

The Rights of Others: Asylum Seekers and Direct Provision in Ireland

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Abstract

The system of direct provision for asylum seekers is 14 years old. Direct provision is where asylum seekers are provided with bed and board, along with a weekly allowance of €19.10 per week per adult or €9.60 per week per child. Asylum seekers are not entitled to any other social welfare payments and cannot seek or enter employment, on pain of criminal sanction. 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, the Executive or the Judiciary on the impact of direct provision on the civil, political, economic, social and cultural rights of asylum seekers. Hanna Arendt, in *The Origins of Totalitarianism* noted that the world sees nothing sacred in "the abstract nakedness of being human". Using Arendt's views as a starting point, this paper explores Ireland's legal obligations towards those seeking protection in Ireland. Examining our international, European and domestic obligations, the paper will seek to explore whether the system of direct provision complies with fundamental human rights law and norms. With a judicial review of the totality of the direct provision system currently before the High Court, this paper provides an analysis of how 'the right to have rights' for asylum seekers is limited.

A. Introduction

The hallmark feature of the Irish reception system for asylum seekers¹ has been the continual withdrawal and diminution of social rights on the grounds of preserving the

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integrity of immigration controls and protection of the welfare state from those who are viewed as not having a definitive right to be within the country. From a country of mass emigration to a country of net immigration, Ireland only began to experience appreciable asylum flows in the last decade. Since 1998, there have been 82,190 asylum applications made in Ireland up to April 2014.² Throughout this period there has been a tendency to exclude asylum seekers from supports that are seen as essential to allowing citizens and legal residents to live with a basic degree of dignity. From an inclusive welfare system that considered need over immigration status, asylum seekers in Ireland have little in the way of definitive legal rights or entitlements to the separated system of welfare support, known as direct provision.³ Asylum seekers, who have authorised presence within the Ireland,⁴ have been greatly affected by the exclusion from the traditional structures of the welfare state. Justifications have been proffered for a separate welfare system for asylum seekers, on the basis that

“[v]oters became concerned that the welfare state should not be a honey pot which attracted the wretched of the earth.”⁵

Within Ireland, asylum seekers exist as a unique category of immigrant, wherein there are no statutory right to social support. Support is provided on the basis of ministerial circulars, wherein parliamentary scrutiny for the whole system of reception for asylum seekers is absent. The mode of delivery of social supports for asylum

¹ The term asylum seeker in this paper refers to those who have made a claim for refugee status or subsidiary protection, but where no final determination of the protection claim has been made. See, Refugee Act 1996 (as amended) and 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.

² Please see <http://www.orac.ie/> for a breakdown of the Irish statistics on asylum applications (last accessed, 05 November 2014). These particular statistics are from, ORAC, *Monthly Statistical Report*, April 2014 and various annual reports of ORAC.

³ See further, Thornton, L. "Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in Ireland" [2007] 24(2) *Refuge: Canadian Periodical on Refugee Studies* 86 and Thornton, L. "Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion" (2013) *Journal of Social Security Law*, 66-88.

⁴ Section 8(1)(a) of the *Refugee Act 1996* (as amended).

⁵ *Westminster City Council v National Asylum Support Service* [2002] UKHL 38, para. 20, per Lord Hoffman.

seekers do not sit well with the Irish government's supposed commitments to social inclusion, solidarity, multiculturalism and anti-racism.⁶

That those seeking asylum have differentiated social rights entitlements to citizens is not surprising. Hannah Arendt in *The Origins of Totalitarianism* stated:⁷

"The world found nothing sacred in the abstract nakedness of being human."

Reflecting on this in June 2014, President Michael D. Higgins noted:⁸

"[T]he national appropriation of 'human rights' – their entanglement with citizenship – has given rise to new categories of persons without rights, such as refugees, displaced and stateless persons. How are we to conceive of the rights of these people, whose number is in the millions in the world today?"

This paper seeks to trace the development of the system of direct provision for asylum seekers and asks whether the rights of this 'other' are protected in Irish law, policy and practice. In Part B, I outline the legal and political nature of the system of direct provision. In Part C, I consider the socio-economic rights of asylum seekers in international and European Law. In the final section, part D, I contextualise the nature of rights for 'others' in Ireland, drawing upon recent developments as regards government instigation of discussions on reform of the direct provision system.

⁶ See Department of Social, Community and Family Affairs, *National Anti-Poverty Strategy* (Dublin, Stationary Office, 1997), Department of Justice, Equality and Law Reform, *Integration: A Two Way Process* (Dublin, Stationary Office, 2000), Department of Social, Community and Family Affairs, *Building an Inclusive Society* (Dublin, Stationary Office, 2001), Department of Justice, Equality and Law Reform, *National Action Plan on Racism 2005-2008* (Dublin, Stationary Office, 2005), Department of An Taoiseach, *Towards 2016 : Ten-year Framework Social Partnership Agreement 2006-2015*, (Dublin, Stationary Office, 2006), Office of Social Inclusion, *National Action Plan for Social Inclusion 2007-2016* (Dublin, Stationary Office, 2007)

⁷ Arendt, H. *The Origins of Totalitarianism*, (London: London : Allen & Unwin, 1967), p. 299.

⁸ Higgins, M.D. "International Human Rights and Democratic Public Ethics", *Royal Irish Academy: Summer Discourse*, University of Limerick, 06 June 2014.

B. The System of Direct Provision

1. What is Direct Provision?

With asylum seekers prevented from entering employment, and therefore having all means of self-sufficiency denied,⁹ initially asylum seekers were entitled to rely on the social assistance system on the same basis as Irish citizens.¹⁰ Direct provision was introduced so as to prevent asylum seekers from accessing social assistance payments. Utilising the ability to provide supplementary welfare allowance *in kind*,¹¹ 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 10 April 2000¹² and Circular 05/00 of 15 May 2000 (now repealed).¹³ Under direct provision and dispersal, bed and board accommodation is provided by the Reception and Integration Agency (RIA)¹⁴ in hostels, guesthouses and holiday camps around Ireland. Asylum seekers are dispersed throughout the country, and cannot choose where to live.¹⁵ 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 2000.¹⁶ Two exceptional needs payments of €100 are given per year to asylum seekers, however there are cases where this payment is not made,

⁹ Section 9(4)(b), Refugee Act 1996.

¹⁰ For a more detailed analysis of the removal of asylum seekers from the mainstream social assistance system, see Thornton, L. "Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in Ireland" [2007] 24(2) *Refuge: Canadian Periodical on Refugee Studies* 86 at pp.88-90.

¹¹ This was originally introduced under Section 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 Chapter 9 of the Social Welfare (Consolidation) Act 2005, in particular Sections 187-189 and Section 200.

¹² DSCFA, *SWA Circular 04/00 on Direct Provision* to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (10 April 2000).

¹³ DSCFA, *SWA Circular 05/00 on Direct Provision* to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (15 May 2000).

¹⁴ 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.

¹⁵ DSFA, Circular 04/00 (10 April 2000), para. 1. See also, DSFA, Circular 05/00 (15 May 2000), para.

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¹⁶ *Supra*. fn. 12, no paragraph/section numbers can be directly referred to.

where asylum seekers are suspected of having other means of support.¹⁷ Those under 18 are provided with free schooling as a legal right.¹⁸ Medical care is provided to all asylum seekers under the medical card scheme. The payment of direct provision allowance is administered by community welfare officers.¹⁹

In 2009, 6, 494 people were resident in direct provision accommodation centres.²⁰ At the end of June 2014, the last date to which the RIA have provided monthly statistics, there are 4,296 people in direct provision.²¹ 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.²²

*2. Establishing Direct Provision: Ignoring Rights, Ignoring Legality*²³

Claims of abuse of the welfare system by asylum seekers²⁴ and establishing systems of surveillance to monitor the actions and activities of asylum seekers

¹⁷ With thanks to Saoirse Brady (Children's Rights Alliance) author of the FLAC report for pointing this out to me, see, *One Size Doesn't Fit All* (Dublin: Printwell Cooperative, 2009), p. 47.

