



Provided by the author(s) and University College Dublin Library in accordance with publisher policies., Please cite the published version when available.

Title	Spotlight on Direct Provision
Authors(s)	Thornton, Liam
Publication date	2015-07
Publication information	Making Rights Real for Children: A Children's Rights Audit of Irish Law
Publisher	Children's Rights Alliance
Link to online version	http://www.childrensrights.ie/sites/default/files/submissions_reports/files/MakingRightsReal2015.pdf
Item record/more information	http://hdl.handle.net/10197/6876

Downloaded 2019-03-20T18:12:20Z

The UCD community has made this article openly available. Please share how this access benefits you. Your story matters! (@ucd_oa)



Some rights reserved. For more information, please see the item record link above.



Children's Rights Alliance

Chapter 6A: Spotlight on Direct Provision

Liam Thornton

"The government hides it so well that people don't know. It's such a tragic form of a life. We don't get new toothbrushes or linen or soap. We want to stand on our own two feet. We want a better life, not a worse one. Ask the Minister to try live where we live and see if she survives for a week. It's not good enough. Would she like her family to be in that situation? Why don't we deserve the same as her children? The fear alone does not let you sleep. Ireland is not living up to its commitments - our rights and needs are not being met. They don't care about our needs. We are treated like animals. When we protested the staff at the centre treated us worse. We are not treated with any dignity or respect. They think we're a burden. After 14 years, you've nothing left where you came from. Everyday a bit of our past is being rubbed out. We're not cats. We don't have 9 lives and we cannot keep adjusting to changes. All I want is the protection of the country. I want to help the world be a better world. Happiness is what you want for everyone. No matter how much of an optimist you are, there is no good from Direct Provision."

Children living in direct provision system in Athlone, Westmeath, 12 February 2015.¹

1. The System of Direct Provision

Direct provision is the phrase used to describe the system Ireland utilises to provide minimum supports to those claiming refugee,² subsidiary protection³ and/or leave to remain.⁴ Within direct provision, asylum seekers⁵ are provided with bed and board, along with a weekly allowance. Accommodation is provided by the Reception and Integration Agency, a 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. Adult asylum seekers are entitled to a direct provision allowance rate of

¹ Children's Rights Alliance, Department of Children and Youth Affairs and UNICEF, *Picture Your Rights: A Report to UN Committee on the Rights of the Child from Children Living in Ireland* (May 2015), p. 89.

² For definition of 'refugee', see Section 2 of the *Irish Refugee Act 1996*.

³ For definition of subsidiary protection, 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. See further, Thornton, L. "Subsidiary protection for asylum seekers within Ireland" [2008] 26(1) *Irish Law Times* 6-13.

⁴ An application for leave to remain is made under Section 3 of the *Immigration Act 1999*.

⁵ 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.

Thornton, L. "Spotlight on Direct Provision" in Children's Rights Alliance, [*Making Rights Real for Children: A Children's Rights Audit of Irish Law*](#) (Dublin: CRA, 2015), pp. 124-130.

€19.10 per week, while the payment for dependent children is €9.60 per week. This rate of payment has not increased since 2000.⁶ In June 2015, the *Working Group Report on the Protection System and Direct Provision (McMahon Report)* recommended an increase in direct provision allowance for adults and children. It is recommended that the adult rate to increase to €38.74 and child rate to €29.80 per week (qualifying child allowance rate under Supplementary Welfare Allowance).⁷

Asylum seekers, while having authorised presence in the State,⁸ are not entitled to any other social welfare payment (including child benefit)⁹ and cannot seek or enter employment, on pain of criminal conviction.¹⁰ 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.¹¹ Since May 2009, asylum seekers have been definitively disentitled to any other social security/welfare payment, other than direct provision allowance, as asylum seekers are legally barred from gaining habitual residence in Ireland.¹² At the end of January 2015, there were 1,482 children resident in direct provision accommodation as part of a family unit.¹³ While figures for length of time children remain in direct provision accommodation are not provided, given the fact that the average length of stay within accommodation centres is generally 48 months (4 years), this significantly impacts on the rights of the child.¹⁴

2. Direct Provision and the Rights of the Child¹⁵

Article 22(1) CRC provides:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person,

⁶ A challenge to the lawfulness of direct provision allowance was unsuccessful in *C.A. & T.A. v Minister for Justice and Equality & others* [2014] IEHC 532 (Mac Eochaidh J., 14 November 2014), see in particular paras. 13.1-13.27.

