Ms Kileni without the amount of income for which she applied. ... The full rate of SWA was paid as a result of representation (sic) received from your Office despite the fact that the SCWO has still not been notified of the legislative basis for this payment to confirm that the decision was not ultra vires...
[...]"*

In conclusion, I am not of the view that an undue delay was caused as a result of maladministration but do acknowledge that a delay did occur while the SCWO verified the rate of entitlement with the Chief Appeals Office (sic). I apologise for any distress caused to Ms Kileni because of this."

In fact, Ms Kileni's SWA application form contained no reference to 'Direct Provision Allowance' or any reduced rate of Supplementary Welfare Allowance. However, it is true that Ms Kileni's letter of appeal to the HSE and her letter to the Appeals Officer refer to a reduced rate of SWA of €19.10 per week.

It appears the HSE did not send any written apology directly to Ms. Kileni.

Decision to Investigate

The matter of payment of arrears to Ms Kileni had been resolved. However, Ms Kileni had been without a payment to which she was entitled for a period of 13 months. The HSE maintained that it had implemented the Appeals Officer's decision correctly. Given the HSE's position and the delay in implementing the Appeals Officer decision, the Ombudsman decided to investigate the complaint under section 4 of the Ombudsman Act 1980.

On 28 July 2011 the Ombudsman notified the Chief Executive Officer of the HSE of her decision to investigate the complaint. The decision to investigate took account of Ms Kileni's contention that the very long delay in paying her SWA entitlements caused herself and her family significant financial hardship and extreme distress. There was a question as to whether the delay in paying SWA might have exacerbated the mental health difficulties of Ms Kileni's daughter and whether the delay created an obstacle to that daughter being reunited with her family.

The Ombudsman decided that it was appropriate to join the Department of Social Protection for the purposes of the investigation. This is because the Department has overall responsibility for the SWA scheme and the fact that, at the time, the relevant HSE staff (Community Welfare Service) were on secondment to the Department and would be transferring to the Department later that year.

A copy of the Statement of Complaint accompanying the notifications is attached at Appendix 1.

Both the HSE and the Department were invited to make submissions in reply to the investigation notification. The HSE's submission reiterated, for the most part, the points in its earlier letter of 10 June 2011. The Department opted not to make a submission but it did respond subsequently to specific requests for information from the Ombudsman's Office.

During the course of the investigation the Ombudsman's investigators examined the HSE and the Appeals Officer files relating to Ms Kileni's SWA application, documents supplied by Ms Kileni and her representatives, and the relevant legislation. The investigators also contacted the Appeals Officer who had upheld Ms Kileni's appeal and conducted interviews with the relevant SCWO and with the relevant HSE Appeals Officer.

In finalising this present report, the Ombudsman has had regard to submissions made both by the HSE and by the Department following their consideration of a draft of this report. Copies of the submissions of the HSE and of the Department are included as an appendix to this report.

Chapter 2 – Analysis

This investigation is focusing on the failure of the HSE’s Community Welfare Service to implement the Appeals Officer’s appeal decision and on the adverse consequences of this failure for Ms Kileni and her family. Key issues for consideration are:

- what exactly was the decision of the Appeals Officer?
- what was the SCWO’s understanding of that decision?
- what procedures were available to the SCWO to challenge that decision?
- what were the consequences for Ms Kileni of the failure to implement the Appeals Officer’s decision?

The Appeals Officer’s Decision

The decision of the Appeals Officer, dated 12 December 2009, was that “*the Appeal is allowed*”. This decision followed an oral appeal hearing which was attended by Ms Kileni (accompanied by an advocate from the Cairde organisation) and by the HSE Appeals Officer. The Appeals Officer wrote an eight page note of the oral hearing which shows that Ms. Kileni’s family history was outlined to her. The note sets out also the Appeals Officer’s analysis of the issues raised and the grounds on which she decided the appeal in favour of Ms Kileni. The key points of relevance in the Appeals Officer’s note were that:

- There was no decision disallowing SWA on the grounds that the appellant was not habitually resident in the State.
- The appellant had never been notified of a decision that her application had been refused because she had been found not to be habitually resident in the State.
- The Community Welfare Officer recorded on 13 November 2008, when the SWA application was made, that he was “unable to determine HRC (habitual residence condition) on the basis of the above information”.
- The Appeals Officer decided to confine her appeal decision “*to the decision notified to the Appellant on 24 November 2008.*” [that is, that Ms Kileni was refused SWA as she had voluntarily left direct provision accommodation.]
- There is no legislative prohibition on, or disqualification from, SWA where a person voluntarily leaves Direct Provision accommodation.
- There was medical advice submitted by Ms Kileni’s advocates, by mental health professionals and HSE social workers concerning Ms Kileni’s own health as well as that of one of her daughters.
- Having regard to the evidence, including medical evidence, the Appeals Officer was satisfied that exceptional medical and social circumstances applied in the case.
- In all the circumstances, the Appeals Officer decided that she should “allow the appeal”.