¹⁸ Section 31 of the Education (Welfare) Act 2000 sets the minimum school leaving age at 16 years.

¹⁹ 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. 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.

²⁰ Reception and Integration Agency, *Annual Report 2009*, p. 5.

²¹ Reception and Integration Agency, *Monthly Statistics: June 2014*, p. 7.

²² Reception and Integration Agency, *Monthly Statistics: June 2014*, pp. 12-18.

²³ For a detailed account of the many documents discussed below, see, Thornton, L. "Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion" (2013) *Journal of Social Security Law* 66-88.

²⁴ Ministerial letter, D. Ahern, DSCFA to J. O'Donoghue, DJELR, 24 June 1998, on the need for more co-ordinated government response to the increasing numbers of asylum seekers in the area of welfare and housing and D. O' Sullivan, DJELR, sending on note from Department of the Environment and Local Government to all members of the Interdepartmental Committee on Immigration, Asylum and Related Issues, 03 July 1998 on accommodation options for asylum seekers outside of the greater Dublin area. Press and Information Office, DJELR, "Minister for Justice, Equality and Law Reform announces that asylum seekers will be dispersed throughout the country", 19 October 1999; Letter from Planning Unit (DSCFA) to B. O'Neill, Asylum Policy Division (DJELR), 04 November 1999 on the implications of direct provision for the DSCFA.

seems to be the core purpose of direct provision.²⁵ Spurred on by media reports,²⁶ changes to the reception of asylum seekers in the United Kingdom²⁷ and recommendations from other European Union states,²⁸ various state agencies were informed of the establishment of the direct provision accommodation system, direct provision allowance rates, and the policy of dispersal on 10 December 1999 (International Human Rights Day).²⁹

Concerns were expressed by those charged with administering the direct provision system and trade union officials as to the lack of a legislative basis for direct provision and the 'manipulation' of the supplementary welfare allowance system.³⁰ Legislation was introduced in 2003 to prevent asylum seekers from receiving rent supplement.³¹ This prevented community welfare officers from placing any asylum seeker outside of the direct provision system. With the introduction of the habitual residence condition to Irish social welfare law in 2004, it was assumed that since asylum seekers had newly arrived in the State, they would not be entitled to any

²⁵ Ministerial letter, D. Ahern, DSCFA to J. O'Donoghue, DJELR, 24 June 1998, on the need for more co-ordinated government response to the increasing numbers of asylum seekers in the area of welfare and housing;

²⁶ 'Asylum Seekers and Homeless vie for Shelter, agency' *Irish Times* 9 May 1997; 'Refugees get £20 million payments' *Evening Herald*, 6 June 1997; 'Refugee tried to bite me to death' *Sunday World*, February, 2000 and 'Free cars for refugees; Cash grants buy BMW's' *Irish Daily Mirror*, December 16 2002. For an analysis of the role of the media in response to the , McGee, H. "Media Response to Asylum" in Fraser, U. and Harvey, C. (eds) *Sanctuary in Ireland: Perspectives on Asylum Law and Policy* (Dublin: IPA, 2003), pp. 187-202.

²⁷ The UK report that reference is made to is, Secretary of State for the Home Department, *Firmer, Fairer, Faster: A Modern Approach to Asylum and Immigration* (Stationary Office, July 1998).

²⁸ Ministerial letter, J. O'Donoghue, DJELR to D. Ahern, DSCFA , 07 August 1998, on the welfare system and asylum seekers.

²⁹ Letter from B. Ó Raghallaigh (DSCFA) to all Health Boards (managerial level), 10 December 1999, confirming the rate of direct provision allowance for asylum seekers. While the letter used the words 'comfort payments', from 2001 onwards the terminology used was 'direct provision allowance'. To avoid confusion, I will use the latter term, or DPA.

³⁰ Email from M. Walsh (Community Services Programme, Eastern Health Board) to J. Murphy (Senior Administrative Officer, Community Welfare, Eastern Health Board), 02 February 2000, on concerns regarding legality of direct provision and payment of direct provision allowance and Letter from F. Mills, General Manager, Homeless, Asylum Seekers and Travellers section, East Coast Area Health Board to SWA Section (DSCFA), 20 March 2000 on payment of supplementary welfare allowance to asylum seekers and legal problems arising. B. Ó Raghallaigh, Planning Unit, (DSCFA) to N. Waters, Director, DASS (DJELR), 25 July 2000 on asylum seekers supported outside of direct provision. Letter from B. Ó Raghallaigh (DSFA) to D. Costello, Principle (DJELR), 10/07/2002 on community welfare officers and trade union discomfort with direct provision system.

³¹ Section 13 of the Social Welfare (Miscellaneous Provisions) Act 2003 inserted section 174(3) and (4) into the Social Welfare (Consolidation) Act 1993 and prevented payment of rent supplement to those unlawfully in the State and also to those who had made an application for refugee status. This section is now contained in section 198(3) of the Social Welfare (Consolidation) Act 2005. See also, Circular 02/03 of 20 May 2003, replacing SWA Circular 05/00 (see above fn. 13). Circular 02/03 reflected the legislative changes which occurred in the Social Welfare (Miscellaneous Provisions) Act 2003 (as amended).

other form of social welfare benefit, expect direct provision.³² Relying on advice from the Attorney General, the Department of Social Protection argued that the system of direct provision accommodation and payment of direct provision allowance needed to be placed on some statutory footing.³³ Attempts to do this, in 2004³⁴ and in 2007,³⁵ failed due to the objections by the Department of Justice and Equality. Concerns raised by the Department of Social Protection that they had no power to pay direct provision allowance, going so far as to say it was *ultra vires* their powers, were ignored by the Department of Justice and Equality.³⁶ When the automatic exclusion of asylum seekers from proving habitual residence was successfully challenged before the Chief Appeals Officer of the Social Welfare Appeals Office in 2009,³⁷ legislation was introduced to wholly exclude asylum seekers from ever being considered habitually resident.³⁸ Therefore, since 2009, I contend that legislation demands that those in receipt of supplementary welfare allowance (whatever the level of payment/in kind provision) would need to prove habitual residence. Since direct provision allowance is a supplementary welfare payment, the Department of

³² The original habitual residence condition was contained in Section 17 of the Social Welfare (Miscellaneous Provisions) Act 2004 (now Section 246 of the Social Welfare (Consolidation) Act 2005 as amended by Section 30 of the Social Welfare (Miscellaneous Provisions) Act 2007, Section 21 of the Social Welfare and Pensions Act 2008 and Section 15 of the Social Welfare (Miscellaneous Provisions) Act 2009). See also, Department of Social Protection, *Habitual Residence Condition-Guidelines for Deciding Officers on the determination of habitual residence*, 1 July 2010. See also, DSFA, *SWA Circular No. 02/04 on the Habitual Residence Condition* to Chief Executive Officers, Programme Managers, Appeals Officers, Superintendent CWOs, Community Welfare (April 2004-no exact date specified).

³³ Minutes of a meeting between ministerial officials and civil servants from the DJELR, DSFA and DHC discussing habitual residence condition and direct provision, 13 July 2004. Access to the advice of the Attorney General is not permitted under the Freedom of Information Act 1998 (as amended).

³⁴ Draft Direct Provision Allowance Circular 01/2004 (28 August 2004), obtained by the author under Freedom of Information legislation.

³⁵ Draft section 24 of the Social Welfare Bill 2007, sought to insert Section 202A(1) into the Social Welfare Consolidation Act 2005. This information is gleaned from a document I received entitled 'Supplementary welfare allowance-direct provision supplement'. No information as regards the date of drafting etc. was included, nor was this document attached to any dated letter. However, from other correspondence, in particular: Letter from D.Watts, Principal Officer (DSFA) to N. Dowling (DJELR), 02 May 2007, on transfer of responsibility for payment of DPA to the DJELR, it appears to have been drafted in 2006.

