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Title	C.A. and T.A.: The Direct Provision Case
Authors(s)	Thornton, Liam
Publication date	2014-12
Publication information	Irish Journal of Family Law, 4 : 116-118
Publisher	Roundhall
Link to online version	www.westlaw.ie
Item record/more information	http://hdl.handle.net/10197/6537
Publisher's statement	Thornton, L., C.A. and T.A.: The Direct Provision Case, Irish Journal of Family Law, 4:116-118, 2014, Roundhall reproduced with permission of THOMSON REUTERS (PROFESSIONAL) UK LIMITED

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C.A. & T.A.: The Direct Provision Case

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Mr Justice Colm Mac Eochaidh delivered his decision in the case of *C.A. and T.A v The Minister for Justice and others* on Friday, 14 November 2014. This summary is based on Mr Justice Mac Eochaidh's unapproved decision, and readers are advised to check the Courts Service website for the approved decision. This detailed decision requires significant analysis, so the purpose of this case note is simply to outline the facts and the decision of Mac Eochaidh J.

Facts

C.A. is a national of Uganda and a young mother. C.A. claimed refugee status in Ireland in April 2010. C.A. made an application for refugee status but this was initially rejected by the Office of the Refugee Applications Commissioner. The Refugee Appeals Tribunal also found that C.A. did not meet the definition of refugee for the purposes of the Refugee Act 1996 (as amended) in October 2011. These decisions were not judicially reviewed by C.A. In December 2011, C.A. made a claim for subsidiary protection. This claim has yet to be determined. [The reason for the delay relates to a separate legal challenge by another subsidiary protection applicant, that successfully led to significant changes in the determination of subsidiary protection claims]. C.A. has resided in direct provision accommodation centre in Galway since June 2010. C.A.'s son, T.A., was born in January 2011 and has resided in direct provision accommodation and was also challenging the system of direct provision on a number of grounds.

The Decision of Mac Eochaidh J.

1. The Successful Grounds of Challenge

i. House Rules

The High Court was invited to consider whether the Reception and Integration Agency's House Rules in Direct Provision violate Article 8 ECHR (the right to private, family life and the protection of the home). While accepting that the Article 8 ECHR is not absolute, Mac Eochaidh J. held that the elements of the House Rules outlined below were unlawful.

- **Unannounced room inspections:** While RIA are entitled to inspect rooms, the overarching manner and unannounced nature of the inspections was not proportionate.
- **Monitoring of presence & Requirement to Notify intended Absences:** The objective of having daily sign in so as to ensure capacity management at direct provision centres is lawful. However, this objective could "easily be achieved" (para. 8.10) in a less restrictive manner. Requiring somebody to sign-in to their home on a daily basis is disproportionate. This analysis also meant that the notification of intended absence from one's home, was also disproportionate.
- **Rules against having guests in bedrooms:** The outright ban (emphasis added) on person's having guests in their home was a disproportionate interference with constitutional rights and rights under the ECHR.

The High Court determined that the bedroom of the applicants was their home, and protected by Article 40.5 of the Constitution and Article 8 ECHR.

ii. Complaints Handling Process

The applicant's are entitled to have an independent complaints handling procedure. Regardless of whether the applicant has had cause to use this (which to date C.A had not). RIA is the author of the House Rules and is in a commercial relationship with the accommodation provider. Mac Eochaidh J. stated that it was not acceptable that RIA would be the final arbitrator in a dispute between the residents in their homes, and the commercial accommodation provider. This breaches the legal principle that nobody should be a judge in something that they have an interest in.

2. The Unsuccessful Grounds of Challenge

i. Direct Provision and Breach of Human Rights

Mac Eochaidh J. noted that the lack of oral evidence, and the fact that the evidence of C.A and T.A was disputed, meant that he could not rule as to whether in this particular case the applicants' constitutional and ECHR rights had been violated due to the conditions and duration of their stay in direct provision (see para. 3.1 and paras. 6.1 to 12.6). Judge Mac Eochaidh held that the European Union Charter of Fundamental Rights did not apply to this case (see paras. 11.1 to 11.10 of the decision). As regards the State's argument that the courts should not decide on socio-economic rights claims, Mac Eochaidh stated that where (at para. 12.6):

"...State action results in a breach of human rights and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of that order."

