

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**



31 July 2007

Case document No. 3

International Federation for Human Rights (FIDH) v. Ireland
Complaint No. 42/2007

**RESPONSE TO THE GOVERNMENT'S
OBSERVATIONS ON THE ADMISSIBILITY**

Registered at the Secretariat on 30 July 2007

Free legal Advice Centres Ltd.
13 Lower Dorset Street,
Dublin 1
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Your ref: ESC 182 GL

M. Regis Brillat,
Executive Secretary,
European Committee of Social Rights,
Directorate General of Human Rights & Legal Affairs,
Council of Europe,
F-67075 Strasbourg Cedex
France

Re: Collective Complaint No. 42/2007

International Federation of Human Rights (FIDH)

v.

Ireland

Dear Monsieur Brillat,

I refer to the above entitled Collective Complaint made by the FIDH against Ireland. I now enclose for your attention the response of the FIDH to the Observations made by the Government of Ireland on the Admissibility of this complaint. This response is being sent by email and fax to ensure timely receipt but the hard copy will follow in the post.

Yours sincerely,

Michael Farrell

Solicitor, Free Legal Advice Centres Ltd.

On behalf of the FIDH

European Committee of Social Rights

Complaint No. 42/2007

International Federation of Human Rights (FIDH)

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Ireland

FIDH Response to the Irish Government's Observations on the Admissibility of the Complaint

Introduction:

There is a significant inaccuracy in the Introduction to the Government's Observations on the Admissibility of this Complaint. At paragraph 1.4 the Government states that the International Federation of Human Rights (FIDH) has made this complaint "on behalf of Ms Kathleen Waddington and persons who are in receipt of Irish contributory old age pensions but who do not reside permanently in Ireland". This is not correct and this misunderstanding by the Government of the nature of the complaint has led it to object to the admissibility of this matter on the grounds that it is really an individual rather than a collective complaint.

The FIDH did not at any stage state that we were making this complaint on behalf of Ms Waddington or any other individual party. On the contrary we made clear that the complaint concerned the effect of the Irish Government's policy on this issue on non-resident pension-holders as a group or class of persons. We will deal with this objection more fully below.

The Government objects to the admissibility of the complaint on six grounds, namely (in summary):

1. The competence of the FIDH to make the complaint
2. Whether the complaint is an Individual or a Collective complaint
3. The complaint allegedly does not concern persons who come within the scope of the Revised Social Charter

4. In relation to Article 12.4 the complaint does not relate to a right protected by the Charter
5. The Free Travel Scheme is not a secondary benefit attached to the Irish old age pension
6. The Committee should have regard to the competence of the European Community in this matter

We will deal with these grounds of objection in sequence.

Ground 1. *The competence of the FIDH*

The FIDH is an organisation which has as its objective the effective implementation of the principles laid down in the Universal Declaration of Human Rights and the other major international and regional human rights conventions and instruments, including the Revised European Social Charter. It is particularly concerned to secure the implementation of economic, social and cultural rights. It has previously made complaints concerning forced labour in Greece and the discriminatory effect on immigrants, children and non-resident nationals of new charges for medical care introduced in France. These complaints led to findings that the States Parties in question had violated provisions of the Charter.

The current complaint alleges discrimination and unfairness in the provision of free travel facilities in Ireland for elderly persons. It does not require specialist expertise in relation to the care of the elderly. We suggest that FIDH's experience and expertise in the interpretation and implementation of the Revised Social Charter and other international instruments and in anti-discrimination law constitutes the particular competence required to make this complaint.

In addition FIDH has consulted with and taken advice from Free Legal Advice Centres Ltd., which has considerable experience in relation to social welfare issues in Ireland and which has in turn consulted with and been advised by organisations working for the welfare of elderly Irish pensioners in the United Kingdom.

Ground 2. *An Individual or a Collective complaint?*

The complaint made clear from the beginning that it concerned a group or class of persons, namely recipients of Irish Old Age Contributory Pensions

who do not reside permanently in Ireland. It stated that this group included some 40,271 persons. Within that group we made clear that those most affected by the policy complained of were those who lived in the United Kingdom, other than Northern Ireland, and that official figures put their number at between 30,556 and 31, 000.

