Direct Provision and the Rights of the Child in Ireland

Liam Thornton

“The main problem with direct provision is the length of time that people spend without knowing when they will have their own freedom. When their children can invite their friends to their birthday parties and when they can say to their friends that we are also the same like you.”

Introduction

The system of direct provision is 14 years old this year. Direct provision is the phrase used to describe the system Ireland utilises to provide minimum support to those claiming refugee, subsidiary protection, or leave to remain. Within direct provision, asylum seekers are provided with bed and board, along with a weekly allowance. Accommodation is provided by the Reception and Integration Agency, a

---

3. Section 2 of the Refugee Act 1996 states that a ‘refugee’ is a person, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”
4. See S.I. No. 518 of 2006, European Communities (Eligibility for Protection) Regulations 2006 and S.I. No. 423 of 2013, European Union (Subsidiary Protection) Regulations 2013. To be eligible for subsidiary protection, a third country national is entitled to subsidiary protection from Ireland where she faces a real risk of suffering serious harm if she is returned to her country of origin or country of former habitual residence. ‘Serious harm’ consists of (i) death penalty or execution, or (ii) torture or inhuman or degrading treatment or punishment of the applicant in the country of origin, or (iii) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. For a more detailed examination of subsidiary protection in Ireland, see L. Thornton, “Subsidiary protection for asylum seekers within Ireland” [2008] 26(1) Irish Law Times 6-13.
5. An application for leave to remain is made under s.3 of the Immigration Act 1999. Section 3(3)(a) of the 1999 Act states that where the Minister for Justice proposes to make a deportation order, an individual may request leave to remain in the State. The Minister is obliged to consider a number of factors where such an individual makes such a claim, including age, duration of residence, family circumstances, humanitarian circumstances, the common good and considerations of public policy.
6. An asylum seeker is a person who seeks refugee status, subsidiary protection or leave to remain. The veracity of the individual’s claim has yet to be tested through the status determination process or determined by the Minister for Justice and Equality.
sub-unit of the Department of Justice and Equality. The weekly allowance, known as direct provision allowance, is paid by the Department of Social Protection. Asylum seekers, while having authorised presence in the State, are not entitled to any other social welfare payment (including child benefit) and cannot seek or enter employment, on pain of criminal conviction. A number of other supports are provided to asylum seekers, including education up to leaving certificate level (if person is of an appropriate age) and entitlement to a medical card. Direct provision, introduced in April 2000, came at a time of considerable moral panic about ‘welfare abuse’ by asylum seekers in Ireland. For over 14 years, this system has existed on an extra-legislative basis and without any in-depth examination, from the legislature or the judiciary on the impact that direct provision has on the civil, political, economic, social and cultural rights of asylum seekers.

This article explores the rights of the child and direct provision in Ireland. First, I will outline the key features of direct provision and the concerns expressed about this system from a children’s rights perspective. Secondly, I will examine the degree to which Ireland is abiding by international obligations as regards children in direct provision, with a core focus on the UN Convention on the Rights of the Child. Thirdly, I will consider legal challenges to the system of direct provision in Northern Ireland and the Republic of Ireland. Finally, I will argue for the need to adopt a human rights compliant system that fully respects, protects and vindicates the socio-economic rights of child asylum seekers in Ireland.

---

7 Section 8(1)(a) of the Refugee Act 1996 (as amended).
9 Section 9(4)(b) of the Refugee Act 1996 (as amended).
11 In this regard, the child could have her own asylum claim, or is in the care or company of a parent/guardian who is claiming asylum. This article does not consider unaccompanied or separated children, for more on this extremely vulnerable category of children in Ireland, see: Veale, A. et. al, Separated Children Seeking Asylum in Ireland (Dublin: Irish Refugee Council, August 2003); Irish Refugee Council, Making Separated Children Visible: The Need for a Child Centred Approach (Dublin: Irish Refugee Council, December 2006); Ombudsman for Children, Separated Children Living in Ireland (September 2009); Office of the Ombudsman, Developing and Optimising the Role of the Ombudsman (Dublin: Ombudsman, 2011).
The Direct Provision System

With fears for the integrity of the welfare state and its ‘abuse’ by asylum seekers, direct provision was introduced in April 2000. Utilising the ability to provide supplementary welfare allowance in kind, the system of direct provision provides asylum seekers with bed and board accommodation and a payment, known as direct provision allowance. The initial legal basis for the system of direct provision and dispersal was based on provision, in-kind, of supplementary welfare allowance and Department of Social Protection Ministerial Circular 04/00 of April 10, 2000 and Circular 05/00 of May 15, 2000 (now repealed). Under direct provision and dispersal, bed and board accommodation is provided by the Reception and Integration Agency (RIA) in hostels, guesthouses and holiday camps around Ireland. Asylum seekers are dispersed throughout the country, and cannot choose where to live. A weekly stipend of €19.10 is paid to each adult and a sum of €9.60 for each dependent child. The level of payment has not changed since 2000. Two exceptional needs payments of €100 are given per year to asylum seekers; however, there are cases where this payment is not made, where asylum seekers are suspected of having other means of support. Those under 18 years of age are