³⁶ Letter from J. Hynes, Secretary General (DSFA) to S. Aylward, Secretary General (DJELR), 05 May 2006 on *ultra vires* actions of DSFA in paying direct provision allowance and requesting DJELR to take responsibility for this payment and Letter from S. Magner (on behalf of S. Aylward, Secretary General) (DJELR) to J. Hynes, Secretary General (DSFA), 30 May 2006 on DJELR's response to DSFA on DPA.

³⁷ 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 (FLAC) and Michael Farrell (FLAC) for making an anonymised version of this decision available to me.

³⁸ Section 15 of the Social Welfare and Pensions (No.2) Act 2009.

Social Protection have knowingly continued to make this unlawful payment. In 2008,³⁹ 2009,⁴⁰ 2010,⁴¹ and 2011,⁴² the Department of Social Protection as part of its public expenditure budget classified direct provision allowance as a "Supplementary Welfare Payment". There is no mention of direct provision allowance in any of the government budgetary documents for 2012, 2013 or 2014.⁴³

3. *Judicial Challenges to Direct Provision in Northern/Ireland*

The courts in Ireland have had limited interaction with issues relating to the direct provision system.⁴⁴ Mr. Justice Adrian Hardiman in the Supreme Court in January 2003 noted that the State makes available legal advice and representation to asylum applicants, as well as either social welfare payments or direct provision.⁴⁵ In 2008, a challenge to the direct provision system was settled out of court.⁴⁶ On 09 April 2014, the system of direct provision was challenged on a number of grounds in *C.A and T.A. (a minor) v Minister for Justice and Equality*.⁴⁷ The grounds for challenge included: (i) a lack of statutory basis for the direct provision system, (ii) a violation of the separation of powers doctrine due to its administrative nature, established by the Government without any primary legislation from the Oireachtas and (iii) violation of human rights under *inter alia* the Constitution and the ECHR Act 2003, due to the level of surveillance and social control of intimate aspects of personal autonomy and

³⁹ Government of Ireland, *Revised Estimates 2008* (Dublin: Official Publications, 2008), p. 181.

⁴⁰ Government of Ireland, *Revised Estimates 2009* (Dublin: Official Publications, 2009), p. 183.

⁴¹ Government of Ireland, *Revised Estimates 2010* (Dublin: Official Publications, 2010), p. 185.

⁴² Government of Ireland, *Revised Estimates 2011* (Dublin: Official Publications, 2011), p. 176.

⁴³ See, Government of Ireland, *Revised Estimates 2012* (Dublin: Official Publications, 2012), Government of Ireland, *Revised Estimates 2013* (Dublin: Official Publications, 2013) and Government of Ireland, *Revised Estimates 2014* (Dublin: Official Publications, 2014).

⁴⁴ The only detailed examination was in the case of *Munteanu v Minister for Justice, Equality and Law Reform*, Unreported judgment of the High Court, 30 July 2002, 2002/381JR (Transcript). This case revolved around the obligations of the DJELR in deportation cases, and obligations of asylum seekers to inform the DJELR 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.

⁴⁵ *Lobe & Osayende v Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 at p. 128.

⁴⁶ See, Thornton, L. "Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion" (2013) *Journal of Social Security Law* 66 at pp. 82-84.

⁴⁷ *C.A and T.A. (a minor) v Minister for Justice and Equality, Minister for Social Protection, the Attorney General and Ireland* (Record No. 2013/751/JR). For an examination of this case, see Liam Thornton, Direct Provision System Challenged Before the Irish High Court: Day 1, Human Rights in Ireland, 29 April 2014, Liam Thornton, Direct Provision System Challenged Before the Irish High Court: Day 2, Human Rights in Ireland, 30 April 2014, and Liam Thornton, Direct Provision System Challenged in the High Court: Days 3-11, Human Rights in Ireland, 16 May 2014. All these short commentaries are available on www.humanrights.ie (last accessed, 05 November 2014).

family life, including rights of the child.⁴⁸ A decision on this challenge is expected shortly.

In Northern Ireland, the system of direct provision was considered in the Northern Ireland High Court in *Judicial Review by ALJ and Others*.⁴⁹ The applicants' claims for refugee status in Ireland on the basis of persecution of non-Sudanese Darfuris in Sudan had been rejected. The applicants subsequently sought subsidiary protection in Ireland in April 2011. However, in July 2011, the applicants entered Northern Ireland and applied for asylum. The UK Border Agency sought to return the applicants to the Republic of Ireland under the Dublin II Regulation.⁵⁰ This decision was challenged *inter alia* on the basis that a return to the Republic of Ireland and to the system of direct provision, would subject the applicants to inhuman and degrading treatment and violate their rights to private and family life as protected by the European Charter of Fundamental Rights (EUCFR). Although not "systematically deficient", Stephens J. stated that Ireland's low rate of recognition of protection seekers was "disturbing".⁵¹ Stephens J relying extensively on the Irish Refugee Council's report *State Sanctioned Child Poverty and Exclusion* accepted the significant hardships asylum seekers in Ireland face. These hardships included: inability for the adult applicants to seek or enter employment; the low rate of direct provision allowance; the communal nature of accommodation and the hostile environment towards family life.⁵² Ultimately, Stephens J was not prepared to find that this constituted a violation of the EUCFR.⁵³

⁴⁸ Other grounds for challenge relate to the right to work for the adult applicant (who is having her subsidiary protection claim processed).

⁴⁹ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88 (Stephens J, 14 August 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.

⁵⁰ Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention [2003] O.J. L.62/1.

⁵¹ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88, para. 65.

⁵² *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88, paras. 71-90.

⁵³ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88, para. 84.

However, the UK Border Agency, were statutorily obliged to "promote the welfare of children who are in the United Kingdom".⁵⁴ In paragraphs 102-103 of his decision, Stephens J noted that if the child applicants' were returned to the Republic of Ireland:⁵⁵

- a) Their mother and Child A (who is now 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.
- e) As a matter of UK policy, the children would not be returned to Sudan, but this is not automatically the case in Ireland.

As the decision in *ALJ* was firmly grounded in interpretation of domestic legal obligations as regards the rights of the migrant child, reading this decision as being transformative would be unwise. Only if the decision in *ALJ* had been firmly based on an interpretation of the EUCFR, would this decision have had a more profound impact.⁵⁶

⁵⁴ Section 55, Borders, Immigration and Citizenship Act 2009 and the UK Supreme Court's interpretation of this duty in *ZH(Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166.

⁵⁵ At paragraph 73, Mr Justice Stephen's 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 paragraph 102 (and again in para 73 & 75), Mr Justice Stephen's 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.

⁵⁶ In this regard, see how the German Constitutional Court has approached issues relating to the constitutionally protected concept of human dignity and the level of payment for asylum seekers in Germany, see: Cotter, C. "The German Federal Constitutional Court and Welfare Benefits for Asylum Seekers: Consequences for the Direct Provision and Dispersal Scheme in Ireland? - Part 1" (2013) 31

Core responses to challenging direct provision, judicially, politically and through public campaigns, have sought to emphasise that if Ireland fully respected domestic, European and international human rights law, the system of direct provision would not be maintained. However, as I explore below, the issue is somewhat complex, and it is not fully clear the extent to which the socio-economic rights of asylum seekers in Ireland could be better protected by strict adherence to international and/or European law.