The SCWO's Understanding of the Appeal Decision

The SCWO made two enquiries by e-mail with the Appeals Officer in relation to her appeal decision. The SCWO confirmed in an interview with the Ombudsman's Investigators that he was aware of the contents of the Appeals Officer's detailed appeal note before he made contact with her.

In the first e-mail, dated 21 December 2009, the SCWO asked the Appeals Officer to clarify which payment she was allowing i.e. "*basic SWA or DPA*" [Direct Provision Allowance], and if basic SWA, what rate of payment should be paid? "*direct provision rate or full payment*"? On the same day the Appeals Officer replied: "*Appeal was against the disallowance of basic SWA full rate*".

In the second e-mail, dated 11 January 2010, the SCWO asked the Appeals Officer to "*identify the specific legislative basis for the payment of full rate basic SWA to a person who has been determined to be not habitually resident in Ireland and clarify if the payment is to be paid less the Direct Provision benefit and privilege*".

Again, the Appeals Officer replied on the same day. In a lengthy e-mail the Appeals Officer said:

- that the sole reason notified by the Community Welfare Service to Ms Kileni for refusal of SWA was that she had voluntarily left her direct provision accommodation;
- that there was no decision on file that Ms Kileni was not habitually resident in Ireland;
- that her (Appeals Officer) decision was confined to the refusal of SWA on the basis that Ms Kileni had left direct provision accommodation;
- that Ms Kileni is "*entitled to the rate of SWA appropriate to her needs*".

Subsequently, on 1 March 2010, the Appeals Officer wrote to Ms Kileni to say that her appeal decision was that she was entitled to the "*Supplementary Welfare Allowance rate appropriate to your need less any means you may have*". A copy of this letter was given to the HSE at the time.

In the course of this investigation, the Ombudsman's Office contacted the Appeals Officer in relation to a number of issues. The Appeals Officer provided a detailed written reply in which she explained:

- The appeal quite clearly "*was against the disallowance of basic SWA full rate*". Decisions on the payment "*generally referred to as DPA (Direct Provision Allowance) ... are not appealable to this [Social Welfare Appeals] Office as it is an administrative payment. Decisions on Supplementary Welfare Allowance payable under the Social Welfare Consolidation Act 2005 are appealable to this Office*".
- As regards her reference to payment at the "*rate of SWA appropriate to her needs*", the Appeals Officer said: "*It is not the practice of an Appeals Officer to specify in his/her decision, the actual rate of payment to be made as this can vary depending on the circumstances which applied throughout the period to which the appeal relates.*"

However, it was her intention that SWA would be paid “*at the rate of SWA appropriate to her means, if any, assessed in accordance with the social welfare legislation.*”

- As regards what should happen in the event that the HSE disagreed with a decision of an Appeals Officer, she outlined various options for review⁵. She noted that none of these options had been followed. She also noted: “*The onus is on the HSE to implement an Appeals Officer’s decision. The ... [HSE] is required to implement the decision of the Appeals Officer on receipt of the decision. There are no provisions which permit payment to be withheld on the grounds that the Chief Appeals Officer is to be, or has been, asked to review an Appeals Officer’s decision.*”

Notwithstanding the clarity of the Appeals Officer responses to his queries, the SCWO decided on 14 January 2010 to pay Ms Kileni at a reduced rate equivalent to the level of the administrative (non-statutory) payment made to an asylum seeker in Direct Provision accommodation. A few weeks later, the SCWO decided that Ms Kileni was not habitually resident in the State and thus not eligible for any Supplementary Welfare Allowance. However, the SCWO continued to pay Ms Kileni at the reduced rate pending the outcome of an appeal against the habitual residence decision.

At interview, the SCWO said that the reason for the refusal decision, as given by the CWO, was incorrect. The SCWO said he had spoken with the CWO prior to his decision and indicated to the CWO that the application should be refused as Ms Kileni was not habitually resident in Ireland. However, this is quite problematic because (as commented upon by the Appeals Officer) there is no evidence on file that the issue of habitual residence had been put to Ms Kileni and that she had been allowed an opportunity to present her case. In fact the evidence on file is that the CWO, at the time of the application, recorded that he was NOT in a position to determine the habitual residence issue at that point. The fact that the SCWO apparently felt he was in a position to determine this issue, in the absence of a proper process, is of concern.