---

13 This was originally introduced under s.170 of the Social Welfare (Consolidation) Act 1993. Since the introduction of direct provision, a new Social Welfare Consolidation Act was introduced, so now see Chap.9 of the Social Welfare (Consolidation) Act 2005, in particular ss.187-189 and s.200.
14 DSCFA, SWA Circular 04/00 on Direct Provision to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (April 10, 2000).
15 DSCFA, SWA Circular 05/00 on Direct Provision to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (May 15, 2000).
16 In Ireland, the non-statutory Reception and Integration Agency is the discrete agency responsible for dispersing and accommodating asylum seekers. It is separate and distinct from the traditional welfare agency of the state, the Department of Social Protection. The Reception and Integration Agency, rather than being responsible for the day to day running of direct provision accommodation centres, contracts this role to private service providers. For a full list of the private bodies that the Reception and Integration Agency currently deal with, see RIA, Monthly Statistics Report, December 2013, pp.14-16 and FLAC, One Size Doesn’t Fit All (Dublin: Printwell Cooperative, 2009), pp.26-31.
17 DSFA, Circular 04/00 (April 10, 2000), para.1. See also, DSFA, Circular 05/00 (May 15, 2000), para.1.
18 See DSCFA, SWA Circular 04/00 on Direct Provision to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (April 10, 2000), no paragraph/section numbers can be directly referred to.
19 With thanks to Saoirse Brady (Children’s Rights Alliance) author of the FLAC report for pointing this out to the author, see, FLAC, One Size Doesn’t Fit All (Dublin: Printwell Cooperative, 2009), p.47.
provided with free schooling as a legal right.\textsuperscript{20} Medical care is provided to all asylum seekers free of charge. The payment of direct provision allowance is administered by community welfare officers,\textsuperscript{21} who previously were employees of the Health Services Executive,\textsuperscript{22} but since October 2011, are now employees of the Department of Social Protection. At the end of June 2014,\textsuperscript{23} the last date to which the RIA have provided monthly statistics, there were 4,296 people in direct provision accommodation centres. Of these, 1,527 are children. There are 3,243 persons, who have spent two or more years in direct provision. There are 2,441 people who have spent four years or more in direct provision. As I have argued elsewhere,\textsuperscript{24} the system of direct provision is legally suspect, with no clear legal basis for the operation of the system.\textsuperscript{25}

Over the last 14 years, deep concerns have been expressed relating to the system of direct provision for children. In the initial 18 months of the operation of direct provision, Fanning, Veale and O’Connor noted significant issues with food quality, lack of privacy and dignity for children and families in direct provision accommodation.\textsuperscript{26} In responding to the report, the then Taoiseach, Mr Bertie Ahern T.D., without wholly rejecting the report findings, stated\textsuperscript{27}:

“I am informed that the sample that forms the basis for the report is 43 families in Limerick, Cork and Ennis, of which 30\% were living under direct provision. Therefore, it was a very small sample.”

\textsuperscript{20} Section 31 of the Education (Welfare) Act 2000 sets the minimum school leaving age at 16 years.
\textsuperscript{21} Community welfare officers are responsible for the day to day administration of the supplementary allowance scheme, in terms of taking decisions and exercising discretion as to payment. While community welfare officers are now known as “Department of Social Protection representatives”, I will continue to use the designation ‘community welfare officers’ as much of the material on which this article is based relates to their role within the Health Services Executive.
\textsuperscript{22} The Health Services Executive (HSE) was established in 2004 and is responsible for the provision of health care and other social services in Ireland. Between 1996-2004, the relevant functions of the HSE as regards asylum seekers and payment of direct provision allowance were carried out by individual health boards. See, Health Act 2004. Since 2011, the HSE no longer has any role as regards payment of direct provision allowance.
\textsuperscript{25} The lack of a legal basis for direct provision is currently being challenged before the Irish High Court, this case is discussed in more detail below.
\textsuperscript{27} An Taoiseach, Mr Bertie Ahern T.D., 554 (No. 2) \textit{Dáil Debates Col.266} (November 15, 2001).
Concerns continued to be expressed in a large number of reports throughout the first decade of the new millennium. The main government reaction to these reports was to ignore the issues raised, and emphasise the need to secure Ireland’s borders and protect Ireland from abuse from ‘economic migrants’. The Special Rapporteur for Children, Dr Geoffrey Shannon, expressed concerns about the system of direct provision on a number of occasions. Dr Shannon also called for an independent complaints mechanism, operated by either Health Information and Quality Authority (HIQA) or the Ombudsman for Children. In June 2014, Dr Shannon called for the system of direct provision to be dismantled. The former Ombudsman, Emily O’Reilly and former Supreme Court judge, Catherine McGuinness, have also raised serious concerns with the system of direct provision. Dr Carol Coulter, as part of the Child Care Law Reporting Project, has highlighted concerns expressed by judges and legal representatives on the suitability of direct provision for long-term care of children. Dr Coulter noted in her Interim Report, that it was not “unreasonable to speculate” that the experiences that led people to claim asylum, along with the significant time spent in direct provision accommodation, has led to individuals (all female single parents) having to be admitted to psychiatric hospitals.