While ultimately rejecting the applicants' claims in this case, at para. 12.6 of his decision, Judge Mac Eochaidh did state:

"...[W]here an applicant claims that 'direct provision' is having such adverse affects on her life as to cause serious harm and where such circumstances are backed up by appropriate medical and other independent evidence, a Court would be entitled to grant appropriate relief, even if the only remedy for the wrong involved the expenditure of additional resources by the State."

The applicant had argued that she and her son have little control over aspects of their daily life as regards food and eating times, direct provision as being unsuitable for raising a child leading to an abnormal family life; lack of privacy and restrictions

on freedom of movement. The applicant (at para. 10 of her affidavit, reproduced in para. 3.10 of this decision) states:

"...[M]y daily life in the accommodation centre is monotonous and routine and the environment is wholly unsuitable for us..."

The adult applicant noted the difficulties in providing for her son and how the €28.70 payment per week means she cannot provide adequately for her son. In a subsequent affidavit, the applicant (para. 3.11 of the decision) notes the level of surveillance and monitoring of parental responsibilities by the authorities, that is only a feature of direct provision.

The respondents presented two affidavits" in response to the allegations made by C.A. The manager of the direct provision centre stated that he was "taken aback by the allegations" and "the Centre prides itself on its standards and its involvement with the residents living there. The accommodation is considered their home while they are there...." The accommodation manager also noted that the applicant had not brought any complaints as regards quality of the accommodation and services provided in the accommodation centre prior to this action.

Noel Dowling, Principal Officer in the Reception and Integration Agency noted the applicants had a "generous and nutritious selection of food..." and:

"They are housed in a very large ensuite room measuring 35ft. x 12ft. They have no bills to concern themselves with....are not concerned about heating the premises...do not have to concern themselves with paying for food and domestic good."

Mr Dowling continued:

"The allegations...demonstrates a startling lack of appreciation for the daily realities of many other non-protection seekers, particularly given the difficult economic circumstances unemployed individuals and low income families currently face....the facilities are designed to be suitable for a *genuine*

protection seeker. It is submitted that were a person *genuinely fleeing persecution* in their home country, such a person would welcome the quiet and peaceful enjoyment of the Eglinton Hotel on the seafront in Salthill, Galway." [emphasis added by me].

Mac Eochaidh J. noted the wide variety of reports that the applicants had sought to open before the court, however due to rules on hearsay, did not take cognisance of these reports (full list on para. 4.2 of the decision). Mac Eochaidh J. accepted that the applicant had very negative feelings about the system of direct provision. However, the High Court stated that there was significant dispute between the applicants and the respondents as regards what negative effects occurred due to direct provision. As the applicants did not seek a plenary hearing (wherein witnesses from both sides could be questioned and cross examined), the applicants failed to discharge the burden of proof to establish that direct provision had the negative effects alleged (see para. 5.3).

Article 3 ECHR (Inhuman and Degrading Treatment):

The court could not decide whether direct provision, and the experiences of this particular applicant, constituted inhuman and degrading treatment, prohibited by Article 3 ECHR. However, given the high threshold set down as regards reception conditions (or total lack thereof) in Greece, the Court would need to assess the evidence of the applicants and respondents in an oral hearing. The examples presented by the applicant are in "stark contrast" to reception conditions that the European Court of Human Rights were assessing in the case of *M.S.S v Belgium and Greece*. As evidence from the applicant could not be tested in this case, it is not possible to assess whether direct provision is a breach of Article 3 ECHR. The applicant has to prove that direct provision humiliates and debases her in a manner that shows a complete lack of respect for human dignity. The respondents have vigorously denied this.

Article 8 ECHR (Private and Family Life):

Communal living in direct provision does impair the right to enjoy family life. However, the applicants' failed to prove in relation this this case, that this was so.

"No professional evidence was sought to be adduced which would suggest an injury to family life occasioned by direct provision...[T]he applicants have failed to establish that 'direct provision', as experienced by them, unlawfully interferes with family life." [para. 9.18, my emphasis]

As regards the "abnormal circumstances" that the child applicant is being reared in, Mac Eochaidh J. stated (at para. 9.19 of his decision) that although instinctively he felt direct provision is not an ideal environment for rearing a child, due to failure of proof from the applicants, he could not find a breach of ECHR and/or corollary Constitutional rights.