It is relevant to point out that in November 2008, when Ms Kileni first applied for SWA, there was no blanket legal exclusion from SWA in the case of asylum seekers. While it appears there was a practice, at first stage decision making, to regard asylum seekers as not habitually resident in the State, this practice was upset by some Appeals Officer decisions in 2008 and 2009. In a number of appeal decisions, subsequently upheld by the Chief Appeals Officer, the appellant asylum seekers were found to be habitually resident in the State. In late December 2009 the Oireachtas amended the law to provide that an asylum seeker (or any person awaiting a decision on application for leave to remain or subsidiary protection) cannot be regarded as being habitually resident. However, in November 2008, it would have been an open question as to whether Ms Kileni was, or was not, habitually resident in Ireland.

It is difficult to understand the logic of the SCWO’s thinking in regard to the possibility of paying Ms Kileni at a reduced, or “Direct Provision”, rate. In the case of Ms Kileni’s SWA application of November 2008, a decision that she was not habitually resident in the State would mean that she had no entitlement to a basic SWA payment at any rate. On the other hand, in the absence of a decision that she was not habitually resident, her SWA entitlement would fall to be calculated along the same lines as any other applicant. The primary

⁵ Dealt with later in this report.

consideration would be the assessment of means and, in the absence of any means (which appears to have been the case with her), Ms Kileni would presumably qualify for the full rate of SWA for herself and for her daughter then living with her. The only reason why her SWA might be paid at a reduced rate would be where she was assessed as having means⁶. In asking the Appeals Officer about payment at the “Direct Provision” rate, the SCWO was referring to a category of payment which has no legal basis and in relation to which the Appeals Officer has no function.⁷

When interviewed, the SCWO said that he was surprised by the Appeals Officer’s decision. In an e-mail communication from the SCWO to the Reception and Integration Agency in late May/early June 2010, the SCWO referred to the Appeals Officer having allowed Ms Kileni’s appeal “on a technicality”.

In reality, it appears the SCWO regarded the Appeals Officer decision as a mistake as it did not take account of the underlying assumption, on his part, that Ms Kileni could not be regarded as habitually resident in the State. Even though the HSE had not taken the decision that Ms Kileni was not habitually resident, the SCWO appears to have expected that the Appeals Officer would have acted on the assumption that Ms Kileni should be found not to be habitually resident in the State. Subsequently, in February 2010, the SCWO dealt specifically with the issue and decided that Ms Kileni was not habitually resident in the State. At this point, the HSE was in a position to withdraw basic SWA payments entirely as Ms Kileni had been found not to satisfy one of the key eligibility conditions. However, the SCWO continued to pay Ms Kileni a reduced rate of SWA pending the outcome of her appeal on the habitual residence issue. Ms Kileni was successful with this appeal.

Benefit and Privilege

The SCWO has told the Ombudsman’s Office that he regarded the second e-mail from the Appeals Officer, on 11 January 2010, to be a revision of her original decision. The SCWO said that he interpreted the Appeals Officer’s phrase “*appropriate to her needs*” as taking account of any assessable means or means she had given up. He referred to the ‘benefit and privilege’ of Direct Provision accommodation which Ms Kileni had given up and assumed that this was an item to be taken into account for the purposes of the means test⁸. The SCWO said he was not aware of the exact value of such benefit and privilege but that the SWA, less such benefit and privilege, would be equivalent to the Direct Provision rate of €19.10.

The rules for calculating means in SWA cases are set out in Part 4 of Schedule 3 to the Social Welfare Consolidation Act 2005. In the present context, Rule 1(2) is particularly relevant; it

⁶ The possibility of assessing the value of benefit foregone – in the form of Direct Provision accommodation – is discussed below.

⁷ There appears to be some confusion about the so-called “Direct Provision” payment. Where this payment is made to people living in Direct Provision accommodation it is not, in any legal sense, a payment under the SWA scheme. It appears to be a non-statutory payment administered by the HSE (now the Department of Social Protection) on behalf of the Department of Justice and Equality. There is no equivalent payment to asylum seekers living outside of Direct Provision.

⁸ It is a feature of some social welfare means tests that the assessed value of a benefit foregone, or given up, may be included as an item of means – even where the benefit is no longer enjoyed.

provides that in calculating the weekly means of a person, for SWA purposes, account shall be taken of:

“(2) all income in cash, including the net cash value of any non-cash earnings ... and the non-cash benefits that may be prescribed ...”