33 C. McGuinness, Foreword, State Sanctioned Child Poverty and Exclusion (September 2012).

34 See, Child Care Law Reporting Project (CCLRP), Vol.1, Case 20, Emergency care order for children in direct provision centre; CCLRP, Vol.3, Case 4, Emergency Care Order for 8-year-old born and reared in direct provision centre; CCLRP, Vol.3, Case 17, Mother in direct provision opposes discharge of Emergency Care Order.

Despite these concerns, and the concerns raised in Seanad Éireann, the Department of Justice and Equality remain steadfast in support of direct provision.\textsuperscript{36}

With the appointment of a new Minister for Justice and Equality (and former Minister for Children), Mrs Frances Fitzgerald, government support for direct provision seemed steadfast. Initially, Minister Fitzgerald’s approach had seen a return to a more ‘victim blaming’ approach, by stating that the fault for long stays in direct provision should be laid at the door of asylum seekers.\textsuperscript{37} The focus on introducing a single application procedure for all protection claims has been hoisted as a solution to shortening time spent in direct provision.\textsuperscript{38} In addition, Minister Fitzgerald is of the view that once “the best possible standards are applied in [direct provision] centres”,\textsuperscript{39} concerns about direct provision will be addressed. Only in July 2014 did the Government accept, to an extent, the unsuitability of the direct provision system.\textsuperscript{40} This approach fails to consider, in any way, the significant child rights concerns with direct provision. Given the significant number of children subject to direct provision in Ireland, the key concerns expressed by experts on children’s rights and civil society actors, questions arise as regards Ireland’s compliance with the UN Convention on the Rights of the Child.\textsuperscript{41}

The Rights of the Child and Ireland’s International Obligations

There has been a lack of sustained comment from various UN human rights treaty bodies on the system of direct provision in Ireland. While the Committee on the Elimination of Racial Discrimination has raised “concerns” about the system of direct

\textsuperscript{36} Seanad Éireann, \textit{Direct Provision System: Motion}, October 23, 2013.

\textsuperscript{37} Minister for Justice and Equality, Frances Fitzgerald, Written Replies (June 18, 2014). Minister Fitzgerald stated: “It should also be noted that in very many instances the delay in finalising cases is due to applicants challenging negative decisions by initiating multiple judicial reviews at various stages of the process. Thousands of applications cannot be finalised because of these legal challenges. Moreover, many other failed protection applicants do not leave the State when subject to a Deportation Order even though the clear legal requirement is for them to leave the State.”

\textsuperscript{38} Minister Frances Fitzgerald T.D. \textit{Dáil Debates} (Unrevised), June 24, 2014, in response to questions from Mr Joe Higgins T.D. (Socialist Party).

\textsuperscript{39} Minister Frances Fitzgerald T.D. \textit{Dáil Debates} (Unrevised), June 24, 2014, in response to questions from Mr Joe Higgins T.D. (Socialist Party).

\textsuperscript{40} These new developments are discussed below in “Conclusion: Protecting the Socio-Economic Rights of Child Asylum Seekers in Ireland”. (With thanks to the editor for permitting these very late changes to the article).

provision, it has notably not condemned the system outright. In its 2014 Concluding Observations on Ireland’s fourth period report under the International Covenant on Civil and Political Rights, the UN Human Rights Committee made two recommendations as regards direct provision. First, the UN Human Rights Committee recommended the introduction of an independent complaints mechanism for direct provision residents. Secondly, and of some significance, the Committee stated that Ireland must “ensure that the duration of stay in Direct Provision centres is as short as possible”. The system of direct provision continues to violate a number of civil, political, economic, social, cultural and political participatory rights. The United Nations High Commission for Refugees (UNHCR) has noted that the majority of persons of concern to them continue to be children and the best legal framework for protection of refugee and asylum seeking children is the Convention on the Rights of the Child. The UN Convention on the Rights of the Child (CRC) is relevant in a number of respects to children in the asylum system and of particular significance to children in the direct provision system. States must respect and ensure that all children within Ireland, regardless of legal status, enjoy all the rights set down in the CRC. In all actions concerning children, including in social welfare institutions, the best interests of the child is the primary consideration. The CRC