⁷ *McMahon Report*, para. 51, 5.27 and 5.30 Bullet Point 1.

⁸ Section 8(1)(a) of the Refugee Act 1996 (as amended).

⁹ Section 246 of the Social Welfare (Consolidation) Act 2005, as amended by Section 15 of the Social Welfare and Pensions (No. 2) Act 2009.

¹⁰ Section 9(4)(b) of 1996 Act (as amended).

¹¹ For a detailed discussion of the modalities of the direct provision system, see: L. Thornton, "Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in Ireland" [2007] 24(2) *Refuge: Canadian Periodical on Refugee Studies* 86; L. Thornton "Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion" (2013) 20(2) *Journal of Social Security Law*, 66-88.

¹² See, Section 15 of the Social Welfare and Pensions (No. 2) Act 2009. This was enacted due to the success of the Free Legal Advice Centres in arguing that the previous iteration of the habitual residence condition did not absolutely exclude asylum seekers, see: *Case A: Review of the Appeal Officer's Decision under Section 318 of the Social Welfare Consolidation Act 2005*.

¹³ Reception and Integration Agency, *Monthly Statistics: January 2015*, p. 7.

¹⁴ Reception and Integration Agency, *Monthly Statistics: January 2015*, p. 19.

¹⁵ For a more detailed analysis of some of the arguments introduced in this short contribution, see Thornton, L. "Direct Provision and the Rights of the Child in Ireland" [2014] 17(3) *Irish Journal of Family Law* 68.

receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The United Nations High Commission for Refugees (UNHCR) has stated categorically that the Convention on the Rights of the Child (CRC) applies to children seeking asylum or children accompanying family members seeking asylum.¹⁶ While Ireland may seek to objectively, legitimately and proportionately limit the socio-economic rights of asylum seekers under other international human rights treaties, they are absolutely prohibited from doing this for children in the system of direct provision.¹⁷ The socio-economic rights of children are outlined in a variety of the CRC's articles. All children have the right to health,¹⁸ the right to benefit from social security,¹⁹ the right to an adequate standard of living,²⁰ the right to education,²¹ the right to rest and leisure,²² and protection from economic exploitation²³ including protection from sexual exploitation²⁴ and trafficking.²⁵ The UN Committee on the rights of the child have stated categorically that there are no grounds for adopting lesser rights protection for children seeking asylum.²⁶ Ireland has very clear international legal obligations that asylum seeking children/children in a family who have a member claiming asylum, must be treated equally *vis-à-vis* citizen children. In Ireland to date, law and administration, has

¹⁶ See, UNHCR, *Global Trends 2013* (Geneva: UNHCR, June 2014) and UNHCR, Executive Committee Conclusion on Children No. 84 (XLVIII) of 1997, preamble paragraph 1. , UNGA Doc. No. A12 (A/52/12/Add. 1).

¹⁷ Article 2 CRC. In this regard, other international human rights treaties are not as categorical as regards the equal applicability of rights for asylum seekers *vis-à-vis* citizens. For discussion on this, see: L. Thornton, (2014) "Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe", FRAME Working Paper No. 6, January 2014, available at <http://www.fp7-frame.eu/> [last accessed: 08 July 2015] and L. Thornton "The Rights of Others: Asylum Seekers and Direct Provision in Ireland" (2014) 3(2) *Irish Community Development Law Journal* 22.

¹⁸ Article 24 CRC.

¹⁹ Article 26 CRC.