There is only one non-cash benefit prescribed for the purposes of Rule 1(2). This is prescribed by article 35 of Statutory Instrument No. 412 of 2007 as:

“... the net cash value to the person of meals, accommodation and related services provided under a scheme administered by the Department of Justice, Equality and Law Reform and known as direct provision, where the costs are met in full by the State.”

However, as Ms Kileni was not in Direct Provision when she applied for SWA in November 2008, she was not receiving the non-cash benefit prescribed in Statutory Instrument No. 412 of 2007. Nor had she been in the Direct Provision arrangement at any time between the initial SWA application and the date of the Appeals Officer’s decision.

The SCWO referred to Rule 1(4) of Part 4 of Schedule 3 to the Social Welfare Consolidation Act 2005 which deals with situations where a person may have deprived himself of means in order to qualify for SWA; this Rule provides that the following shall be taken into account in calculating means:

“all income and the value of all property of which the person has directly or indirectly deprived himself or herself in order to qualify ... for the receipt of supplementary welfare allowance”.

The key requirement is that the person must have deprived themselves of income or property in order to qualify for the allowance. The Direct Provision of meals, accommodation and related services is categorised as a non-cash benefit and, on the face of it, does not constitute either “income” or “property” for the purposes of Rule 1(4). It seems clear, therefore that it has no relevance to this case.

Even if it did constitute either “income” or “property”, it would be hard to conclude that Ms Kileni left Direct Provision *“in order to qualify ... for the receipt of supplementary welfare allowance”*.⁹

Ms Kileni left Direct Provision accommodation as, she says, it was unsuitable for her family¹⁰. She says the accommodation was overcrowded with herself and her two daughters living in one room of a four bedroom house which was shared with three other families. Ms Kileni maintains that she witnessed gender based violence and that her daughter tried to commit suicide in the centre. Ms Kileni says she raised the matter with the Reception and Integration Agency but was told there was no other accommodation available to her. Ms Kileni says she left the centre for these reasons and also because the medical services she required for her daughter were available in Dublin only. In any event, the Appeals Officer noted Ms Kileni’s statement that she *“had left this direct provision accommodation in August*

⁹ She left the Direct Provision accommodation in August 2008 but did not apply for SWA until November 2008.

¹⁰ Prior to the oral hearing, the SCWO informed the Appeals Officer as follows: “... I contacted the [Reception and Integration Agency] to ascertain the standard of the direct provision accommodation that Ms Kileni walked out of in Co Mayo and was assured that it was of a very high standard.”

2008 for social and medical reasons and I [Appeals Officer] accepted on the basis of all the evidence before me that this was the case.”

The SCWO’s interpretation of the Appeals Officer’s communication to him of 11 January 2010, as marking a revision of her original decision, simply does not stand up. If there had been such a revision, the Appeals Officer would have been obliged to inform Ms Kileni of this. The Appeals Officer did not so inform Ms Kileni.

Procedures to Challenge Appeals Officer Decisions

In circumstances where the SCWO was unhappy with the decision of the Appeals Officer, there were a number of legal options available to challenge that decision. Pending the outcome, in the event that one of these options was being pursued, it was not open to the SCWO to disregard the Appeals Officer decision or to substitute his own different decision for her decision.

The procedure for appealing the decision of an Appeals Officer of the Social Welfare Appeals Office is set out in the Social Welfare Consolidation Act 2005.

Under section 317 of the Social Welfare Consolidation Act 2005 an Appeals Officer may revise the decision of an Appeals Officer (including his or her own decision) where it appears that *“the decision was erroneous in the light of new evidence or of new facts brought to his or her notice since the date on which it was given...”*. If the SCWO believed that there were new facts or evidence relevant to the case, it would have been open to him to bring this to the attention of the Appeals Officer and to seek a revision of the original decision.

Under section 318 of the Social Welfare Consolidation Act 2005, the Social Welfare Chief Appeals Officer *“may, at any time, revise any decision of an Appeals Officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.”* A request for such a review may be made by any party, including by the SCWO or by the Department of Social Protection. Indeed, the Department itself in 2008/2009 sought reviews by the Chief Appeals Officer of some Appeals Officer decisions involving the habitual residence condition.

Under section 327 of the Social Welfare Consolidation Act 2005, *“any person”* who is *“dissatisfied”* with the decision of an Appeals Officer may appeal that decision to the High Court *“on any question of law”*. It is clear that this avenue of appeal is open to the HSE (or now to the Department of Social Protection).