43 Concluding Observations, ICCPR, Ireland, UN Doc. ICCPR CCPR/C/IRL/CO/4 (July 24, 2014), para.19. See also, ICCPR: Human Rights Committee, List of Issues in Relation to the Fourth Periodic Report: Ireland, UN Doc. CCPR/C/IRL/Q/4 (November 22, 2013). See also, Ireland, Replies by Ireland to List of Issues. UN Doc. CCPR/C/IRL/Q/4/Add.1 (February 27, 2014). See also, Seanad Éireann Public Consultation Committee, Observations and Recommendations to the UN Human Rights Committee (June 2014).
45 See, UNHCR, Global Trends 2013 (Geneva: UNHCR, June 2014) and UNHCR, Executive Committee Conclusion on Children No. 84 (XLVIII) of 1997, preamble para.1, UNGA Doc. No. A12 (A/52/12/Add. 1).
47 Article 3(1) CRC.
explicitly recognises that children seeking asylum (alone or as part of a family group) "receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights" under the CRC.\textsuperscript{48} The socio-economic rights of children are outlined in a variety of the CRC’s articles and mainly reinforce recognised rights under the International Covenant on Civil and Political Rights\textsuperscript{49} and the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{50} All children have the right to health,\textsuperscript{51} the right to benefit from social security,\textsuperscript{52} the right to an adequate standard of living,\textsuperscript{53} the right to education,\textsuperscript{54} the right to rest and leisure,\textsuperscript{55} and protection from economic exploitation,\textsuperscript{56} including protection from sexual exploitation\textsuperscript{57} and trafficking.\textsuperscript{58}

The supervising body responsible for ensuring state parties to the CRC are abiding by their legal obligations, the Committee on the Rights of the Child, has emphasised throughout their examination of state reports, concluding observations and general comments that children seeking asylum enjoy all the rights set down in the CRC.\textsuperscript{59} In all dealings with asylum seeking children, the best interests of the child is to be the primary consideration and emphasises that special care needs to be taken of already disadvantaged groups within society and this includes refugee and asylum seeking children.\textsuperscript{60} In General Comment No. 13 on the \textit{Best Interests of the Child}, the CRC Committee has confirmed:

\begin{quote}
\textsuperscript{48} Article 22 CRC.
\textsuperscript{49} International Covenant on Civil and Political Rights 1966, (ICCPR) 999 \textit{U.N.T.S.} 171.
\textsuperscript{50} International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) 993 \textit{U.N.T.S.} 3.
\textsuperscript{51} Article 24 CRC.
\textsuperscript{52} Article 26 CRC.
\textsuperscript{53} Article 27 CRC.
\textsuperscript{54} Articles 28-29 CRC.
\textsuperscript{55} Article 31 CRC.
\textsuperscript{56} Article 32 CRC.
\textsuperscript{57} Article 34 CRC.
\textsuperscript{58} Article 35 CRC.
\textsuperscript{59} In Concluding Observations, CRC, Qatar, UN Doc.CRC/C/111 (2001) 59, the Committee stated that all children within Qatar’s jurisdiction “must enjoy all the rights set out in the Convention without discrimination” (para.296(a)); Concluding Observations, CRC, Iceland, UN Doc. CRC/C/124 (1998) 109 at para.483.
\textsuperscript{60} See, General comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1), UN Doc. CRC/C/GC/14 (May 29, 2013), para.75 and Concluding Observations, CRC, Ireland, CRC/C/73 (1998) 14 at para.96.
\end{quote}
“the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the environment, living conditions, protection, asylum, immigration...”

The CRC Committee has stated in a number of concluding commentaries that the rights under the Covenant apply to all children within the jurisdiction of a State regardless of their immigration and nationality status. The Committee has found that the prohibition of discrimination “prohibits differences in treatment on grounds that are not arbitrarily and objectively justifiable, including nationality”. In all dealings with asylum seeking children, the best interests of the child is to be the primary consideration and emphasises that special care needs to be taken of already disadvantaged groups within society and this includes refugee and asylum seeking children. The Committee on the Rights of the Child has seemingly rejected any attempt to differentiate between the socio-economic rights of children in asylum-like situations. Distinctions in treatment in the fields of health, social welfare and education, between citizen children and non-national children have been frowned upon. In relation to the right of a child to an adequate standard of living, the Committee has expressed concern where vulnerable children were living in situations where the household income remains significantly lower than the national mean. Asylum seeking children, be they in the care of their parents, or unaccompanied, should also have full access to a range of services and asylum seeking families should not be discriminated against in provision of basic welfare entitlements that could affect the children in that family.