The Government's objection on this ground is based on the mention in the complaint of an individual non-resident pension holder, Ms Kathleen Waddington, who lives in Yorkshire, England. Ms Waddington was referred to by way of example to illustrate the effect that exclusion from the Irish Free Travel Scheme had upon her as a fairly typical Irish pensioner living in Great Britain. Her circumstances are dealt with in three or four paragraphs on page 6 of the 16-page complaint.

We pointed out in the course of the complaint that the Free Travel issue has been raised by a number of important organisations representing Irish emigrants in Great Britain, namely the Federation of Irish Societies, the London Irish Centre, the Camden (London) Elderly Irish Network and the London Irish Elders' Forum. And a Task Force on Policy regarding Emigrants set up by the Irish Government itself in 2001 described this as an important issue and recommended that non-resident Irish pensioners be enabled to access free transport when visiting Ireland.

In this connection the Federation of Irish Societies (FIS), the national umbrella organisation for Irish clubs and societies in Britain, passed a resolution concerning the extension of the Free Travel Scheme at its annual conference in June 2007.¹ The Irish Post (the main newspaper catering for the Irish community in Britain) also reported that Free Travel in Ireland was a major concern for pensioners attending an Irish Pensioners Consultation and Conference held in the London Irish Centre in early July 2007.²

Ground 3. *Within the Personal Scope of the Charter?*

This objection appears to deal with matters which should more properly be dealt with as part of a consideration of the merits of the complaint rather than its admissibility.

Without prejudice to that contention, however, the objection seems to be misconceived and its relevance is unclear. The Government relies on the first

¹ See text of Motion 'B' at Appendix One. The Motion was passed unamended.

² See report in The Irish Post, 14 July 2007 at Appendix Two.

paragraph of the Appendix to the Revised Social Charter, which deals with the extent to which certain articles of the Charter include “foreigners”. However, the complaint concerns the exclusion from the Irish Free Travel Scheme of non-resident pension holders, the great bulk of whom are not “foreigners”, but Irish citizens, while those who are not Irish citizens are persons who have lived and worked in Ireland for long enough to qualify for an Irish pension.

Moreover, the Government’s Observations do not refer to the fact that the paragraph in question is to be interpreted in light of Article 18 of the Charter. Article 18.4 requires States parties to recognise “the rights of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties”. It is submitted that recognition of these rights should preclude the Parties concerned from depriving their nationals who go abroad to work of benefits to which they would be entitled if they had not left the country.

The Government again, rather tendentiously, states at paragraph 2.4.4 that this complaint relates to Ms Waddington and then appears to go on to suggest that the concerns of Irish nationals resident outside the State cannot be the subject of a complaint in relation to Article 23 of the Charter. We repeat that the complaint concerns the 30,000 to 40,000 non-resident Irish pension holders, rather than any particular individual, and we submit that an argument that no complaint can be made under Article 23 in relation to these persons is quite incorrect and contrary to the spirit and meaning of Article 18.4 of the Charter, already referred to, and Article 12.4.

Ground 4. In relation to Article 12.4, the complaint does not deal with a right guaranteed by the Charter

The Government’s Observations do not deal separately with this objection but it appears to be dealt with in paragraphs 2.4.6 to 2.4.8. Once again, it is submitted that this matter should more properly be dealt with in relation to the merits of the complaint.

The Government again relies on a paragraph in the Appendix to the Revised Social charter to qualify the obligations implied by Article 12.4, but once again it does not refer to the proviso that Articles 1 to 17 of the Charter, including Article 12.4, are to be interpreted in the light of Article 18, including Article 18.4, cited above.

Without prejudice to the argument that this objection relates to the merits of the complaint rather than its admissibility, it is submitted that Article 12.4 by necessary implication requires States parties to provide for the retention by their own nationals of benefits arising out of social security legislation,

“whatever movements the persons protected may undertake between the territories of the parties”.

Ground 5. *The Free Travel Scheme is not a secondary benefit attached to the old age pension*

Yet again we submit that this is an argument that more properly relates to the merits than the admissibility of the complaint.