C. The Socio-Economic Rights of Asylum Seekers: International & European Law

1. International Human Rights Law

The International Bill of Human Rights (which includes the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) recognises the vast array of civil, political, socio-economic, and cultural rights that individuals possess. These rights inhere in all individuals "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁵⁷ While political rights are expressly limited to citizens,⁵⁸ socio-economic rights, including the right to social security, the right to work and to fair conditions of work, the right to an adequate standard of living, including food, water, clothing and shelter and medical care and the right to elementary education, inhere in "everyone".⁵⁹ While there is still controversy regarding the legal-juridical nature of socio-economic rights,⁶⁰ the international

Irish Law Times 6 and The German Federal Constitutional Court and Welfare Benefits for Asylum Seekers: Consequences for the Direct Provision and Dispersal Scheme in Ireland? - Part 1" (2013) 31 *Irish Law Times* 23.

⁵⁷ Art. 2 UDHR, art. 2(1) ICCPR and art. 2(2) ICESCR.

⁵⁸ Art. 21 UDHR, Art. 25 ICCPR.

⁵⁹ Arts. 23-27 UDHR and Arts. 7, 8, 9, 11, 12, 13 & 15 ICESCR. The exception which exists for developing countries restricting economic rights to citizens need not be discussed in the context of this paper.

⁶⁰ See generally, Sunstein, C. "Against Positive Rights" (1993) 2(1) *Eastern European Constitutional Review* 35, Beetham, D. "What Future for Economic, Social and Cultural Rights" (1995) 43 *Political Studies* 41, Neier, A. "Social and Economic Rights: A Critique" (2006) 13(2) *Human Rights Brief* 1.

system of rights protection proclaims the indivisibility of all rights.⁶¹ In the other main thematic human rights treaties on the Elimination of Racial Discrimination, Rights of Women, Children, Migrant Workers and those with Disabilities⁶² civil and political rights, along with economic, social and cultural rights were dealt with side by side.

Socio-economic rights are those rights recognised under international law as forming part of the corpus of human rights. These include (but are not limited to) the following:⁶³

- The right to social security (art. 22 UDHR, art. 9 ICESCR),
- The right to work and to fair conditions of work (art. 23 UDHR, arts. 6 & 7 ICESCR), The right to rest and leisure (art. 24 UDHR),
- The right to an adequate standard of living, including food, water, clothing and shelter and medical care (art. 25 UDHR, arts. 11 & 12 ICESCR),
- The right to elementary education (art. 26 UDHR, art. 13 ICESCR),
- The family has a right to adequate social protection since it is the "natural and fundamental group unit of society" (art. 10 ICESCR).

The primary actors and the primary rights bearers and duty holders within the international system of law continues to be states. State parties to international human rights instruments expressly agree to protect the rights provided for in those treaties.⁶⁴ However, the interpretation and application of human rights treaties treaty provisions can vary. The Committee on the Rights of the Child has seemingly

⁶¹ World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/Conf.157/23 (12 July 1993), para. 5 and Nickel, J.W. "Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights" (2008) 30(4) *Human Rights Quarterly* 984.

⁶² International Covenant on the Elimination of All Forms of Racial Discrimination, (CERD) U.N. Doc. A/6014 (1966), International Convention on the Elimination of Discrimination Against Women (CEDAW) U.N. Doc. A/34/46 (1979), International Convention on the Rights of the Child (CRC) UN Doc. A/44/49 (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (IPRMW), U.N. Doc. A/45/49 (1990). The Convention on the Rights of Persons with Disabilities' (CRPD) UN Doc. A/61/611 (2006) entered into force on 3 May 2008, having reached the required ratification by 20 States.

⁶³ These rights are also protected under various other thematic treaties on Race, Women, Children and Disability, as well as being protected (to a great degree) by the European Social Charter and under the European Charter of Fundamental Rights (EUCFR).

⁶⁴ See generally, Article 18, Article 19 and Article 31(2) of the Vienna Convention on the Law of Treaties, *U.N.T.S.*, Vol. 1155, 331, Article 27. The *Vienna Convention of the Law of Treaties* (VCLT) is seen as, in the main, being declaratory of existing customary international law. The ICJ sees such a statement as uncontroversial and has declared it customary in *Territorial Dispute (Libya v Chad)* (1994) ICJ Reports, para. 41 and *Oil Platforms (Iran v United States)* (1996) ICJ Reports, para. 23.

rejected any attempt to differentiate between the socio-economic rights of children in asylum-like situations.⁶⁵ Distinctions in treatment in the fields of health, social welfare and education, between citizen children and non-national children have been frowned upon.⁶⁶ 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.⁶⁷ Asylum seeking children, be they in the care of their parents, or unaccompanied, should also have full access to a range of services⁶⁸ and asylum seeking families should not be discriminated against in provision of basic welfare entitlements that could affect the children in that family.⁶⁹ The Committee on Economic, Social and Cultural Rights have stated that differences of treatment in the enjoyment of socio-economic rights may be justified where these differences are *reasonable, objective and proportionate*.⁷⁰ It is not fully clear whether nationality or asylum status in and of itself would be reasonable, objective and/or proportionate means of restricting access to socio-economic rights. In the Committee's *General Comment on Social Security*,⁷¹ it seems to be implicitly recognised that there can be differences in the enjoyment of social security between different groups within society.⁷² The Committee has stated that social security systems should not infringe on the right to an adequate standard of living for immigrants, including asylum seekers,⁷³ and has raised concerns about the living conditions of asylum seekers in reception centres,⁷⁴ and their exposure to racial discrimination.⁷⁵ The most recent

⁶⁵ See further, Thornton, L. "Direct Provision and the Rights of the Child in Ireland" (2014) 17(3) *Irish Journal of Family Law* (forthcoming) and Smyth, C. "Children, Direct Provision and the European Convention on Human Rights" in Egan, S., Thornton, L. & Walsh, J. *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury, 2014), pp. 159-182.

⁶⁶ Concluding Observations, CERD, Italy, CRC/C/124 (2003) 36 at para. 161.

⁶⁷ Concluding Observations, CRC, Ireland, UN Doc. CRC/C/IRL/CO/2 (September 2006), para. 56.

⁶⁸ *Ibid.* para. 64. 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).

⁷⁰ General Comment No. 20, ICESCR, *Non-Discrimination in Economic, Social and Cultural Rights* (Art. 2(2)), UN Doc. E/C.12/GC/20 (2 July 2009), para. 13.

⁷¹ General Comment No. 20, ICESCR, *The Right to Social Security* (Art. 9), UN Doc. E/C.12/GC/9 (4 February 2008).

⁷² *Ibid.*, see in particular, para. 9, para. 24, para. 37 and para. 64.

⁷³ Concluding Observations, ICESCR, Australia, UN Doc. E/2001/22 (2000) 66 at para. 397 and Concluding Observations, ICESCR, Switzerland, UN Doc. E/C.12/CHE/CO/2-3 (26 November 2010) at para. 18.

⁷⁴ Concluding Observations, ICESCR, The Netherlands, UN Doc. E/1999/22 (1998) 37 at para. 184.

⁷⁵ Concluding Observations, ICESCR, Spain, UN Doc. E/1997/2 (1996) 27 at para. 104.

examination of the UK's record on the economic, social and cultural rights of asylum seekers and those seeking protection is examined in one paragraph.⁷⁶ While the Committee "encourages" the UK to allow asylum seekers to access the labour market, there is an implicit acceptance that there can be differentiation in mode of delivery of social services for asylum seekers. While welcoming the introduction of additional voucher support to particularly vulnerable asylum-seekers,⁷⁷ there was no discussion of the fact that asylum seekers socio-economic rights are markedly less than those of UK citizens and other legal residents. However, when discussing Australia's report, the Committee expresses concern that asylum seekers and those seeking protection do not enjoy universal coverage for social security payments (including non-contributory payments).⁷⁸ In 2011, commenting on Germany's and the Russian Federation's reports on socio-economic rights, the Committee expressed "deep concern" for the situation of those seeking asylum or protection and their lack of access to adequate healthcare and social security.⁷⁹ The Committee stated that asylum seekers must enjoy "equal treatment in access to" the labour market, healthcare and non-contributory social security benefits.⁸⁰ This confusion surrounding applicability of seemingly universal socio-economic rights for asylum seekers is mirrored by other UN human rights treaty bodies.⁸¹ The inability of human rights instruments to fully pierce the veil of State sovereignty within the field of socio-economic rights continues to have a profound effect for those seeking asylum.