61 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1), UN Doc. CRC/C/GC/14 (May 29, 2013), para.30 (emphasis added).
62 Article 2(1) of the Covenant applies to all children within the jurisdiction of a state party. In Concluding Observation, Qatar, CRC, UN Doc. CRC/C/111 (2001) 59, the Committee stated that “children within its [Qatar’s] jurisdiction enjoy all the rights set out in the Convention without discrimination” (para.296(a)); Concluding Observations, Iceland, CRC, UN Doc. CRC/C/124 109 at para.483.
66 Concluding Observations, CRC, Ireland, UN Doc. CRC/C/IRL/CO/2 (September 2006), para.56.
67 Concluding Observations, CRC, Ireland, UN Doc. CRC/C/IRL/CO/2 (September 2006), para.64.
68 See also, Concluding Observations, CRC, United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (2008), paras 70-71.
69 Concluding Observations, CRC, United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/121 (2002) 23, para.142(b); Concluding Observations, CRC, Canada, UN Doc. CRC/C/15/Add.215 (2003), para.47(e).
So as a state party to the CRC, it is very clear that asylum seeking children/children in a family who has a member claiming asylum, must be treated equally vis-à-vis citizen children. In Ireland to date, law and administration has rejected such a rights based approach to children in direct provision. As I discuss below, while the role of law has been limited to date in challenging direct provision, what exists is the potential for within law (domestic, European and international) to challenge the direct provision system from a child’s rights perspective.

The Rights of the Child: The Limits and Potential of Law

The courts in Ireland have had limited interaction with issues relating to the direct provision system. One of the only judicial comments in the Supreme Court on the direct provision system was made by Hardiman J. who noted (obiter):

“…the State makes available to [asylum] applicants an elaborate system of legal advice and free legal representation as well as social welfare or direct provision for their needs. All this is as it should be…”

In 2004, the habitual residence condition was introduced in order to limit access to a number of social welfare payments, including one parent family payment and child benefit. The habitual residence condition was initiated as a response to the expansion of the European Union, so as:

---

69 The only detailed examination was in the case of Munteanu v Minister for Justice, Equality and Law Reform, unreported, High Court, July 30, 2002 (2002/381JR (Transcript)). This case revolved around the obligations of the Department of Justice, Equality and Law Reform in deportation cases, and obligations of asylum seekers to inform the Department of Justice, Equality and Law Reform of any change of address. The High Court held that it was not reasonable for the applicant to assume that the RIA would inform the Department of Justice of her new address.


71 Under the habitual residence condition, it is presumed, until the contrary is proven, that a person is not habitually resident, unless she has been present in Ireland or Common Travel Area for a continuous period of two years. See s.246 of the Social Welfare (Consolidation) Act 2005 (as amended).
“[t]o safeguard our social welfare system from … people from other countries who have little or no connection with Ireland.”

In its initial legislative incarnation, the habitual residence condition did not explicitly bar asylum seekers from being habitually resident. However, various circulars, purporting to offer guidance to social welfare decision-makers and appeals officers, stated that asylum seekers were prevented from being habitually resident, given that their residence was temporary and solely for the purpose of having their protection claim determined. The only incidental success in the Republic of Ireland, as regards the system of direct provision, came from the Social Welfare Appeals Office. This (short lived) success related to the payment of child benefit to an asylum seeker who was in the process for a number of years. In Case A, an asylum seeker who arrived in Ireland in 2004 (post the introduction of the habitual residence requirement), was deemed to be habitually resident and entitled to child benefit, after she had resided in Ireland for five years. The Chief Appeal Officer noted:

“I do not believe there was any intention in framing the [habitual residence] legislation to exclude a particular category such as asylum/protection seekers from access to social welfare benefits. If there was any such intention, the relevant legislative provisions would have reflected that intention and removed any doubt on the issue.”

---

73 See, DSFA, SWA Circular No. 02/04 on the Habitual Residence Condition to Chief Executive Officers, Programme Managers, Appeals Officers, Superintendent CWOs, Community Welfare (April 30, 2004) and DSFA, SWA Circular No. 06/05 on clarification of the Habitual Residence Condition as applied to European Economic Area nationals to Chief Executive Officers, Programme Managers, Appeals Officers, Superintendent CWOs, Community Welfare (May 2005).
74 Section 9(3)(a) of the Refugee Act 1996. See also, DSCFA, SWA Circular No. 02/00 on Revised Procedures Relating to Temporary Payment Cards and the Allocation of PPS Numbers to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs, Community Welfare (February 9, 2000).
75 Case A: Review of the Appeal Officer's Decision under Section 318 of the Social Welfare Consolidation Act 2005, Decision of the Chief Appeals Office of the Social Welfare Appeals Tribunal, 12 June 2009. There were several other cases, wherein similar arguments had been made by the Department of Social Protection that the applicants were not habitually resident. I do not have access to these decisions. I would like to express my thanks to Saoirse Brady (formerly FLAC, now Children’s Rights Alliance) and Michael Farrell (FLAC) for making an anonymised version of this decision available to the author.
76 Case 'A': Review of the Appeal Officer's Decision, para.18.
Case A was won on a convincing argument by the applicant (represented by the Free Legal Advice Centres) on a discrete point of whether asylum seekers could be considered habitual residence. When the Chief Appeals Officer stated that they could, legislation was quickly rushed through the Oireachtas to explicitly exclude asylum seekers from ever being considered habitually resident. Section 246(7) of the Social Welfare (Consolidation) Act 2005 (as inserted), now explicitly prevents asylum seekers from ever being able to meet the condition of the habitual residence condition, regardless of how long they have been in the protection status determination process. Substantative challenges in Ireland to the lack of legal basis or on the operation of the direct provision system have usually been settled before such issues could be considered by a court. With increasing frustration from public interest lawyers and activists’ in Ireland on lack of legal challenges to the legality of the direct provision system, the Northern Ireland High Court got an opportunity to consider the rights of the child in direct provision in some detail.