The Government appears to argue in essence that the Free Travel Scheme is quite separate and distinct from the Old Age Pension. Again without prejudice to the contention that this is an argument concerning the merits of the complaint, we have already indicated that when the Free Travel Scheme was introduced in 1967, it was stated specifically that its function was “to enable old age (and blind) pensioners to travel free of charge ...” and it was accessed by the persons concerned displaying their pension books.

The scheme was subsequently extended on a goodwill basis to include a small number of persons of pension age who were not in receipt of any pension or who were in receipt of a pension from outside the State, mostly from the United Kingdom. However, the overwhelming majority of the elderly persons benefiting from the Free Travel Scheme were in receipt of Irish old age pensions and the scheme was inextricably linked in the public mind and the minds of the recipients with the old age pension. This was reinforced by the fact that when Free travel Passes were introduced, they were issued automatically upon qualification for the pension.

The Government has attached to its Observations the most recent Guidelines for processing Free Travel applications but they do not rebut the argument that the Free Travel Scheme is intimately associated with the old age pension. The Guidelines are confusing if not contradictory on this issue. While paragraph 3.2 of the Guidelines says that applicants must apply for Free Travel Passes and that they will qualify if they live permanently within the State and are aged 66 or over, paragraph 3.3 states: “A Free Travel Pass will be issued automatically at age 66 if the applicant is getting a pension from this Department (the Department of Social and Family Affairs)”. Paragraph 4.1 states; “Where a person is receiving a pension from this Department, a Free Travel Pass will be automatically issued on his/her 66th birthday”.

The Government has also argued that because the Free Travel Scheme applies to both non-contributory and contributory pensions, it is independent of insurance contributions. It then refers to the paragraphs of the Appendix to the Charter dealing with Article 12.4 of the Charter, claiming that they allow

the introduction of a residence qualification for benefits such as the Free Travel Scheme.

However, the relevant paragraph allows the introduction of a residence qualification before granting benefits to “nationals of other Parties”. It is not obvious that this allows the introduction of such a residence qualification for nationals of the party providing the benefit.

It is submitted that the complexity of this argument demonstrates that it requires more detailed consideration, aided perhaps by oral argument and input from other parties, for its resolution and thus it is not a matter which should be dealt with at the admissibility stage.

Ground 6. *Membership of the European Community*

Under this heading the Government states that it has been in discussion with the European Commission concerning the possible extension of the Free Travel Scheme to non-resident Irish pensioners. This in itself indicates that the Government acknowledges that this is a matter which concerns a significant number of persons rather than just a single individual. It also involves a recognition that the current situation is anomalous and unsatisfactory and that action should be taken to resolve it.

The Government goes on, however, to argue that because of Ireland’s membership of the European Community, the Committee should “exercise a presumption that it has not departed from its Charter obligations”. It relies on the decision of the European Court of Human Rights in the case of ***Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, application No. 45036/98.***

There is, however, a fundamental difference between the subject matter of the current complaint and the ***Bosphorus*** case. In the latter case, the Irish Government impounded an aircraft belonging to Yugoslav Airlines in implementation of a specific European Community Regulation which was of direct and legally binding effect. In the matter which is the subject of the current complaint, the Irish Government is merely discussing with the European Commission the possible implications of extending the Free Travel Scheme. To extend a presumption of compliance with the Charter in every instance where States parties are in discussions with the European Commission would render the Charter and the Committee effectively redundant.

In the present case the institutions of the European Community have

expressed no definitive view on the suggested extension of the scheme. In paragraph 2.6.2 of its Observations the Government submits that to extend the Free Travel Scheme “would contravene legal obligations flowing from its membership of the European Community”. In the preceding paragraph, however, the Government states merely that “it has been indicated that any such extension ... *may (our emphasis)* fall foul of Community law ...” The Government goes on to say that contacts are ongoing to find ways of extending the scheme in line with EC law”. We submit that this clearly indicates that extension of the scheme would not automatically or necessarily be in breach of Ireland’s EC obligations.

In fact, there has been no Regulation or Directive that bears directly on this issue and no decision by the European Court of Justice. Indeed, as outlined in the body of the complaint, EU Commissioner Spidla said in February 2006 that EU law would not prevent the extension of Free Travel Passes to non-resident pensioners, although he was more cautious in a further statement in September 2006.