2. European Human Rights Law

⁷⁶ Concluding Observations, ICESCR, United Kingdom, UN Doc. E/C.12/GBR/CO/5 at para. 27 (2009).

⁷⁷ *Ibid.* The Committee goes on to express concerns relating to "the low level of support and difficult access to health care for rejected asylum-seekers." The social rights of rejected asylum seekers are outside the scope of this thesis.

⁷⁸ Concluding Observations, ICESCR, Australia, UN Doc. E/C.12/AUS/CO/4 at para. 20 (12 June 2009).

⁷⁹ Concluding Observations, ICESCR, Germany, UN Doc. E/C.12/DEU/CO/5 at para. 13 (20 May 2011) and Concluding Observations, ICESCR, Russian Federation, UN Doc. E/C.12/RUS/CO/5 at para. 21 (20 May 2011).

⁸⁰ *Ibid.*

⁸¹ See generally, Thornton, L. "Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe" FRAME FP7, Working Paper No. 6, pp. 9-13, available at <http://www.fp7-frame.eu/working-papers/> (last accessed, 04 November 2014).

In the last decade, the Council of Europe⁸² and the European Union⁸³ have played a key role in developing a pan-European normative framework as regards the protection of socio-economic rights of asylum seekers in Europe. Legislative action by the European Union,⁸⁴ coupled with judicial interpretation of cases relating to the socio-economic rights of asylum seekers by the Court of Justice of the European Union⁸⁵ and the European Court of Human Rights,⁸⁶ has seen asylum seekers recognised as rights bearers in accessing accommodation, education and a basic standard of living. This came about due to the presence of EU law on issues relating to 'reception conditions' of asylum seekers. The Reception Conditions Directive (RCD)⁸⁷ and the successor Recast Reception Directive (RRD)⁸⁸ are unique, in that a very basic standard of living has been set down from those considered outside the European polity. It has been estimated that the total cost across 25 member states (excluding Ireland and Denmark) for providing reception conditions to asylum seekers (and in some cases those seeking subsidiary protection as well as third country non asylum applicants) is €1.5 billion.⁸⁹ Ireland is not bound by the Reception Conditions Directive or the Re-Cast Reception Directive. As permitted by the Lisbon Treaty, Ireland has an opt-in clause to measures relating to inter alia EU

⁸² K. Sithole, "The Council of Europe, Rights and Political Authority" (2013) 21(1) *European Review* 118, 121-123.

⁸³ D. Chalmers and others, *European Union Law: Text and Materials* (2nd edition, Cambridge: CUP, 2010), pp 9-50.

⁸⁴ See, for the European Union, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] O.J. L.31/18 and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] O.J. L.180/96.

⁸⁵ See in particular, Joined cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department, M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2012] 2 *Common Market Law Reports* 9 and Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others*, judgement of the CJEU, 24 February 2014.

⁸⁶ The seminal decision on the socio-economic rights for asylum seekers is Application no. 30696/09, *M.S.S v Belgium and Greece*, judgement of the ECtHR, 21 January 2012.

⁸⁷ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] O.J. L.31/18 (this will be referred to as the Reception Conditions Directive or RCD).

⁸⁸ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] *Official Journal of the European Union* L. 180/96 (hereinafter Recast Reception Directive or RRD).

⁸⁹ EU Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and Council laying down minimum standards for reception of asylum seekers (Recast), SEC(2008) 2944 (3 December 2008) at p. 45.

immigration and asylum law. 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.⁹⁰

In the EU's recent Recast Reception Directive (RRD),⁹¹ two recitals of note emerged that should cause us to reflect on the interaction and interplay between international and European systems of human rights protection and EU law.

Recital 9 of the RRD states:

"In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively."

Recital 10 of the RRD states:

"With respect to the treatment of people falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party."

Throughout, the concept of human rights, along with the concept of dignity⁹² or dignified treatment,⁹³ is referred to in the Directive. However, it must also be noted

⁹⁰ Mr. Alan Shatter TD, Minister for Justice and Equality, Written Answers 593 and 594: EU Directives, 30 April 2014.

⁹¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] *Official Journal of the European Union* L 180/96, hereinafter 'Recast Reception Directive' or RRD.

⁹² The concept of dignity is mentioned as regards detention of international protection applicants (see Recital (18) RRD), something which is beyond the scope of this paper and in Recital (35). In Recital (35), it is stated that the RRD seeks to respect the concept of human dignity in light of cited provisions of the Charter of Fundamental Rights of the European Union (EUCFR) ([2010] O.J. C. 83/389); including: human dignity (art. 1); prohibition of torture, inhuman and degrading treatment (art. 4); right to liberty and security (art. 6); respect for family life (art. 7); right to asylum (art. 18); non-discrimination (art. 21); rights of the child (art. 24) and right to an effective remedy and fair trial (art. 47). There is no mention or reference to Chapter Four, Arts 27-38 EUCFR. The rights protected under this chapter of the EUCFR include *inter alia*, the right of workers to information and consultation from employers,

that at no stage is any reference made to the concept of 'socio-economic rights' for those seeking protection in Europe.

Some of the obligations under the Reception Directives include:

- Recognition of a dignified standard of living;⁹⁴
- Highly circumscribed freedom of movement rights;⁹⁵
- The right to be provided with some form of shelter,⁹⁶
- Material reception conditions,⁹⁷
- A circumscribed right to education for children under 18;⁹⁸
- Protection of particularly vulnerable asylum seekers.⁹⁹
- A limited right to work.¹⁰⁰

The socio-economic rights highlighted above, should not be seen as a wholly rights based approach towards the socio-economic rights of asylum seekers¹⁰¹ or without practical problems of implementation.¹⁰² In the drafting of the Recast Reception

right to collective action, fair and just working conditions, protection from exploitation, the Union "recognises and respects the entitlement" to social security and social assistance if needed, right to access health care and also to environmental and consumer protection.

⁹³ See Recital (11) and Recital (25) where a 'dignified standard of living' is mentioned. The only appearance of this phrase in the core text of the RRD is in Article 20(5) RRD, where it is stated that decisions for withdrawal or reduction of material reception conditions, Member States 'shall under all circumstances...ensure a dignified standard of living.'

⁹⁴ Preamble recital 7 RCD and Preamble recital 9 and 10 RRD.

⁹⁵ Article 7 RCD/Article 7 RRD.

⁹⁶ Article 14 RCD/ Article 18 RRD.

⁹⁷ Article 13 RCD/Article 17 & 18 RRD.

⁹⁸ Article 10 RCD/Article 14 RRD. In relation to the possibility of separate education for children of asylees (or possibly asylum seekers themselves), Chalmers comments that educational provision "is only on terms of 1950s Mississippi", Chalmers, D. (editorial) "Constitutional treaties and human dignity" (2003) 28(2) *European Law Review* 147.

⁹⁹ See Article 16-19 RCD and Article 21-25 RRD.

¹⁰⁰ Under the RCD, a right to work was granted (Article 11(2) RCD) if an asylum applicant's first instance decision was not rendered within one year. This is to be reduced to 9 months under Article 15 RRD. Priority can still be given to EU citizens, EEA nationals and 'legally resident' third country nationals.

¹⁰¹ See generally, Nuala Mole, "The complex and evolving relationship between the European Union and the European Convention on Human Rights" (2012) 4 EHRLR 1 and European Commission, *Report from the Commission to the European Council and the European Parliament on the application of Directive 2003/9/EC Laying Down Minimum Standards for the Reception of Asylum Seekers* (2007, Brussels)

¹⁰² See, Peers, S. "The EU Reception Conditions Directive: A Weak Compromise" (Brussels: Statewatch, 2011); ECRE, *Comments and Analysis on the Recast Reception Directive* (September 2011). See also, e, Guild, E. "Seeking Asylum: Storm clouds between international commitments and EU legislative measures" (2004) 29(2) *European Law Review* 198.