²⁰ Article 27 CRC.

²¹ Article 28/29 CRC.

²² Article 31 CRC.

²³ Article 32 CRC.

²⁴ Article 34 CRC.

²⁵ Article 35 CRC.

²⁶ 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)). See this point reemphasised in: 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 (29 May 2013), para. 75 and Concluding Observations, CRC, Ireland, CRC/C/73 (1998) 14 at para. 96 and Concluding Observations, CRC, Ireland, UN Doc. CRC/C/IRL/CO/2 (September 2006), para. 56.

Thornton, L. "Spotlight on Direct Provision" in Children's Rights Alliance, [Making Rights Real for Children: A Children's Rights Audit of Irish Law](#) (Dublin: CRA, 2015), pp. 124-130.

rejected such a rights based approach to children in direct provision. The 2015 *List of Issues of the Committee on the Rights of the Child* to Ireland had not been issued prior to the finalising of the *McMahon Report*. However, it remains instructive as to what the precise obligations of Ireland are towards children in the asylum system.

At para. 10, the UN Committee on the Rights of the Child requests that Ireland:²⁷

"Please provide additional information on the criteria for the fulfilment of the so called "Habitual Residence Condition" in order to access social services. In doing so, please provide information on measures, if any, taken to ensure that this condition does not result in children from asylum-seeking, refugee, migrant, and Traveller and Roma ethnic minority backgrounds being excluded from primary care, child benefits and social protection"

3. Direct Provision: A Violation of the Rights of the Child

Ireland is to be commended for mainstreaming children seeking asylum into education and providing for their medical needs through the medical card system. However, the significant time that children have had to spend in direct provision is of deep concern.²⁸ The *McMahon Report* has proposed that all individuals in the protection, leave to remain or deportation systems, for 5 years or more, should, in general, be granted either protection status or leave to remain within 6 months of the reports publication. The *McMahon Report* "discounted the possibility of an amnesty".²⁹ Instead, the *McMahon Report* recommends:³⁰

²⁷ CRC, [List of Issues for Ireland](#), UN Doc. CRC/C/IRL/Q/3-4/.

²⁸ See in particular, Shannon, G. *Fifth Report of the Special Rapporteur for Children*, (Dublin: 2011), p. 18; O'Reilly, E. "Asylum Seekers in our Republic: Why Have we Gone Wrong?" *102 Studies*, Summer 2013; McGuinness, C., Foreword, *State Sanctioned Child Poverty and Exclusion* (September 2012) and Coulter, C. *Interim Report: Child Care Law Reporting Project* (November 2013), p. 20, p. 24 and p. 27 and *McMahon Report*, para. 3.1. and Appendix 6.

²⁹ *McMahon Report*, para. 3.4.

³⁰ *McMahon Report*, para. 3.128.

Thornton, L. "Spotlight on Direct Provision" in Children's Rights Alliance, [Making Rights Real for Children: A Children's Rights Audit of Irish Law](#) (Dublin: CRA, 2015), pp. 124-130.

"All persons awaiting decisions at the protection process and leave to remain stages who have been in the system for five years or more from the date of initial application should be granted leave to remain or protection status as soon as possible and within a maximum of six months from the implementation start date subject to the three conditions set out below for persons awaiting a leave to remain decision. It is recommended that an implementation start and end date be set by the authorities as soon as possible."

If this recommendation is implemented, it has the potential to impact upon an estimated 1,082 children who have been living in the direct provision system for over five years.³¹

However, it must be recognised that time spent in direct provision is only one of the problematic aspects of direct provision. Fundamentally, Ireland must ensure that accompanied children seeking asylum (or with carers who are seeking asylum), must enjoy all socio-economic rights that are recognised in the UN Convention on the Rights of the Child. The *McMahon Report* engaged in an analysis of potential *child protection* issues within the direct provision system,³² the *McMahon Report* does not substantively engage in a *child rights* analysis of the direct provision system.³³ If the *McMahon Report* recommendations are implemented, children can still potentially spend up to five years in the direct provision system.³⁴