The Irish Taoiseach (Prime Minister), Mr Bertie Ahern, in an interview with the Irish Post newspaper in Britain on 20th December 2006 stated that the Government had received advice indicating legal difficulties in connection with extension of the scheme. However, he said that the Minister for Social and Family Affairs and officials from his Department had discussed the matter on several occasions with the EU Commissioner responsible and his officials, with a view to clarifying the legal issues involved. Mr. Ahern said: “Extending free travel to all Irish pensioners in Britain when they visit Ireland remains a priority of this Government... I am determined to explore all options further and ... I am keeping this issue under close review and contacts with the European Commission are ongoing.”³

We suggest that this is not a matter where the Government, by excluding non-resident pensioners from the Free Travel Scheme, is acting to implement a clear and specific European Community Regulation, which might have the result that the Committee could not consider the matter further. And, once again, we submit that if the Government wishes to pursue this rather complex argument, it is not something which should be dealt with at the admissibility stage.

Conclusion:

The FIDH submits that it has the required competence to make this complaint and the complaint is a genuinely collective rather than an individual complaint.

³ The Irish Post, 20 December 2006. See text of interview at Appendix Three.

We further suggest that the other matters raised in the Government's Observations on the Admissibility of this complaint are ones that should more properly be dealt with at the merits rather than the admissibility stage.

Correction:

Finally, we would like to correct a typographical error in the second sentence of the final paragraph on page 14 of the complaint. This sentence should have read as follows:

“And we suggest that the additional expense and administrative problems which are perceived as a possible outcome of expanding the Free Travel Scheme would not be so grave as to render the exclusion of non-resident pension holders necessary in a democratic society for the protection of the public interest, or objectively and reasonably justified”.

Signed

Michael Farrell

Solicitor, Free Legal Advice Centres Ltd.

On behalf of the International Federation of Human Rights (FIDH)

European Committee of Social Rights

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Appendix One

Motion for submission to FIS Annual Congress 2007

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Motion A

That FIS write to the Irish airlines AER LINGUS and Ryan Air and raise concerns that Irish pensioners returning in a hurry to Ireland to bury relatives are being forced to pay premium rate fares, which are prohibitive, and in many cases prevent elderly Irish people from burying their last remaining relatives. That the FIS request the airlines set aside up to two seats on their flights for emergencies like this to enable Irish pensioners here to travel at reduced rates.

Motion B

The AGM call upon FIS to seek an up-to-date on the issue of travel concessions for Irish pensioners living in the UK in the light of the Irish Governments decision to allow EU citizens living in the North of Ireland to

travel free in the Republic, based on a reciprocal bi lateral agreement between Britain and Ireland. Why is such an agreement geographically restricted? Why are Irish Pensioners living in the same EU State. I.e. Britain not entitled to the same concessions?

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Appendix Two

Free travel lies at heart of our Irish concerns 7/11/2007 -
11:03:05 AM

Despite worries relating to finance, leisure and health the issue of free travel still remains the biggest bone of contention for Irish pensioners in Britain. ELAINE SHERIDAN attended the Irish Pensioners Consultation and Conference Day held in London to speak to those directly affected by the issues. HUNDREDS of Irish pensioners from around Britain attended the Irish Pensioners Consultation and Conference day organised by the Irish Elderly Advice Service at the London Irish Centre. Irish elders from across London, the Midlands, Nottingham and Luton turned up last week for the chance to have their say about concerns, hopes and aspirations that will affect their lives over the next decade. It has been over 10 years since the last major conference of this size took place. And as a result it was deemed necessary to obtain up-to-date information to inform British and Irish statutory bodies, legislators and policy makers about the changing needs of Irish pensioners in Britain. Organiser Sally Mulready said: "The Irish Elderly Advice Network wanted to consult and hold a conference for Irish pensioners to find out what were their priorities. We were delighted with the day and we learned a huge amount about the priorities for Irish pensioners in future years." A number of discussion workshops took place throughout the day where members were advised on various of topics that may affect their everyday lives. The main topics of discussion included healthcare, pensions, finance, leisure and returning home to Ireland. But one of the burning issues for Irish pensioners living in Britain is the chance of free travel when they return home for holidays. And scores of pensioners turned up to the conference to air their views on this issue and put their case forward. Dubliner Maud McAllister from St. John's Wood in London said: I've been here since 1958 but visit my brother in Ireland at least twice a year. I'd really like to be able to travel for free when I go home. It's so expensive on public transport for us pensioners and I think the Irish government should waive that. Last year The Irish Post reported on how progress had been made in the campaign to provide free travel for Irish emigrant pensioners visiting the Emerald Isle. And last summer it looked as if that campaign had come one step closer to fruition when the British and Irish governments announced that all pensioners living on the island of Ireland could enjoy free public transport throughout the country. It was then hoped that the same could be extended to people in receipt of an Irish pension living in other countries. That campaign has drawn wide support across the political spectrum but has been held up because of fears it could go against European Union laws. Last September the EU