Directive (as with the Reception Conditions Directive (2003))¹⁰³ previously), there was institutional push back to adopting a more rights orientated system of reception for asylum seekers.¹⁰⁴ As is evidenced from the progression of the proposals from 2008 to 2011, concerns about abuse of the asylum and protection system led to significant downgrading of core elements of socio-economic rights protection within the RRD. In this regard, the European Parliament and Council of the European Union,¹⁰⁵ were central in arguing for a less rights orientated and more punitive approach to material reception conditions for asylum seekers.

The precise impact of the obligations upon States due to the EU's Reception Conditions Directive has been considered in a number of cases before the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).¹⁰⁶ In *M.S.S. v Belgium and Greece*,¹⁰⁷ M.S.S lived in extreme poverty while awaiting the outcome of his asylum claim, which had been lodged in June 2009 and still had not been decided upon on the date of the ECtHR judgment.¹⁰⁸ No information on accommodation or subsistence was provided to M.S.S.¹⁰⁹ The applicant was living in a park with other Afghan asylum seekers, did not have any

¹⁰³ Compare the approach of the various institutions to the Commission's initial draft of the RCD (2003), see: Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States [2001] O.J. C.213/E/286 and contrast the consultations between European Parliament, Committee on Foreign Affairs Common Security and Defence Policy, Employment and Social Affairs Committee and Foreign Affairs Committee, "Report on the proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States" A5-0112/2002, [2001] O.J. C.213/E/286 and Opinion of the Committee of the Regions on the 'Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States' [2002] O.J. C.107/85 and Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States' [2002] O.J. C.48/63.

¹⁰⁴ See, European Parliament legislative resolution of 07 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), [2010] O.J. C-212E/348 (05 August 2010); European Economic and Social Council, *Opinion of the European Economic and Social Committee on the RRD*, SOC/332 (16 July 2009) and Committee of the Regions, *Opinion of the Committee of the Regions on the RRD*, CONST-IV-021 (5-7 October 2009).

¹⁰⁵ See above.

¹⁰⁶ While limited, the European Convention on Human Rights can be viewed, in certain instances, as protecting socio-economic rights, see further: O' Cinneide, C. "A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights" (2008) 5 *European Human Rights Law Review* 583 and Thornton, L. "The European Convention on Human Rights: A Socio-Economic Rights Charter" in Egan, S., Thornton, L. & Walsh, J. *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury, 2014), pp. 227-256.

¹⁰⁷ Application no. 30696/09, *M.S.S v Belgium and Greece*, judgement of the ECtHR, 21 January 2011.

¹⁰⁸ *Ibid.*, para. 235.

¹⁰⁹ *Ibid.*, para. 236.

sanitation or opportunities to maintain his appearance or hygiene, and relied on churches and other individuals and organisations for food.¹¹⁰ The conditions of his stay in Greece, the applicant argued, violated inter alia his rights under Article 3 ECHR, as this amounted to inhuman and degrading treatment. Greece argued that the applicant had a 'pink card' which enabled him to work and also to obtain medical assistance free of charge. Greece stated that had the applicant remained in the country, rather than going to Belgium (from which he was later returned), he would have had ample resources to rent accommodation and cater for his needs.¹¹¹ Greece further argued that to find that the applicant's Article 3 ECHR rights were violated by a failure to provide for material reception conditions, would place an undue burden on the state in the midst of its worst ever financial crisis.¹¹²

The ECtHR began by emphasising that Article 3 ECHR does not provide the right to a home¹¹³ or the right to a certain standard of living.¹¹⁴ The ECtHR stated that the obligation to provide accommodation and decent material conditions to impoverished asylum seekers is due to "positive law", namely the EU's Reception Condition's Directive.¹¹⁵ The ECtHR also noted their decision in *Budina v Russia*,¹¹⁶ where it was stated that in a situation of severe deprivation, a contracting state may have obligations under Article 3 ECHR. The ECtHR emphasised that asylum seekers were a particularly vulnerable group¹¹⁷ and while the 'pink card' gave the applicant the opportunity to work, this was not realisable due to his poor command of Greek, the administrative hurdles in being registered as an employee, and the general unfavourable economic climate in Greece.¹¹⁸ It is important to note that the ECtHR only found such a violation due to Greece's legal obligations under the RCD. Judge Roazakis, in a concurring opinion, stated that the RCD 'weighed heavily' on the court.¹¹⁹

¹¹⁰ *Ibid.*, para. 238.

¹¹¹ *Ibid.*, paras. 240-243.

¹¹² *Ibid.*, para. 243.

¹¹³ Repeating the sentiments expressed in *Chapman v UK* (2001) 33 EHRR 399 at para. 99.

¹¹⁴ See, *Muslim v Turkey* (2006) 42 EHRR 16.

¹¹⁵ *Supra* fn. 86 at para. 250.

¹¹⁶ Application No. 45603/05, *Budina v Russia*, Unreported judgment of the ECtHR, 18 June 2009.

¹¹⁷ *Supra* fn. 86 at para. 251, see also Application No. 15766/03, *Orsus v Croatia*, Unreported judgement of the ECtHR, 16 March 2010 at para. 147.

¹¹⁸ *Ibid.*, para. 261.

¹¹⁹ Individual concurring opinion of Judge Roazakis, *supra* fn. 86. There are no paragraph numbers to which direct reference can be made. In November 2014, the European Court of Human Rights held

In *N.S. and M.E.* the Court of Justice of the European Union,¹²⁰ in essence adopted the approach of the ECtHR in its *M.S.S.* decision. Here the Court noted that the asylum applicants could not be returned to Greece from Britain and Ireland respectively. The CJEU held:¹²¹

"....to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible'....where they cannot be unaware that systemic deficiencies...in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment...."

In *Saciri*,¹²² the CJEU held that the level of material reception conditions available to asylum seekers, where an EU Member State decides to provide financial allowances in the form of vouchers or monetary payment, must:¹²³

"ensure that the total amount of the financial allowances covering the material reception conditions is sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing, having regard, if necessary, to the preservation of the interests of persons having specific needs..."

that Switzerland would be in breach of Article 3 ECHR, if individual assurances were not provided for (and followed) by Italy, as regards reception conditions for a number of asylum seekers. See also, App. no. 29217/12, *Tarakhel v Switzerland*, decision of the Grand Chamber of the ECtHR, 04 November 2014.

¹²⁰ Joined cases C-411/10 *NS v Secretary of State for the Home Department et. al.* and C-493/10 *ME v ORAC et al.*, judgment of the CJEU, 21 December 2011.

¹²¹ *Ibid.*, para. 94.

¹²² Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others*, judgement of the CJEU, 24 February 2014.

¹²³ Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others*, judgement of the CJEU, 24 February 2014, para 46.

In both international and European systems for the protection of rights of asylum seekers, enforcing absolute destitution on asylum seekers is prohibited. However, this does not equate with provision of a similar level of services. While Ireland is bound by its international human rights treaty obligations, it is not bound by the EU's Reception Condition's Directive or Recast Reception Directive. The severity of the conditions outlined in the cases from the ECtHR and CJEU as regards the treatment of asylum seekers in Greece, has not been reached within direct provision in Ireland. However, the decision of the Northern Ireland High Court (discussed above) that the system of direct provision is incompatible with the protection of the welfare of the child in a family seeking asylum, shows the potential of human rights based approaches to judicial decision having some impact. Overall, international and European human rights law is a creature of state agreement and state acceptance of decisions or comments made on domestic human rights regimes'. Decisions of the ECtHR and the CJEU are not as easily set aside or simply ignored by States as comments from various UN human rights treaty bodies can be.