The system of direct provision has been considered substantively in the decision of the Northern Ireland High Court in Judicial Review by ALJ and Others. The applicants had made a claim for refugee status in the Republic of Ireland in 2010 on the basis that the applicants would face persecution as non-Sudanese Darfuris. This application was rejected by the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal in 2011. The applicants subsequently made an application for subsidiary protection in Ireland in April 2011. However, in July 2011, the applicants entered Northern Ireland and applied for asylum. Under EU Law, the

---

78 A.N. v Minister for Justice, Equality and Law Reform, Outline Submission of the case by the applicant is on file with the author, no further written submissions were made to the High Court. (The author expresses his appreciation to Michael Lynn BL for making this submission available to him.) For further detail and discussion of this challenge, see L. Thornton “Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion” (2013) Journal of Social Security Law 66 at pp.82-84. For recent representations made by an expelled asylum seeker, by the criminal and human rights law firm, KOD Lyons, see C. Lenihan, “Expulsion from Direct Provision: The right to housing & basic subsistence for asylum seekers”, Human Rights in Ireland, June 18, 2014 (available at www.humanrights.ie).
79 In the Matter of an Application for Judicial Review by ALJ and A, B and C [2013] NIQB 88 (Stephens J., August 14, 2013). Other issues relating to the fairness and appropriateness of the status determination system for those seeking asylum and/or subsidiary protection in Ireland, will not be discussed, see paras 53-70.
Dublin II Regulation, the UK authorities sought to return the applicants to the Republic of Ireland. The applicants challenged the decision of the UK Border Agency to return them to Ireland and argued that discretion should be exercised not to return them to the Republic of Ireland, under Art.3(2) of the Dublin II Regulation. The applicants contended that a return to the Republic of Ireland would subject them to the system of direct provision, which would violate their rights under Arts 4 and 7 of the European Charter of Fundamental Rights (EUCFR). Article 4 EUCFR protects against torture, inhuman and degrading treatment. Article 7 EUCFR protects the right to private and family life. Although not “systematically deficient”, Stephens J. stated that Ireland’s low rate of recognition of protection seekers was “disturbing”.

Stephens J. relied extensively on the Irish Refugee Council’s report State Sanctioned Child Poverty and Exclusion, from 2012, in noting the significant hardships asylum seekers in Ireland face: unable to work on pain of criminal sanction; the low rate of subsistence allowance, communal accommodation, meals, hostile environment towards family life, isolation and health problems. However, Stephens J. rejected the argument that the direct provision system constituted a systematic failure to such an extent that it constituted inhuman and degrading treatment, and stated:

---


81 Article 3(2) of the Dublin Regulation II allows an EU Member State to examine an application for asylum lodged with it by a third-country national, even if such examination is not the responsibility of that Member State (i.e. due to an applicant already having made an asylum application in another EU Member State).

82 It is interesting to note that Stevens J. adopted an approach utilised in the English Court of Appeal decision *EM (Eritrea) & Ors v Secretary of State for the Home Department* [2013] 1 W.L.R. 576. However, the test of systemic deficiency coupled with a breach of a right under the ECHR or EUCFR, was condemned by the UK Supreme Court in *EM (Eritrea) & Ors v Secretary of State for the Home Department* [2014] UKSC 14 (February 19, 2014). The UK Supreme Court, in February 2014, emphasised that if the UK sought to return an asylum applicant to another country under the Dublin II Regulation, the applicant should not be returned if there was a real risk of a violation of his or her Convention rights. There was no need for an applicant to additionally show that the asylum determination system or the reception conditions the asylum seeker could be subjected to, suffered from systemic deficiencies.