Commission rejected plans to allow only emigrants drawing an Irish pension to free travel on public transport within the island of Ireland. And officials stated the rule would have to apply to all Irish elderly living abroad, if it was to be allowed at all. It is still very much a live issue and negotiations are on-going between the Irish Government and EU officials. One angry pensioner at the conference said: Free travel is a big issue for us pensioners. We got our free passports so why not give us the free bus pass. It wouldnt cost the government much to allow us ex-pats to return home and travel around the country for free. After all the money we've sent home in the past it's a disgrace that we're not given a bus pass. I hope the Irish government act quickly before it's too late for a lot of us. Six years ago free travel for Irish emigrants was one of the key recommendations of the Irish Government's 2001 Task Force on policy regarding emigrants. And last summer a postcard campaign organised by the Labour Party in Ireland saw the Irish Government inundated with pleas to pursue the issue of free travel.

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Appendix Three

Taoiseach applauds the Irish in Britain *12/20/2006 - 11:54:35 AM*

In his first detailed interview about the importance of the Irish community in Britain Taoiseach Bertie Ahern talks to NIAMH HENNESSY about the possibility of broadcasting RTÉ abroad, extending free travel to Irish pensioners in Britain and his support for emigrants looking to return to live in Ireland Do you think free travel should be extended to Irish pensioners in Britain? There have been a number of requests and enquiries in relation to the extension of entitlement to free travel in Ireland to Irish-born people living outside Ireland, or to those in receipt of pensions from the Department of Social and Family Affairs — particularly in Britain — when they return to Ireland for a visit. Overall we are delivering significant improvements to the Free Travel Scheme and from early 2007 an allisland free travel scheme will be in place for all pensioners both North and South. Extending free travel to all Irish pensioners in Britain when they visit Ireland remains a priority of this government. In many ways this is about recognising the debt of gratitude we owe to the Irish in Britain who helped to build the successful country we now have. Because of EU laws we have also had to look at possibly extending the Free Travel Scheme to all persons in the EU who are in receipt of an Irish social welfare pension when they visit Ireland. As of now the advice is that it would not be possible to extend entitlement to free travel only to Irish-born people living abroad as to do so would be contrary to European legislation which prohibits discrimination on the grounds of nationality. In addition legal advice also indicates that to extend the Free Travel Scheme to people in receipt of Irish pensions who live outside the State would also be discriminatory under EU law. However I am determined to explore all options further and the Minister for Social Affairs has raised the issue in meetings with the Commissioner for Employment and Social Affairs. In addition officials from the Department of Social and Family Affairs met with European Commission officials on a number of occasions in an effort to clarify the legal issues involved. I am keeping this issue under close review and contacts with the European Commission are ongoing. Should more assistance be given to Irish pensioners looking to return to Ireland from Britain to live? The Department of Social and Family Affairs has a role in supporting Irish emigrant groups abroad centred on providing good quality, clear and comprehensive information for Irish people who wish to return to live in Ireland. The Department ensures that appropriate and relevant information for our emigrants abroad is available by funding and supporting the various voluntary agencies involved in this work. Emigrant Advice is the main voluntary organisation in Ireland involved in providing information for people intending to go abroad to work and for those emigrants abroad who are considering coming home. In 2005 some € 150,000 was provided to assist this organisation with its work which included the updating and publication of the information guide entitled Returning to Ireland. This guide includes information on a wide range of topics including social welfare, health, pensions, taxation, education and accommodation. The information is presented in a way that is tailored to the needs of targeted groups of people — for instance the elderly coming home to retire, single people returning to Ireland to find work and the needs of families