D. The Rights of Others: Asylum, Direct Provision & Ireland

1. The Limits of Rights Discourse?

In 1992, at the very start of the creation of the EU asylum legal system, Weiler stated that:

"[t]he treatment of aliens...has become a defining challenge to an important aspect of the moral identity of the emerging European polity and the process of European integration."¹²⁴

Some ten years later in 2000, Colin Harvey noted that¹²⁵

¹²⁴ Weiler, J.H.H. "Thou shalt not oppress a stranger: On the judicial protection of human rights of non-EC nationals-A critique" (1992) 3 *European Journal of International Law* 65 at p.65.

¹²⁵ Harvey, C. *Seeking Asylum in the UK: Problems and Prospects* (London: Butterworths, 2000) at p. 331.

"[t]he picture emerging from the EU is grim. The asylum seeker is routinely constructed as a threat to the area of freedom, security and justice."

Honig points to the increasing hysterical reaction of the citizenry in Western Europe to provision of socio-economic rights to aliens. She points out the contradiction that, at a time when (most) European welfare states contracted, foreigners were depicted as wanting to "...come 'here' to take 'our' welfare..."¹²⁶ While human rights seek to protect the weak, marginalised and vulnerable,¹²⁷ there is often a presupposition amongst human rights scholars that asylum seekers and those seeking protection automatically have the same socio-economic rights as citizens and others.¹²⁸ Cosmopolitan conceptions of rights protection can either argue for recognition of rights, or seek to re-orientate current understandings of human rights, while seeking inclusive legal protections for all, regardless of citizenship or residency status within a nation.¹²⁹ Cosmopolitanism has received greater attention in recent years due to the growing cultural, economic and legal ties which exist between states within a globalised world.¹³⁰ The restrictions on the right to work, freedom of movement, privacy and segregation of asylum and protection seekers from the host community all offend against notions of cosmopolitanism.¹³¹ National systems relating to reception conditions for asylum and protection seekers, utilize concepts of national belonging to justify limiting enjoyment of economic and social rights.¹³² While Benhabib argues that human rights law refuses to permit any exceptions to norms of

¹²⁶ Hoing, B. "Another Cosmopolitanism? Law and Politics in the New Europe" in Benhabib S. *et al. Another Cosmopolitanism* (Oxford: OUP, 2006) at p. 113.

¹²⁷ Gearty, C. *Can Human Rights Survive* (London: CUP, 2006) at p. 5.

¹²⁸ See, Marks, S. *The Riddle of All Constitutions: International Law, Democracy and Critique of Ideology* (Oxford: OUP, 2000) and Beetham, D. "Human Rights as a Model for Cosmopolitan Democracy" in Archibugi, D., Held, D. & Kohler, M. (eds) *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity Press, 1998).

¹²⁹ Cosmopolitanism has a number of diverse other meanings, from love of fellow man to following certain moral ideals of humanity, decency, honesty and fair dealings, see Waldron, J. "Cosmopolitan Norms" in Benhabib, S. *et al. Another Cosmopolitanism* (Oxford: OUP, 2006) at pp 83-85.

¹³⁰ See generally, Hutchings, K. & Dannreuther, R. *Cosmopolitan Citizenship* (New York: MacMillan Press, 1999); Anderson-Gold, S. *Cosmopolitanism and Human Rights* (Cardiff: University of Wales Press, 2001) and Pogge, T.W. *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002).

¹³¹ Benhabib, S. *The Rights of Others: Aliens, Residents and Citizens* (London; Cambridge University Press, 2004) at p. 164.

¹³² Benhabib, S. "Hospitality, Sovereignty and Democratic Iterations" in Benhabib, S. *et al. Another Cosmopolitanism* (Oxford: OUP, 2006) at p. 171.

human rights,¹³³ this fails to recognise the cautious approach adopted by many of the human rights treaty bodies towards full equality in the enjoyment of rights for those seeking asylum or protection. The UDHR, Benhabib argues, is "the most comprehensive international law document in the world."¹³⁴ However, in reality, it does not deal substantively with issues such as differentiation in rights protection for those whose legal status in a state is unclear. Benhabib's analysis of international human rights law is still useful, in that it holds a mirror to the supposed standards of international human rights law, and contrasts this to state practice and the approach of international human rights bodies. It is clear that an individual's citizenship, and legal and settled residence status within a state, continues to have a profound effect on the enjoyment of socio-economic rights and the legal protection of such rights.

While there is much merit in the cosmopolitan view of international human rights law, it does not reflect the reality, recognised by treaty bodies and the UNHCR, that differing standards of reception conditions for asylum and protection seekers may not necessarily violate international human rights standards. The Committee on the Rights of the Child has been the only treaty body to rule out any distinctions in the enjoyment of rights for asylum and protection seekers. The approach of the Committee on Economic, Social and Cultural Rights appears to be shifting as regards equal and non-discriminatory enjoyment of rights for those seeking asylum and protection. The various other human rights treaty bodies and UNHCR, while accepting the indivisibility of rights and also seeking to ensure asylum and protection seekers are recognised as rights bearers, nevertheless have accepted that there may be differences in treatment and in the socio-economic rights enjoyed by asylum seekers. This is evidenced by the acceptance of measures that separate asylum and protection seekers from host communities, and where asylum and protection seekers do not enjoy the same standard of living compared to others who are dependent on social assistance within states. It is not always clear when differences in levels of socio-economic rights protection for asylum seekers are legitimate, reasonable and proportionate. It might be accepted that asylum seekers may be subject to a separate welfare or social security regime upon arrival in a state. However, over

¹³³ Benhabib, S. *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), p. 2.

¹³⁴ Benhabib, S. "The Philosophical Foundations of Cosmopolitan Norms" in Benhabib, S. et al. *Another Cosmopolitanism* (Oxford: OUP, 2006) at p. 30.

time, such separation becomes more difficult to justify, in particular, when there are significant differences in the mode of delivery and monetary level of social supports, despite similarities in terms of levels of need. At present, the requirements of international human rights law are not clear.

The 'culture of suspicion'¹³⁵ that surrounds asylum seekers has existed for many years, and its development can be seen in the debates surrounding the 1951 Refugee Convention.¹³⁶ However, this culture of suspicion has substantially eased within international human rights law, which is evidenced by increased engagement by the treaty bodies on issues which affect asylum seekers and those seeking other forms of protection. However, as outlined above, problems still remain. The protections afforded to asylum seekers provide a test case for the cosmopolitan commitments of international human rights law.¹³⁷ There remains a lack of clarity as to the precise scope and content of socio-economic rights and entitlements for asylum seekers under international human rights law. This, it is argued, has had knock on effects, in European human rights law and in the minimum standards in reception conditions specified for asylum seekers within the European Union. Within the domestic sphere, with particular relevance to Ireland, the lack of clarity has resulted in separated systems of support at lower monetary levels for asylum seekers and exclusion from mainstream social welfare systems. The extent, to which the limited protections afforded by international human rights law to asylum and protection seekers, has contributed to this position, should not be under-emphasised.

2. The Limits & Potential of Human Rights in Challenging Direct Provision in Ireland

¹³⁵ Hayes, D. "From Aliens to Asylum Seekers" in Cohen, S. et. al. *From Immigration Controls to Welfare Controls* (London: Routledge, 2002), p. 40.

¹³⁶ See generally, Weis, P. *The Refugee Convention, 1951: The Travaux Préparatoires Analysed, with a commentary* (Cambridge, CUP, 1995).

¹³⁷ See, Marks, S. *The Riddle of All Constitutions: International Law, Democracy and Critique of Ideology* (Oxford: OUP, 2000) and Beetham, D. "Human Rights as a Model for Cosmopolitan Democracy" in Archibugi, D., Held, D. & Kohler, M. (eds) *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity Press, 1998).