Northern Ireland has refused to return children to the Republic of Ireland, who, along with their mother, had unsuccessfully claimed asylum and had an application outstanding for subsidiary protection in Ireland.³⁵ Relying on Section 55 of the Borders, Immigration and Citizenship Act 2009,³⁶ Stephens J. held that the children would not

³¹ *McMahon Report*, paras. 3.11-3.13. This recommendation may also potentially benefit 649 children who are in the refugee/subsidiary protection system, or who are subject to a deportation order for a period of over 5 years.

³² *McMahon Report*, para. 4.61 to 4.75.

³³ See further, Thornton, L. "A Preliminary Human Rights Analysis of the Working Group Report and Recommendations on Direct Provision", pp. 20-26, available on www.humanrights.ie (last accessed, 08 July 2015).

³⁴ *McMahon Report*, para. 3.165.

³⁵ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88.

³⁶ Section 55 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".

be able to develop their sense of identify and belonging in direct provision centres, accepted that many asylum seekers spend several years in direct provision and this can impact on mental and physical health of children and would not be able to enjoy family life in the Republic of Ireland if returned to direct provision.³⁷ In the recent Irish High Court decision, *C.A & T.A.*,³⁸ direct provision was not found to have violated any of the adult applicant's human rights, protected under the constitution or the European Convention on Human Rights. A decision as to whether the child applicant, T.A, had legal rights that the State had to protect by virtue of Ireland's legal obligations under the UN CRC, was adjourned.³⁹ The *Dos Santos* judgment, delivered a number of days after *C.A and T.A.*, stated that no individual rights can be relied upon in Irish courts by children deriving from Ireland's obligations under the UN CRC.⁴⁰

4. Recommendations

- ✚ The system of direct provision violates the rights of children and the system as currently operating is not compliant with Ireland's obligations under the UN Convention on the Rights of the Child.
- ✚ The length of time children must live in direct provision is of deep concern. However, this is only one problematic aspect of the direct provision system.
- ✚ At a minimum, children seeking asylum should be entitled to child benefit and should not be expected to reside in communal accommodation for the duration of their (or their carers) asylum claims.
- ✚ Children seeking asylum should enjoy the same social, economic and cultural rights as Irish citizen children. To this end, the habitual residence condition in Irish social security law, must be amended so that it no longer violates the socio-economic rights of children seeking asylum.

³⁷ For a detailed discussion on this case, and its potential impact, see Thornton, L. "Ireland's Asylum & Direct Provision System under the Spotlight in Northern Ireland High Court", *Human Rights in Ireland*, 14 August 2013 and Smyth, C. "Direct Provision at 14: Has Direct Provision Met its Nemesis", *Human Rights in Ireland*, 10 April 2014 (both available at www.humanrights.ie, last accessed 08 July 2015).

³⁸ *C.A. & T.A. v Minister for Justice and Equality & others* [2014] IEHC 532 (Mac Eochaidh J., 14 November 2014). For a summary of the decision, see Thornton, L. "C.A. and T.A.: The Direct Provision Case" (2014) 17(4) *Irish Journal of Family Law* 116.

³⁹ *C.A. & T.A. v Minister for Justice and Equality & others* [2014] IEHC 532 at para. 2.10. This element of the decision was specifically adjourned due to the *Dos Santos* decision.

⁴⁰ *Dos Santos & others v Minister for Justice and Equality & others* [2014] IEHC 550, (McDermott J., 19 November 2014), paras 48-60.

Thornton, L. "Spotlight on Direct Provision" in Children's Rights Alliance, [*Making Rights Real for Children: A Children's Rights Audit of Irish Law*](#) (Dublin: CRA, 2015), pp. 124-130.

- ✚ An explicit best interests of the child requirement should be introduced within Irish immigration and protection law, protecting the best interests of the child as regards their civil, political, economic, social and cultural rights in Ireland.