hoping to start a new life in Ireland. The guide outlines in a comprehensive way the benefits and costs associated with returning to Ireland to live. Copies have been posted to all our Irish Immigrant Centres abroad and to all Irish Embassies and Consulates. It has also been widely distributed to organisations in Ireland with an information-giving role such as Citizens Information Centres, FÁS offices and Social Welfare Local Offices. As part of our on-going campaign The Irish Post is bringing its case for RTÉ in Britain before the Oireachtas Committee on Communications, Marine and Natural Resources in January. Do you think Irish people living in Britain deserve to have RTÉ broadcast in their homes? The government has proposed to allow RTÉ to use its public funding to reach Irish communities in Britain in the draft Broadcasting Bill which was subject to the consultation by the Joint Oireachtas Committee earlier this year. In view of the importance we attach to this issue I have now accelerated this aspect of the Bill and government has approved a new Broadcasting (Amendment) Bill 2006. This new Amendment Bill will be published in the coming days and I expect to have it enacted early in the New Year. The new Bill deals with the issue of RTÉ broadcasting to Irish communities abroad and also with amendments to the existing legislation for digital terrestrial television in Ireland and analogue switch-off. It is intended that RTÉ will produce a service that reflects and represents the content of the channels currently available in Ireland — RTÉ1 and RTÉ2 — and also that TG4 would contribute to this service. This will now be a fundamental part of RTÉ's remit and an obligation. Various possibilities will be available to RTÉ as to the means it uses to broadcast to communities in Britain — be it terrestrial, cable or satellite — and RTÉ will have to explore these possibilities. Once the legislation — now approved for publishing by government — is in place RTÉ will commence developments in this regard. What are the important issues facing the Irish Government in relation to Irish people in Britain? Our community in Britain — and indeed Ireland — is becoming an older community and I think the biggest issue we face is how we cherish our senior citizens. This is even more the case with our community in Britain because many of our people were forced to leave Ireland for economic reasons and endured particular hardship and difficulties as a result. Of course so many members of our community in Britain have done so well and there are Irish people at the top of every walk of life in Britain but we must also remember those for whom life has not been so fortunate. I am delighted that the government has overseen the biggest increase in spending in support for our community in Britain. This year we will provide in the region of £7million to assist our community and the vast bulk of this funding goes to help the elderly members of our community, helping to provide advice centres, social functions, health and housing support and a plethora of other services. I think another related issue is how we interact with our second and third-generation Irish in Britain. Now that the day of large-scale emigration from Ireland to Britain has thankfully ended our community in Britain is changing and we must ensure that our second and third-generation Irish also feel a sense of connection to Ireland, to our culture and traditions. How important is the Irish community in Britain to the Irish Government? One of the great strengths of our country is the size of our Irish Diaspora and it is this more than anything else which has underpinned our ability to punch above our weight in the world. For a small island of 6million people it is our worldwide community which has contributed so much to our country and foremost amongst that Diaspora is our community in Britain. While it is impossible to be absolutely accurate about the size of our community in Britain most academic opinion estimates the Irish community including our second and third-generation members to be in excess of 6million people — that is over 10 per cent of the population of Britain. I am always struck when I visit Britain — which I do regularly — at the incredible range of jobs Irish people perform in Britain and the economic profile of Irish business people in every sector, not just areas which were traditional strengths such as construction but across all spectrums of industry and commerce. Relations between Britain and

Ireland have never been better and this is in part a reflection of our community in Britain and the contribution they have made to building up the British economy and British society. In doing so they have also contributed in no small way to Ireland and to Anglo-Irish relations. What would you like to say to the Irish community in Britain this Christmas? I know that sometimes Christmas can be a difficult time especially for those who have lost loved ones during the year and for those who find this a lonely time perhaps remembering past Christmases in Ireland. I would like them to know that they are not forgotten. There can be few houses in Ireland where a candle is not lit to remind them of loved ones abroad and it is this link between home and our community abroad which is ever enduring. This year has been a significant one for Ireland — for the efforts which Tony Blair and I have been making to ensure full implementation of the Good Friday Agreement in Northern Ireland. I hope that 2007 will be the year when we finally achieve powersharing in Belfast.