It appears the SCWO’s thinking at the time was that the Appeals Officer had made a mistake in law by allowing a SWA appeal from a person in respect of whom a positive decision on the habitual residence condition had not been given. In these circumstances, a request from the SCWO for a review by the Chief Appeals Officer would have been appropriate. Having failed to avail of this option, it was not open to the SCWO to disregard the Appeals Officer’s decision or to decide to implement it in part only.

The SCWO said at interview that he was unaware of the procedure for requesting a review by the Chief Appeals Officer of an Appeals Officer’s decision. The SCWO said also that this case was the only one in which he had queried the decision of an Appeals Officer.

It is surprising that a SCWO, who plays a key managerial role in the operation of SWA, would not be aware of these provisions in social welfare law which has been in place since the 1950s.

Consequences for Ms Kileni

Ms Kileni was paid €11,882 in arrears of SWA in January 2011; but she had been without the full weekly payment to which she was entitled for a period of 26 months. While Ms Kileni received some SWA payments on the basis of emergency needs during this period, she did not have a consistent source of basic income for herself and her family. Because of her status – awaiting a decision on her application for humanitarian leave to remain – she was not allowed to take up employment.

In the normal course, not having money for food, for rent, for clothing is self-evidently a huge trauma for any family. In the particular circumstances in which she found herself, the trauma for Ms Kileni and her family must have been very significant. During this time one of her daughters was in her final year in secondary school. During this time also her other daughter received medical treatment following her suicide attempt and was placed in foster care. In addition, Ms Kileni herself had her own mental health difficulties and was found to be suffering Post Traumatic Stress Syndrome arising from experiences before coming to Ireland. She was attending counselling provided by a support service for victims of torture.

From the outset, social workers from the HSE and from the Lucena Clinic (Child and Adolescent Mental Health Service) had advocated in support of Ms Kileni's SWA application on the basis that her daughter's recovery, and return to her family, would be helped very considerably where the family had a regular income and appropriate accommodation.

Following the favourable Appeals Officer decision, a HSE social worker wrote to Ms Kileni's Community Welfare Officer on 13 January 2010 to thank him "*and your Department*" for finding in favour of Ms Kileni. The social worker said that the decision, and the expected financial support, "*will greatly relieve stress levels for Mrs Kileni, whom, as you may be aware, has experienced many significant traumatic events in her life to this point*". The social worker went on to say that his Department was then "*co-ordinating reunification of [daughter] with her mother and sister*" and that the "*set date for the completion of reunification of this family is Friday 29 January 2010*". The social worker said that the reunification decision had been made "*due to Ms Kileni's assessed stability at this time and also that of her daughter*". This appears to be a reference both to the mental health status of mother and daughter as well as a reference to the anticipated financial stability consequent on the Appeals Officer decision. At that point, the social worker expected that Ms Kileni would continue to be paid at the full rate of SWA for herself and her daughters.

It is clear that the decision of the SCWO¹¹ to pay SWA at the reduced rate (equivalent to the Direct Provision rate) upset the plans for family reunification. In the apparent belief that the Appeals Officer had revised her original decision, and had now awarded reduced rate SWA only, two HSE social workers wrote jointly to the Chief Appeals Officer on 25 January 2010. They wrote "*to appeal against the latest judgement from your respective Office's to overturn your previous decision to find in favour of Ms Kileni...*". The social workers referred to the

¹¹ Communicated to Ms Kileni on 14 January 2010.

decision to reunite the Kileni family and said that “*the positive ruling from your Office allowing Mrs Kileni’s appeal and being allowed the full payment amount had a bearing on this decision*”. The social workers asked that this “revised” decision be reconsidered as “*the payment of the full rate for one adult and two dependants would prove invaluable in positively advancing family stability away from one of a very delicate nature previously*”.

As the Appeals Officer had not revised her favourable decision, the social workers’ “appeal” made no difference. In the event, the family reunification plan was not implemented and, even at the time of writing this report, the daughter of Ms Kileni has not been reunited with her mother and her sister. In light of the fact that she was not receiving full rate SWA, and thus was unable to afford accommodation on her own¹², Ms Kileni and her daughter moved to Direct Provision accommodation in a hostel in Dublin. At the time of writing, Ms Kileni lives in hostel accommodation with one daughter while her other daughter (for whom Direct Provision is untenable) lives with a foster family.

One cannot say with any certainty that the family would have been reunited successfully had the Appeals Officer decision been implemented fully. Had the family reunited on 29 January 2010, as planned by the HSE social workers, their situation would have deteriorated significantly within weeks as, on 19 February 2010, the SCWO decided that Ms Kileni was not habitually resident in the State and thus was not entitled to basic rate Supplementary Welfare Allowance. This decision was subsequently overruled by a Appeals Officer in August 2010 but by then, unable to pay for rented accommodation, Ms Kileni and one of her daughters had returned to Direct Provision accommodation.

