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A Time for Hope? The European Communities (Reception Conditions) Regulations 2018

Liam Thornton¹

1. Introduction

For those unfamiliar with the term, ‘direct provision’, it is shorthand for provisions that Ireland has in place for those seeking protection in Ireland. This includes provision of education to those up to Leaving Certificate level, availability of medical services to asylum seekers in the protection system, along with a range of accommodation supports, a weekly financial allowance and provision of food, or the ability to cook food. This system of direct provision has existed for almost nineteen years. There have been countless reports since the early 2000s urging Ireland to come in line with common European Union norms, but all these reports, had been ignored. Yet, only since 06 July 2018 have the rights, entitlements and obligations for asylum seekers been placed on any sort of legislative footing. In response to a decision of the Irish Supreme Court recognising the right to work for asylum seekers,² the Irish Government decided, after many years to become bound by European Union law, when it comes to the reception rights of asylum seekers.

International human rights law does recognise that States have duties to protect the social, economic and cultural rights of asylum seekers. The EU’s Recast Reception Directive (RRD)³ and its predecessor, the Reception Directive 2003 are unique,⁴ in that a very basic standard of living has been set down from those considered outside the European polity – asylum seekers. International and European human rights law have attempted (albeit, in my view unsuccessfully⁵) to protect the socio-economic rights of asylum seekers in Europe. The key method and efforts for seeking protection of the dignity, inherent worth and socio-economic rights for asylum seekers should be focused on domestic rights regime, with international rights mechanisms supplementing socio-economic rights protection for asylum seekers.

Within EU law, the language of ‘reception’ of asylum seekers masks the reality of asylum seeker exclusion from human rights protections. Whether we like it or not, the EU Reception Conditions Directive is not wholly human rights based nor human rights compliant. Nevertheless, that said, the coming into force of the European Communities (Reception Conditions) Regulations 2018 is to be welcomed.⁶ At this stage (November 2018), even with reservations on its total compliance with human rights norms and standards, there is I argue, the potential for further enhancing the rights and entitlements of asylum seekers in Ireland.

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2. Is the EU Reception Directive Important?

The decision of the Irish Government to become bound by European Union norms and standards, in my view, is significant. It has signalled a turn away from a wholly administratively based, non-legislative system that had existed from 10 April 2000 until 06 July 2018. This, in my view, enhances the concept of the rule of law. I may not feel that the 2018 Regulations are wholly human rights compliant, nor do they in my view fully conform with Ireland’s obligations under international human rights law, however, for the first time in a generation, the Oireachtas (incidentally) have stated clearly what the reception rights of asylum seekers should be. Prior to this, we had to rely on Freedom of Information requests to try and decipher why the system of direct provision came into being, and why changes may have been made to that system. At a minimum, we now have the Oireachtas taking clear and unequivocal control over the issue of rights and obligations for asylum seekers. That this could not have been done on 10 April 2000 (when the administrative direct provision system started to be implemented), speaks volumes as regards the desire of certain civil servants, and some Government ministers, to keep the rights and entitlements of asylum seekers outside the purview of the Oireachtas. However, this is only part of the struggle for seeking the continuous improvement of reception rights for asylum seekers. Now that EU law applies in Ireland, we also have to deal with some of the legal realities, that even with the direct provision system having a legislative basis, that does not automatically mean significant improvements for the rights of asylum seekers. Nevertheless, it would be remiss of me not to acknowledge that several significant improvements have emerged prior to and since Ireland bound itself to EU law.

3. The Reality of Rights under the EU Reception Directive: Shelter, Allowances and Work

The 2018 Regulations, as well as confirming asylum seekers right to medical assistance, right to education, right to enhanced protection for vulnerable persons, and appeals mechanisms should a protection applicant be denied a reception right, nevertheless allow (but do not mandate) the continuation of direct provision accommodation.

(a) Shelter apart from communities

The highly-institutionalised nature of direct provision accommodation centres, coupled with the significant length of time asylum seekers will be in these centres, has caused concern for over 18 years (see here). In essence the right to live a life how each individual deems fit, encompasses the system of direct provision accommodation in Ireland. Article 7 of the 2018 Regulations permits the Minister for Justice to provide accommodation centres (and other forms of shelter) which exclusively house asylum seekers. Once accommodation centres are provided, then other obligations begin to arise. Under, Article 18(2) of the Reception Directive, Member States must ensure that the accommodation centre “ensure[s] protection for family life”, as well as permitting visitors, guests, legal advisors and others may meet an asylum seeker in their accommodation centre. In Article 7 of the 2018 Regulations, Ireland only protects the latter, not the former.

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8 Dáil Deb 23 January 2018; Sen Deb 25 January 2018.
In relation to the protection of family life, the words of MacEochaidh J. in C.A. decision may in future prove instructive to lawyers challenging direct provision centres as not protecting family life now that the Reception Directive has become part of Irish law:

Though the Court has heard submissions in respect of the abnormal circumstances in which the minor applicant has been reared, it seems to me that much more should have been done to persuade the Court as to the negative psychological effects of such an environment. It places the Court in an impossible position to invite it to conclude that there is some serious deficiency in the environment in Eglinton when I have no evidence other than the mere assertion of Ms. A and the submission of lawyers that this is so. Though my instinct tells me that ‘direct provision’ is not an ideal environment for rearing children, I cannot assume the skill and knowledge of a psychologist to make conclusions about the suitability of ‘direct provision’ for children. Therefore, again, because of a failure of proof, the contention that the respondents are responsible for creating a negative atmosphere in which the second named applicant is being reared, in breach of relevant ECHR and Constitutional rights must fail.

