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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

² For definition of ‘refugee’, see Section 2 of the Irish Refugee Act 1996.
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.
€19.10 per week, while the payment for dependent children is €9.60 per week. This rate of payment has not increased since 2000. 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).

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. 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. At the end of January 2015, there were 1,482 children resident in direct provision accommodation as part of a family unit. 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.

2. Direct Provision and the Rights of the Child

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,
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 exploitation 23 including protection from sexual exploitation 24 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).
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/IRL/CO/2 (1998) 14 at para. 96 and Concluding Observations, CRC, Ireland, UN Doc. CRC/C/IRL/CO/2 (September 2006), para. 56.
reected 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/.
29 McMahon Report, para. 3.4.
30 McMahon Report, para. 3.128.
“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.  

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, the McMahon Report does not substantively engage in a child rights analysis of the direct provision system. If the McMahon Report recommendations are implemented, children can still potentially spend up to five years in the direct provision system.

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. Relying on Section 55 of the Borders, Immigration and Citizenship Act 2009, 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.
34 McMahon Report, para. 3.165.
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 identity 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.\(^n\) In the recent Irish High Court decision, \textit{C.A & T.A.}, 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.\(^n\) The \textit{Dos Santos} judgment, delivered a number of days after \textit{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.\(^n\)

4. \textit{Recommendations}

\begin{itemize}
\item 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.
\item 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.
\item 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.
\item 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.
\end{itemize}

\(^n\) \textit{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 \textit{Dos Santos} decision.
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.