Nevertheless, it is clear that the failure to implement the Appeals Officer decision had far-reaching negative consequences for the Kileni family. On 27 May 2010 the lead social worker dealing with the family sent a lengthy report to his HSE Principal Social Worker seeking the Principal’s support in having the Appeals Officer decision implemented fully. On the question of family reunification, the social worker said that matters had progressed well “*at an emotional level and no child protection or welfare issues remain to be addressed ...*”. Significantly, the social worker reported that “*solely due to financial and accommodation concerns, reunification has yet to take place*”. The social worker warned that “*continuing to be paid the direct provision rate alone will in all probability have a detrimental effect on this family and will greatly preclude the reunification experience for all*”. Finally, pointing out that “*a significant weekly foster payment is being made to [the daughter’s] foster carers*”, the social worker pleaded for “*an amicable joined up response from the various bodies within the HSE to address these unique but nonetheless exceptional circumstances*”.

The Principal Social Worker passed on this report to the Community Welfare Service (including the SCWO) but without any apparent outcome. The HSE joined up response, sought by the social worker, did not happen. In the meantime, as pointed out by the HSE social worker, the HSE was paying the foster carers an allowance of €350 per week and, in addition, the foster carers were paid Child Benefit in respect of Ms. Kileni’s daughter.

¹² The friends with whom Ms Kileni shared a house in Dublin had moved away.

In summary, the failure of the SCWO to implement fully the decision of the Appeals Officer was incorrect and without justification. The Kileni family suffered considerably as a consequence of that failure and, indeed, it would seem that these adverse consequences persist to this day.

The Ombudsman, in practice, deals with very few complaints made by or on behalf of asylum seekers. This is because of a restriction on her jurisdiction, dating back to the enactment of the original Ombudsman Act in 1980, in relation to asylum seekers. The Ombudsman does not have jurisdiction in the case of actions of the Department of Justice and Equality “*taken in the administration of the law relating to immigration or naturalisation*”. The State’s most important interactions with asylum seekers occur within the area of law relating to immigration or naturalisation. Ireland is almost unique amongst those countries which have a public service Ombudsman in having the State’s key interactions with asylum seekers excluded from jurisdiction. Other than by way of judicial review, this important area of public administration is (and has been) effectively free of any external oversight.¹³

In conducting this investigation, and in finalising this report, the Ombudsman has been aware of a significant and growing public unease regarding the arrangements for asylum seekers in this country. More and more, questions are being raised now about the appropriateness of the “Direct Provision” arrangements particularly as they impact on family life, on mental health and on the welfare of children. However the Ombudsman, on the basis of one investigation, cannot purport to make a finding on this general issue.

¹³ At the end of 2011 there were 238 outstanding High Court actions against the Office of the Refugee Applications Commissioner. Source: Annual Report 2011: Office of Refugee Applications Commissioner - [http://www.orac.ie/website/orac/oracwebsite.nsf/page/CRSE-8XZGK713241510-en/\\$File/Office%20of%20the%20Refugee%20Applications%20Commissioner%20-%20Annual%20Report%20-%202011.pdf](http://www.orac.ie/website/orac/oracwebsite.nsf/page/CRSE-8XZGK713241510-en/$File/Office%20of%20the%20Refugee%20Applications%20Commissioner%20-%20Annual%20Report%20-%202011.pdf)

Chapter 3 – Findings

Having carried out an investigation under section 4 of the Ombudsman Act 1980 (as amended) the Ombudsman finds¹⁴:

- that the Community Welfare Service of the HSE (acting for the Department of Social Protection) failed to implement correctly a decision of a Social Welfare Appeals Officer; that there was no proper basis for this failure; and that the failure caused significant adverse consequences, over an extended period, for the Kileni family;
- that, in particular, the failure to implement the Appeals Officer's decision impacted negatively on the efforts to re-unite the Kileni family being made by the HSE Child Protection Service;
- that this failure reflects actions which were taken without proper authority, were improperly discriminatory as well as being otherwise contrary to fair or sound administration.

¹⁴ In its response to a draft of this report, the Department of Social Protection said that it "*accepts that there was an unwarranted and significant delay in the payment of arrears in this case as the officer dealing with the appeal did not ensure the Social Welfare Appeals Office (SWAO) decision was followed up in full.*" The Department also said that the SCWO should "*have implemented the SWAO decision in full*".

