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A View from Outside the EU Reception *Acquis*: Reception Rights for Asylum Seekers in Ireland

Liam Thornton¹

1. INTRODUCTION: SITUATING IRELAND WITHIN EU RECEPTION LAW

Only indirectly impacted by common European Union (EU) reception standards, Ireland presents an interesting case study on the reception rights for asylum seekers. The legal obligations upon Ireland as regards reception conditions² for applicants for international protection,³ who are not subject to detention,⁴ are dominated by domestic legal obligations. Ireland does not have any obligations under either the Reception Conditions Directive 2003 ('the RCD 2003') or the Recast Reception Conditions Directive 2013 ('the RRCD 2013').⁵ If Ireland had opted into the RCD 2003 and/or the RRCD 2013, then a number of clear legal rights would inhere within applicants for international protection, including:

- Recognition of a dignified standard of living;⁶
- Highly circumscribed freedom of movement rights;⁷

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² I find the language of 'reception conditions' for asylum seekers to be problematic. While I have a preference for utilising the phrase 'socio-economic rights', given that this language of 'reception' has become so dominant, and given that this chapter is assessing the degree to which the agreed European Union standards are reflected within Ireland, I reluctantly will use the language of 'reception'. For a further analysis, see Liam Thornton, *Law, Dignity & Socio-Economic Rights: The Case of Asylum Seekers in Europe*, FRAME Working Paper No. 6, January 2014, available at <http://www.fp7-frame.eu/working-papers/> and Liam Thornton, 'The Rights of Others: Asylum Seekers and Direct Provision in Ireland', *Irish Community Development Law Journal* 2014, p.22-44.

³ In this chapter, the phrase asylum seeker is utilised in the sense of a person who has formally made a claim for refugee status and/or subsidiary protection status, but whose claims(s) have yet to be determined. In this regard, while Ireland may offer social supports for those claiming a discretionary leave to remain (under Section 3 of the Immigration Act 1999), such claims are strictly outside the scope of this chapter.

⁴ In general, Ireland does not routinely detain asylum applicants, hence the decision not to focus on detention issues within this chapter.

⁵ Articles 1 and 2 and Article 4a(1) of Protocol No 21 of the Treaty on the Functioning of the European Union (TFEU) [2012] O.J. C326/49; Preamble Recital 20 RCD and Preamble Recital 33 RRCD.

⁶ Preamble recital 7 RCD and Preamble recital 9 and 10 RRCD.

⁷ Article 7 RCD/Article 7 RRCD.

- The right to be provided with some form of shelter;⁸
- Material reception conditions;⁹
- A circumscribed right to education for children under 18;¹⁰
- Protection of particularly vulnerable asylum seekers;¹¹
- A limited right to work.¹²

Given the seeming lack of EU legal obligations upon Ireland under the RCD 2003 or RRCD 2013, it is important to situate reception conditions for asylum seekers within their political, legal and societal contexts. Recent studies have argued that EU Member States have not downgraded reception conditions (or procedural rights) of those seeking asylum in light of communalised European standards.¹³ Therefore, to what extent have common standards impacted, or otherwise, on Ireland, who is not wholly part of the *acquis communautaire* of EU reception law? In this regards, statistics on numbers seeking asylum within Ireland in comparison with EU statistics, may be instructive as regards the supposed 'scale of problem' identified within political discourses that are discussed later in this chapter.

Table 1. First Time Protection Applications in Ireland¹⁴

Year	Total Applications* for International Protection in the EU	Ireland (as a percentage of total Applications in the EU)
2015	1,321,600	3,271 (0.25%)
2014	626,960	1,440 (0.23%)
2013	431,090	946 (0.22%)
2012	335,290	956 (0.28%)
2011	309,040	1,290 (0.41%)

* The 2013 -2015 figures include Croatia, the figures from 2011-2012 exclude Croatia.

⁸ Article 14 RCD/ Article 18 RRCD.

⁹ Article 13 RCD/Article 17 & 18 RRCD.

¹⁰ Article 10 RCD/Article 14 RRCD. 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', D. Chalmers (editorial) 'Constitutional treaties and human dignity', (2003) 28(2) *European Law Review*, p. 147.

¹¹ See Article 16-19 RCD and Article 21-25 RRCD.

¹² 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 RRCD. Priority can still be given to EU citizens, EEA nationals and 'legally resident' third country nationals.