(b) The right to be self-sufficient

Article 15 of the EU’s Reception Directive provides a very limited right to work for asylum seekers. Articles 11 to 16 of the 2018 Regulations go beyond the minimum standards established under EU law, and arguably provides greater rights for asylum seekers to access the labour market in Ireland. This is not an absolute right to work, and again does not appear to conform with Ireland’s freely accepted human rights legal obligations.

Once an asylum applicant has not received a decision on her protection claim within eight months, she may apply to the Minister for Justice to exercise her right to work. Assuming there is no decision on her protection claim in the meantime, from the first day of her ninth month in Ireland, she may exercise her right to work.

In essence, the EU Reception Directive permits national legal measures that employers have to first seek to hire EU/EEA citizens and legally resident non-EU citizens, before they can hire asylum seekers.

While the right to work for asylum seekers under Articles 11 to 16 of the 2018 Regulations is not absolute, there is a nine month waiting period, there are various job restrictions, the current measures

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on the right to work, there is some cause for optimism at this time. While no doubt significant work may need to occur explaining this new reality to employers and business organisations, some asylum seekers are now working in Ireland. The right to work is not a panacea to all the ills in direct provision, but it is a good start.

(c) The promise of the daily expenses allowance

Comparing financial assistance payments for asylum seekers across the European Union can give rise to difficulties. In some countries, the financial allowances must cover food, housing, clothing, heating and other material reception conditions. In other countries (such as Ireland), accommodation and food is provided, and a low level of financial allowance is granted to asylum seekers. One commonality within all EU Member States is that financial allowances for asylum seekers are generally lesser than minimum social assistance/social welfare rates for citizens and those with a secure residency status within the State.

The payment formerly known as direct provision allowance or DPA, since 9th October 2018 has been known as the ‘daily expenses allowance’, which is paid weekly. Under Article 2 of the 2018 Regulations, a ‘daily expenses allowance’ is defined as (my emphasis):

“... part of the material reception conditions that constitutes a weekly payment made, under a scheme administered by the Minister for Employment Affairs and Social Protection, to a recipient in order for the recipient to meet incidental, personal expenses”

Article 17(5) of the EU Reception Directive states that where Member States provide financial allowances or vouchers, this shall be determined with reference to the levels of financial support, levels that are set down in law or by practice, which may be set at rates provided to a Member State’s own nationals. However, nothing prevents Member States, including Ireland, from providing applicants for international protection with lesser allowances/voucher levels, in comparison to nationals of the Member States.

That from the years 2000 to 2016, the rate of direct provision allowance remained at €19.10 per adult and €9.60 per child was a scandal. There were two raises in direct provision allowance. The first, by the then Minister for Social Protection, one month before a general election, raised payments to child asylum seekers only to €15.60. The second raise occurred in equally questionable circumstances, with Leo Varadkar orchestrating a rise of direct provision allowance to children and adults at the rate of €21.60 during his campaign to become Taoiseach.

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The Court of Justice of the European Union noted that the level of financial allowances under the 2003 Reception Directive:

... must be sufficient to ensure a dignified standard of living adequate for the health of applicants and capable of ensuring their subsistence.

In addition, the level of financial allowances must preserve family unity and protect the best interests of the child. The question of best interests of the child and direct provision allowance is one potential avenue, at least in the political sphere, for challenging the rates of direct provision allowance in Ireland.

In Budget 2019, the now Minister for Employment Affairs and Social Protection, Regina Doherty, provided the biggest raise in direct provision allowance. The adult payment (from March 2019) will now become €38.80, with the child allowance becoming €29.80. What caused such a significant raise in the payment? And why was this not leaked like so much of the other Budget 2019 measures? To the absolute credit of Regina Doherty, there was no fanfare, there was no grandiose statements or announcements. Just quietly hidden away in the Budget 2019 documents was this significant rise in direct provision allowance, now called a daily expenses allowance. That this increase came so close to the placement of direct provision on a legislative footing, is, in my view, no coincidence. It may have been the case, that in light of EU legal norms and standards, the Government/Minister felt they had to increase the payment. Whatever the reason, the increase is welcome – even if we now need to discuss re-introducing child benefit for children trapped within direct provision. In my own view, the key benchmark for determining rates of daily expenses allowance should be with reference to the standards of Irish society, and rates of payment that may be needed to ensure inclusivity within Irish society.

4. A New Dawn in Ireland?

The fact that the EU Reception Conditions Directive is not wholly rights based must be acknowledged. However, even the limited rights protected, and their incorporation into secondary legislation is welcome. There may be avenues to further enhance the social and economic rights of asylum seekers now that the Reception Directive is transposed into Irish law. In the arena of financial allowances, accommodation provision and the right to work there are some tentative signs of change (although painfully slow). The Irish Government is on notice, we are watching and waiting to see that EU legal rights must be protected. At a minimum, we must demand a generous interpretation and application of these rights. The incorporation of EU law into Irish law, in my view opens up more avenues to further enhance the social and economic rights of all asylum seekers in Ireland.

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15 Case C-79/13, Federaal agentschap voor de opvang van asielzoekers v Selver Saciri ECLI:EU:C:2014:103, para. 37.