Chapter 4 – Recommendations

In responding to a draft of this report, the Department of Social Protection said that, in the light of the Ombudsman’s report, it had asked the HSE to write to Ms Kileni to convey its apologies for what had happened. The Department explained that it had asked the HSE to convey this apology because it was the “responsible body” at the time the claim was made. The Ombudsman understands that the HSE has now written to Ms Kileni and has apologised for what occurred. If this apology had not already been made, the Ombudsman would be recommending that such an apology should be made.

In view of the significant adverse consequences suffered by Ms Kileni and her family, as set out in this report, the Ombudsman recommends to the Department of Social Protection that it make a “time and trouble” payment – or “consolatory” payment as it is known in some other jurisdictions – to Ms Kileni of €3,000.

This recommendation is being made to the Department of Social Protection, rather than to the HSE, on the basis that the SWA scheme at the time in question was being administered on behalf of the Department and under its general control and direction and because, in any event, the SWA scheme has always been funded through the Department’s Vote.

EMILY O’REILLY
OMBUDSMAN

June 2013

Appendix 1

Statement of Complaint issued to the HSE and Department of Social Protection on 28 July 2011

Ms Kileni complained to the Ombudsman about the failure of the Health Service Executive (HSE) to implement an appeal decision in her favour on her application for Supplementary Welfare Allowance (SWA). Ms Kileni's complaint is that this failure to implement the appeal decision, made by an Appeals Officer of the Social Welfare Appeals Office, has had a significant adverse effect on herself and her family, not least because of the very difficult circumstances in which she and her family found themselves at the time.

The background to this case is that Ms Kileni and her two dependent children came to Ireland in 2007 as asylum seekers. Initially, she was paid SWA at what is known as the Direct Provision rate while living in Direct Provision accommodation in Mayo. This rate is intended for private necessities only as, with Direct Provision, the claimant is regarded as not having housing or food costs. At the time, the rate was €19.10 a week for an adult and €9.60 for a child dependant.

In November 2008, because (she says) she found the Direct Provision accommodation unsuitable in her particular circumstances, Ms Kileni went to live with friends in Dublin and applied for SWA at the standard rate. This application was refused. She appealed this decision, initially through the HSE appeal arrangements and subsequently to the Social Welfare Appeals Office. In June 2009 she attended an oral hearing at the Social Welfare Appeals Office. In December 2009 the Appeals Officer allowed the appeal. However, following this appeal decision in her favour, the HSE failed to implement the decision and did not pay the arrears due retrospective to the date of original application in November 2008.

In January 2011 - thirteen months after the decision of the Appeals Officer and 26 months after her application - the HSE paid Ms Kileni arrears of SWA retrospective to November 2008. These arrears were paid following the involvement of the Ombudsman's Office.

With the payment of the arrears due to her, Ms Kileni's initial complaint to the Ombudsman, concerning the HSE's failure to implement the Appeals Officer's decision, has now been resolved. However, she continues to complain about the delay in paying these arrears and contends that this delay has caused not only financial hardship but extreme distress to herself and her family. For example, a decision to reunite Ms Kileni with a daughter, who was in foster care, appears to have been influenced by the positive decision of the Social Welfare Appeals Office in December 2009. However, the reunification seems to have been delayed as the Appeals Officer's decision was not implemented at the time.

Appendix 2

HSE response to draft report (complainant's name altered to protect her identity)

9th April 2013

Ms. Patricia Doyle

Investigator

Office of the Ombudsman,

18 Lower Leeson Street,

Dublin 2

Dear Ms. Doyle,

I wish to acknowledge receipt of the draft report "Appeal Denied", an investigation by the Ombudsman into the failure of the Health Service Executive (acting for the Department of Social Protection) to implement a decision of the Social Welfare Appeals Office on an appeal by an asylum seeker.

As you are aware, the community welfare service is now under the control and direction of the Department of Social Protection. Therefore, the HSE does not wish to make any comment on the report but notes that following representation from the Department of Social Protection that the Ombudsman has decided not to include Chapter 3 of the draft report.

On behalf of the HSE, I wish to apologise to Ms. Thandi Kileni for the delay she experienced in receiving her entitlement following the Social Welfare Appeals Officer's determination. This delay is much regretted, and it is my understanding that all payments due to Ms. Kileni have now been made.

Yours sincerely,

Greg Price

Director of Advocacy

Department of Social Protection response to draft report

(complainant's name altered to protect her identity)

Office of the Secretary- General
Department of Social Protection
Áras Mhic Dhiarmada
Store Street
Dublin 1

Mr Fintan Butler
Senior Investigator
Office of the Ombudsman
18 Lr Leeson Street
Dublin 2

15 April 2013

Dear Mr Butler,

I refer to your letter of 13th March 2013 regarding a complaint by Ms Thandi Kileni, in relation to her application for Supplementary Welfare Allowance (SWA).