Since its inception in 2000, asylum seekers have challenged the system of direct provision through protest highlighting the inherent inhumanity of this system.¹³⁸ Irish human rights organisations¹³⁹ have continuously pointed out the significant legal and social problems with placing asylum seekers in direct provision.¹⁴⁰ The Special Rapporteur for Children,¹⁴¹ the former Ombudsman, Emily O'Reilly,¹⁴² and former Supreme Court judge, Catherine McGuinness¹⁴³ have all highlighted significant concerns with the system of direct provision.¹⁴⁴ Despite these concerns, and the concerns raised in the Oireachtas,¹⁴⁵ the Department of Justice and Equality had, until July 2014, remained steadfast in support of direct provision.¹⁴⁶ In July 2014, the UN Human Rights Committee¹⁴⁷ stated that Ireland must "ensure that the duration of stay in Direct Provision centres is as short as possible."¹⁴⁸

¹³⁸ While recent protests by asylum seekers have gained some media attention (see e.g. Brady, T. & McConnell, E "Justice officials to meet asylum protesters", *Irish Independent*, 13 September 2014), asylum seekers have protested about the direct provision system since its inception. See as indicative examples: Lucey, Anne "Asylum-seekers refuse to eat accommodation centre's food", *Irish Times*, 26 February 2003; Lucey, Anne, "Tralee protest: asylum seekers refuse food", *Irish Times*, 05 October 2007; Mac Cormaic, R. "Asylum seekers end protest", *Irish Times*, 20 August 2008; Holland, K., "Asylum seekers say hostel 'unbearable'", *Irish Times*, 12 February 2009; Siggins, L. "Protest as agency tells Galway asylum seekers to quit hostel", *Irish Times*, 18 May 2011

¹³⁹ Free Legal Advice Centres (FLAC), *Direct Discrimination? An Analysis of the Scheme of Direct Provision in Ireland* (July 2003) and FLAC, *One Size Doesn't Fit All - A Legal Analysis of Direct Provision, 10 years On* (November 2009). Irish Refugee Council (IRC), *State Sanctioned Child Poverty and Exclusion* (September 2012); NASC, the Irish Immigrant Support Centre, *Hidden Cork: The Perspectives of Asylum Seekers on Direct Provision and the Asylum Legal System* (2008).

¹⁴⁰ For a near complete list of reports on direct provision and links to these reports from Irish human rights and community organisations since 2000, see Thornton, L. *Closing Our Eyes: Irish Society and Direct Provision*, Human Rights in Ireland, 08 October 2013 and Thornton, L. *The Myth of the Cherished Child in Ireland*, Human Rights in Ireland, 10 June 2014. Both available on www.humanrights.ie (last accessed, 05 November 2014).

¹⁴¹ Shannon, G. *Fifth Report of the Special Rapporteur for Children*, (Dublin: 2011), pp. 31-33 and p. 42.

¹⁴² O'Reilly, E. "Asylum Seekers in our Republic: Why Have we Gone Wrong?" 102 *Studies*, Summer 2013. See also, Thornton, L. "The Ombudsman and Direct Provision", *Human Rights in Ireland*, 10 July 2013.

¹⁴³ McGuinness, C., Foreword, *State Sanctioned Child Poverty and Exclusion* (September 2012).

¹⁴⁴ See also, 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* and Coulter, C. *Interim Report: Child Care Law Reporting Project* (November 2013), p. 20, p. 24 and p. 27.

¹⁴⁵ Seanad Éireann, *Direct Provision System: Motion*, 23 October 2013 and Minister Frances Fitzgerald T.D. *Dáil Debates* (Unrevised), June 24, 2014, in response to questions from Mr Joe Higgins T.D. (Socialist Party).

¹⁴⁶ Holland, K. "Reform of Direct Provision a Priority, says new Minister", *Irish Times*, July 23, 2014. The first hint of reform of direct provision was indicated in An Taoiseach and An Tánaiste, *Statement of Government Priorities 2014-2016*, p.9 (July 11, 2014). For analysis of these developments, see Thornton, L. "Direct Provision: The Beginning of the End?", *Human Rights in Ireland*, August 6, 2014 (available on www.humanrights.ie).

¹⁴⁷ 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*

In October 2014, the Minister for State at the Department of Justice and Equality, Mr Aodhán Ó Ríordáin TD appointed a working group to "examine improvements to the Protection process and the Direct Provision system".¹⁴⁹ The terms of reference for this Working Group¹⁵⁰ are narrow. Firstly, the working group is tasked with recommending improvements in the processing of protection applications. That this has been included is interesting of itself, given that Minister Ó Ríordáin has indicated that a new Protection Bill will be introduced in January 2015, before the working group's final report.¹⁵¹ As regards direct provision, the working group is tasked with making recommendations for

"showing greater respect for the dignity of persons in the system and improving their quality of life by enhancing the support and services currently available...[ensuring] the overall cost of the protection system to the taxpayer is reduced or remains within or close to current levels and that the existing border controls and immigration procedures are not compromised."

While there has been acceptance, in some government circles, that direct provision is "inhumane",¹⁵² it has also been made very clear that whatever the outcome of the Working Group's deliberations, direct provision is not going to be abolished.¹⁵³ Therefore, there may be little transformative impact on the socio-economic rights of

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, L. Thornton, *The System of Direct Provision & Ireland's Obligations under the UN International Covenant on Civil & Political Rights (ICCPR)*, (Dublin: Seanad Éireann Public Consultation Committee, 2014) and Seanad Éireann Public Consultation Committee, *Observations and Recommendations to the UN Human Rights Committee* (June 2014).

¹⁴⁸ The UN Human Rights Committee also stated that an independent complaints mechanism must be introduced, see further, Concluding Observations, ICCPR, Ireland, UN Doc. ICCPR CCPR/C/IRL/CO/4 (July 24, 2014), para.19.

¹⁴⁹ Department of Justice and Equality, "Ministers Fitzgerald and O Ríordáin announce composition of Working Group to examine improvements to the Protection process and the Direct Provision system", Press Release, 13 October 2014.

¹⁵⁰ The working group comprises of representatives of civil society organisations, academics and various appointees from Government departments. There is one member who previously resided in direct provision, with no current members of the working group resident in direct provision accommodation centres.

¹⁵¹ Speech by Minister of State Aodhán Ó Ríordáin T.D, Private Members Business, Counter Motion on Direct Provision, 1st October 2014, available at www.merriestreet.ie (last accessed, 03 November 2014).

¹⁵² *Ibid.*

¹⁵³ Hayes, K. "Asylum seeker in direct provision 'broken' by experience", *Irish Times*, Wednesday, 29 October 2014.

asylum seekers in Ireland. The lack of clarity from most international human rights treaty bodies on what precisely constitutes proportionate, objective and reasonable limitations on the social and economic rights of asylum seekers has contributed to domestic systems, like Ireland, offering significantly lesser protection of socio-economic rights for asylum seekers. The solution to this lies neither in law nor in strategic litigation. While these are important in achieving broader aims and seeking to use law to promote human rights; only a fundamental re-evaluation of society's approach to asylum seekers in Ireland will result in the recognition of, what Arendt terms, "the right to have rights." To date law and administration has been used to justify exclusion, separation and distancing of asylum seekers from Irish society and placing people in the direct provision system. Until there is more fundamental societal introspection, it appears that Irish society is doomed to repeat the mistakes of the past.¹⁵⁴

¹⁵⁴ See generally, Titley, G. "Asylum seekers in Ireland languish in the Magdalene laundries of our time", *The Guardian*, October 3, 2012; Thornton, L "More Asylum Seekers in 'Direct Provision' than Prisoners in Jail", *Irish Times*, April 3, 2014; and Mullally, U. "The State still treats people as subhuman", *Irish Times*, June 9, 2014.