Length of time in Direct Provision

The applicant, through no fault of her own, has spent 2 out of 3 and a half years in direct provision (due to the significant backlog in deciding whether the applicant was entitled to subsidiary protection). While Mac Eochaidh J. opined (paras 10.8-10.9):

"Unduly lengthy exposure to 'direct provision' may well be injurious and this unlawful...the failure of the applicants to discharge the burden of porrof....is equally fatal to this 'duration claim'"

ii. No Grounds to Challenge the Payment of Direct Provision Allowance

The applicants sought a declaration that the weekly direct provision allowance payment is unlawful due to the lack of any statutory basis for the payment and is a "manipulation" of the supplementary welfare allowance. The applicants' argued that due to Section 246(7) of the Social Welfare Consolidation Act 2005 (as amended). Mac Eochaidh J. rejected this argument. The judge found that as a matter of law, the direct provision payment (€19.10 per week per adult/ €9.60 per week per child) was not a social welfare payment. While Direct Provision Allowance was classified as a supplementary welfare allowance payment for some years of Budget Estimates or Revised Estimates presented to the Oireachtas, this was not of any legal significance. The Oireachtas had to be aware that mainstream social welfare

payments are not paid to protection applicants. Mac Eochaidh J. summarised his decision as follows (at para 13.20):

"The applicants have suggested that the fact that DPA looks like social welfare, that DPA uses the language of social welfare, that the amounts less deductions are identical to certain social welfare payments and that the payments are made by the same Minister who operates payments under the SWCA 2005 means that these DPA are either unlawful payments under the Act or a manipulation of the Act. None of these factors either alone or together establishes that DPA is a disguised social welfare payment. The State is not prohibited from making cash payments to protection applicants"

In any event, Mac Eochaidh J. stated that the applicant did not have legal standing to challenge the legality of the payments. Even if the applicants' were correct that direct provision allowance is outside the powers of the Minister for Social Protection,

"The court should not make an order which would have significant negative consequences for the applicants and for all other persons in receipt of this money in the expectation that the legislature would cure the negative effect of the order of the court."

Mac Eochaidh J. also noted (at para. 13.26) that direct provision allowance is the only social welfare payment that has not been increased since its inception in 2000. However, the proper place to pursue this argument and agitate for an increase is in the political arena.

iii. Direct Provision is not in breach of the Separation of Powers

The Executive (Government) are entitled to create a scheme on an extra legislative basis to support protection seekers. Even where such issues relate to the protection of fundamental rights, the Oireachtas have not legislated for reception conditions for protection applicants. Given the inactivity of the Oireachtas in this regard, nowhere in the Constitution is it suggested that the Oireachtas have to establish principles and policies before the Government exercise its executive powers. The Respondents (at para. 14.12) outlined 26 payments/schemes that do not have any legislative

underpinning (including JobBridge, Back to School Allowances; Free Travel; School Meals etc.). Mac Eochaidh J. also pointed to the fact that for many decades national school education did not have a legislative underpinning. Mac Eochaidh J. held (at para 14.25):

"The mere fact that 'direct provision' could have been placed on a legislative footing does not mean that this must happen"

Mac Eochaidh J. continued (at para. 14.40):

"...[T]he establishment and operation of a scheme of material support for protection applicants by the Government without legislative basis is a lawful exercise of Government of the executive powers conferred by Article 28.2 of the Constitution and does not infringe the separation of powers or trespass on the function of law making granted to the Oireachtas under Article 15 of the Constitution"

3. The Outstanding Questions

i. Convention on the Rights of the Child

Mac Eochaidh J. did not make a decision on issues relating to arguments on the UN Convention on the Rights of the Child, something that was to be decided in a different case before the High Court this Wednesday, 19 November 2014 in the case of *Dos Santos*.

ii. Right to Work

Mac Eochaidh J also adjourned the arguments regarding the challenge to the prohibition on employment for those seeking subsidiary protection, as there is another High Court challenge pending on this issue. The judge stated that

"...on an issue of this importance the High Court should avoid the possibility of issuing conflicting findings and the court last in time to hear the argument should adjourn the point..."