When Ms Kileni applied for SWA in November 2008 the scheme was administered by the Community Welfare Service (CWS) division of the Health Service Executive (HSE) on behalf of the Minister for Social Protection in accordance with guidelines issued by this Department. This Department had no role in deciding entitlement in individual cases. The CWS staff were transferred to the Department of Social Protection (DSP) with effect from 1 January 2011 on a secondment basis for a period of nine months until the end of September 2011. From 1 October 2011 the staff of CWS transferred to the Department as civil servants.

You raised some specific questions in your letter and report which have been clarified with the relevant areas as follows:

Delayed Arrears Payment

DSP accepts that there was an unwarranted and significant delay in the payment of arrears in this case as the officer dealing with the appeal did not ensure the Social Welfare Appeals Office (SWAO) decision was followed up in full. Both the officer concerned and the HSE Appeals Officer have since retired.

It appears that the delayed issuing of arrears in this case was a once-off event and there is no evidence that arrears are delayed in SWA claims where the SWAO has allowed a claim.

Decision on entitlement:

Ms Kileni, as a South African national, who applied for SWA in 2008 was required to satisfy the Habitual Residence condition (HRC). The Social Welfare Consolidation Act provides that a person shall not be entitled to SWA unless he or she is habitually resident in the State at the date of making

the claim. The Community Welfare Service Best Practice Manual 2007 section 4.1.4, notes that persons leaving Direct Provision (DP) must be assessed for HRC.

The initial decision by the Community Welfare officer (CWO) to refuse SWA as the claimant “voluntarily left direct provision” did not address the HRC elements of the case.

This decision was appealed to the SWAO and the Appeals Officer (AO) allowed the appeal. As Ms Kileni’s appeal was allowed and she was awarded payment she had been determined as HRC compliant, by default. The Superintendent Community Welfare Officer (SCWO) mistakenly sought to review the claim to decide on the HRC at a time other than at the date of application.

The SCWO should have implemented the SWAO decision in full.

It is considered that this particular case was exceptional and that there is no evidence to suggest that, in general, SWAO decisions are not implemented immediately.

Appeals Guidelines and Training:

It is understood that the HSE, in June 2011, considered the request of the OO to issue guidelines to staff highlighting the importance of implementing the decisions of AO’s promptly and in full.

The CWS Best Practice Manual provides detailed information on the appeals process and advises that: *“Where an Appeals Officer overturns an unfavourable decision of a CWO or SCWO, the decision will be sent to the SCWO and to the client. This decision is final and should be acted upon promptly by the CWO.”*

Following the transfer of the CWS into this Department, new training on decision making and the handling of appeals was commenced for all former CWS staff through the Department’s Staff Development Unit.

The objective of this training is to ensure staff:

- Make reasonable, balanced and well-founded decisions
- Understand and apply Principles of Natural Justice, Citizens Rights and the Principles of Good Administrative Practice
- Write unbiased, logical, objective reports on the circumstances of claimants
- Communicate the decision clearly and in writing and quote legislative reasons
- Understand the claim review and appeals procedures

Letter of Apology:

At the request of DSP, Mr Greg Price (now Director of Advocacy in HSE but formerly the relevant HSE liaison officer with the OO), has now issued a letter of apology to Ms Kileni, on behalf of the HSE, as they were the responsible body at the time the claim was made.

OO decision to include the DSP in this complaint:

It is noted that the OO decided that it was appropriate to join the DSP for the purposes of the investigation. Your report states both the HSE and the DSP were invited to make submissions in reply to the investigation back in 2011.

Your letter states the HSE’s submission reiterated the points in its earlier letter of 10 June 2011 and that the DSP opted not to make a submission but it did respond subsequently to specific requests for information from the Ombudsman’s Office. We had understood that the information provided your office with sufficient clarification and that a further submission was not required.

Conclusion

In an effort to progress Ms Kileni's residency status, DSP have raised her case with the Department of Justice & Equality with a view to ensuring the case is regularised as quickly as possible.

This Department endeavours through on-going training and detailed guidelines, to ensure that all appeals cases are followed up appropriately and efficiently and that customers are made aware of their entitlements in this regard.

Finally, I wish to emphasise that the DSP is fully aware of its responsibilities in relation to the OO and seeks to respond in a timely and comprehensive manner to all requests from your Office.

I hope this letter addresses satisfactorily the issues outlined in the letter and report of 13th March.

Yours sincerely

Niamh O'Donoghue
Secretary General