85 In the Matter of an Application for Judicial Review by ALJ and A, B and C [2013] NIQB 88, para.84.
“It is not for the courts in this jurisdiction to determine whether the evidence of conditions in Direct Provision accommodation amounts to a breach of Articles 1 and 7 of the Charter [EUCFR]. Those are questions for the courts in Ireland.”

The applicants’ case did succeed on the following ground. Section 55 of the Borders, Immigration and Citizenship Act 2009 provides that any function of the UK Home Secretary within the field of immigration, asylum or nationality must be discharged so as to “promote the welfare of children who are in the United Kingdom”.

Stephens J., relying on the Convention on the Rights of the Child and the case of ZH (Tanzania) from the House of Lords, held that the UK Border Agency had failed to consider the best interests of the children in this case. In paras 102-103 of his decision, Stephens J. focusing on welfare of the child if returned to Ireland, considered the following issues:

(a) their mother and Child A (who at this stage was over 18) would be unable to work in the Republic of Ireland, but could possibly work in Northern Ireland;
(b) the family would be forced to live in a communal direct provision hostel in the Republic of Ireland, however have their own accommodation and budget, and can cook their own meals in Northern Ireland;
(c) the minor children, B and C, could “develop their own sense of belonging and separate identity” in Northern Ireland, which they could not do in direct provision centres in the Republic of Ireland;
(d) there are significant physical and mental health issues amongst asylum seekers in direct provision in Ireland due to the significant amount of time they have to spend in this system;

86 ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 A.C. 166.
87 At para.73, Stephens J. Stated: “[a]sylum seekers are legally required to ‘reside and remain’ in the Direct Provision accommodation centre…. It is a criminal offence to breach this requirement.” This is not the case and asylum seekers are free to leave direct provision, once they inform the Office of Refugee Applications Commissioner of their new address. However, if they do leave, they are not entitled to the payment of €19.10 per week per adult/€9.60 per week per child. Further on in para.102 (and again in paras 73 and 75), Stephens J. states: “[c]hildren of asylum seekers are not entitled to a state education once they are 16.” This too is incorrect and children of asylum seekers or child asylum seekers are entitled to remain in secondary education until completion of their Leaving Certificate.
(e) as a matter of UK policy, the children would not be returned to Sudan, but this is not automatically the case in Ireland.

While Stephens J. did not find that the status determination systems or the reception conditions of asylum seekers in Ireland were so awful that they constituted inhuman and degrading treatment, he has clearly stated that the system of direct provision is contrary to the best interests of the child. With the porous border between the Republic of Ireland and Northern Ireland, as well as a multitude of transport options to travel to Northern Ireland, it may be that others seeking asylum in this State will make such a journey.

While there had been some movement as regards a challenge to the direct provision system in mid-2013, this case was withdrawn in early December 2013. Finally, on April 9, 2014, (one day shy of the 14 year anniversary) an important case commenced, challenging the system of direct provision in Ireland before the Irish High Court. In C.A and T.A. (a minor) v Minister for Justice and Equality, the applicants are arguing that the lack of a statutory basis for the system of direct provision and payment of direct provision allowance of €19.10 per week per adult and €9.60 per week, per child, has no legal basis, continues to operate unlawfully, through ministerial circulars and administrative arrangements without any legal basis. This, it is argued, is a violation of Art.15.2.1 of the Irish Constitution which provides the:

“sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”

---

The applicants are arguing that the system of direct provision, the lack of any independent complaints process, the constant surveillance, control of what an applicant can eat violate the following legally protected rights, including the right to family and private life; rights of the child; personal choice and autonomy; freedom of movement and residence as protected by domestic, European and international human rights law. The adult applicant in this case had requested permission to work; however, this was refused by the Minister for Justice in 2013. The applicant contends that as a subsidiary protection applicant, the Minister cannot rely on s.9(4) of the Refugee Act 1996 (which prohibits asylum seekers from seeking or entering employment). The Minister must consider her application to be allowed work in its own right. The applicant is further challenging the absolute exclusion of those seeking asylum/subsidiary protection from accessing social welfare rights under the Social Welfare Act 2005 (as amended). Argument in this case before Mac Eochaidh J. finished in August 2014 and a decision is expected by October 2014. The outcome in this case will be of significant interest, for asylum seekers who are placed in direct provision, civil society organisations and individuals who have highlighted key problematic aspects with the system of direct provision over the last number of years.

So while the Irish courts will eventually be able to assess the legality of direct provision, the High Court in Northern Ireland has already delivered a significant judicial critique of the direct provision system. Given the reluctance of Irish judges in accepting any socio-economic rights arguments to date, it is entirely possible that the decision of the Northern Ireland High Court in ALJ will be of limited significance. The lack of any political comment on the ALJ decision in the Oireachtas suggests a continued reluctance to substantively engage in a robust children's rights-based analysis of direct provision. However, as Smyth correctly notes, the fact that the court in ALJ refused to return a family to direct provision in Ireland may engage Ireland’s European Union obligations. As permitted by the Lisbon Treaty, Ireland has an opt-in clause to measures relating to, inter alia, EU immigration and asylum

---

90 For a detailed analysis of this, see G. Whyte, “Public Interest Litigation in Ireland and the ECHR Act 2003” in S. Egan, L. Thornton, and J. Walsh, The ECHR and Ireland: 60 Years and Beyond (Dublin: Bloomsbury, 2014).

law. The EU Reception Conditions Directive\textsuperscript{92} and the successor EU Recast Reception Directive\textsuperscript{93} are unique, in that a very basic standard of living is guaranteed for asylum seekers. However, Ireland decided not to opt into either Reception Conditions Directive or the Recast Reception Directive. The core reason that Ireland did not choose to opt-in to these Reception Directives is due to the (limited) recognition of the right to work for asylum seekers.\textsuperscript{94} However, with another European state (the UK) refusing to send back an asylum seeking family to Ireland, this could impact on the effective operation of EU law relating to asylum claims processed in the first EU country of application.

**Conclusion: Protecting the Socio-Economic Rights of Child Asylum Seekers in Ireland**

While the new Art.42A is still not part of the constitution (for now), it was somewhat of a significant moment for the Irish polity to recognise the rights of children.\textsuperscript{95} Nevertheless, there is a lack of public outrage regarding the direct provision on conditions and the length of time men, women and children are forced to remain. While there are significant concerns aired regarding how, in the past, Irish government, society and religious institutions mistreated children, the lack of any sustained concern about direct provision is exceptionally worrying.\textsuperscript{96} In one of his

\textsuperscript{94} Mr Alan Shatter TD, Minister for Justice and Equality, Written Answers 593 and 594: EU Directives, April 30, 2014.
\textsuperscript{95} Thirty-First Amendment of the Constitution (Children) Bill 2012. See also, In the Matter of the Referendum on the Proposal for the Amendment to the Constitution contained in The Thirty First Amendment to the Constitution (Children) Bill 2012 [2013] IEHC 458 (October 18, 2013). This decision is currently under appeal to the Supreme Court.
first public statements since appointment as a Minister for State at the Department of Justice and Equality, Mr Aodhán Ó Riordáin TD stated97:

“Direct provision needs radical reform. It is unacceptable that a child could spend half their life in a direct provision centre – in poverty, marginalised, stigmatised. I will be working closely with the Minister [for Justice, Frances Fitzgerald] and officials on this. A lot of work has in fact already been done, and there is an awareness within the department it has to change.”

However, by October 2014, Minister Ó Riordáin had indicated that the system of direct provision will remain in place.98 A Working Group on the Protection and Direct Provision System was established in October 2014.99 This group consists of civil society organisations, experts in child and immigration law and policy, one former asylum seeker and representatives of a number of government departments. The terms of reference for the working group are narrow. Reference to ensuring the dignity of the person is welcome. There is no mention of legal obligations upon this State to provide for asylum seekers, in particular the clear obligation under the UN Convention on the Rights of the Child, for those under 18 seeking asylum (or are part of families seeking asylum), that there can be no differentiation as regards rights entitlements as compared to citizen/resident children in Ireland. The Working Group will not deliver its final report until April 2015 (the 15th anniversary of direct provision). It is not known, at the time of writing, whether the working methods of the Working Group will allow for submissions, meetings and discussions with asylum seekers to discuss their concerns and experiences in the direct provision system. In particular, whether Article 12 CRC, and the right of the child to be heard, will be respected. The precise impact the current case before the High Court, and the Government appointed Working Group will have on the continuation of the system of

direct provision and for the 1,527 children currently residing in direct provision accommodation, is unclear. The extent of distancing and separation from the host communities, by placing asylum seekers into institutionalised settings, has worrying similarities to Ireland’s past practices towards children in borstals, industrial schools, mental hospitals, mother and child homes and Magdalenes'.\textsuperscript{100} If the deliberations of the Working Group simply focus on improving conditions within the centres, habitability, food quality, child safety in direct provision centres, this will be a lost opportunity. Only full compliance with Ireland’s international obligations under the UN Convention on the Rights of the Child towards child asylum seekers is warranted. Tinkering with systems and processes that may ensure safe or more pleasant living conditions misses the point. The system of direct provision is a significant violation of children’s rights. Only the dismantling of direct provision will ensure that the rights of all children in Ireland are cherished equally.

\textsuperscript{100} While this issue has come into the spotlight of late, a definitive and accessible history and analysis of these institutionalised spaces is contained in S. Kilcommins, L. O’Donnell, E. O’Sullivan, and B. Vaughan, \textit{Crime Punishment and the Search for Order in Ireland} (Dublin: Institute of Public Administration, 2004).