¹³ Natascha Zaun, 'Why EU asylum standards exceed the lowest common denominator: the role of regulatory expertise in EU decision-making', (2016) 23(1) *Journal of European Public Policy*, p. 136-154 and Ariadna Ripoll Servent & Florian Trauner, 'Do supranational EU institutions make a difference? EU asylum law before and after "communitarization"', (2014) 21(8) *Journal of European Public Policy*, p. 1142-1162.

¹⁴ See generally, Eurostat, Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded) (Last update: 18-03-2016) and Office of the Refugee Applications Commissioner (Ireland), *Annual Reports 2011-2015*, Dublin: ORAC 2015.

As can be seen from these figures, the rate of international protection claims is exceptionally small within Ireland when compared to the EU figures. Ireland, as a state on the periphery of Europe 'benefits' geographically from limited protection claims. Despite the small nature of the jurisdiction, it is important to reflect upon and consider the impact of EU law upon Irish domestic law. The chapter has two core aims. First, to consider the degree to which Ireland respects, protects and fulfils (or otherwise) selected reception conditions, including accommodation/shelter, the right to financial allowances, the right to work and withdrawal or reduction of reception conditions for asylum seekers.¹⁵ This will be analysed with respect to the political engagement upon questions on reception for asylum seekers within Ireland that assists in understanding why Ireland does not want to be formally bound by the RCD 2003 and RRCD 2013. Second, the role of the domestic courts in Ireland as regards challenges to Ireland's reception regime for asylum seekers and attempted reliance on European Union law, will be described and considered.

2. RESPECTING, PROTECTING AND FULFILLING RECEPTION RIGHTS FOR ASYLUM SEEKERS IN IRELAND

2.1 Contextualising Reception Conditions for Asylum Seekers in Ireland

In Ireland from the year 2000 onwards, legal and political reactions towards reception conditions for asylum seekers have been punitive in nature. Prior to 2000, asylum seekers reception rights were met within the confines of the Irish welfare state.¹⁶ Overtime, the dominant public and political perception of abuse of the asylum system, contributed to the emergence of state sanctioned difference in welfare entitlements between asylum seekers when compared with Irish citizens and those with a settled residency status.¹⁷ The Irish reception system for asylum

¹⁵ In this regard, I will utilise the language of international human rights law and the tripartite duties to respect, protect and fulfil all human rights, whether civil and political, or economic, social and cultural, see further: Liam Thornton, 'Socio-Economic Rights and Ireland', in: Suzanne Egan (ed.), *International Human Rights: Perspectives from Ireland*, Bloomsbury 2015, p.171-198, in particular p. 178-180.

¹⁶ For a full exploration of the previous inclusiveness of asylum seekers within core Irish welfare law provisions, see Liam Thornton, 'Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in the Republic of Ireland', (2007) 24(2) *Refuge, Canada's Journal on Refugees*, p. 86-100, at p. 88-89 and Claire Breen, 'The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing', (2008) 20(4) *International Journal of Refugee Law*, p. 611-636.

¹⁷ This is discussed in much more detail in Liam Thornton, 'Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion', (2013) *Journal of Social Security Law*, p. 66-88, in particular p. 71-80.

seekers is almost entirely based on administrative policies as opposed to law.¹⁸ The system of reception for asylum seekers is known generally as 'direct provision'. Direct provision mandates that asylum seekers can be provided with shelter, a small social assistance payment, meeting of medical needs through the public health system, education for those up until the terminal secondary education examination. Therefore, as regards education and medical care, Ireland exceeds the standards set down in the RCD 2003 and RRCD 2013. Instead of the direct provision system being established specifically within legislation by the *Oireachtas* (Irish Houses of Parliament),¹⁹ the system emerged in a more haphazard fashion. Established in 2000, direct provision emerged from administrative circulars from within the Department of Social Protection.²⁰ Over time, legislative changes prohibited asylum seekers from gaining access to a social assistance payment known as 'rent supplement', which some asylum seekers had access to and which permitted them to leave direct provision accommodation and enter the private rental market, with the vast proportion of their rent paid for by the State.²¹ Access to all forms of social assistance payment, other than direct provision allowance, was

¹⁸ Liam Thornton, 'The Rights of Others: Asylum Seekers and Direct Provision in Ireland', (2014) 3(2) *Irish Community Development Law Journal*, p. 22-42, in particular p. 23-26. The one exception being the right to education for school-going children, whereby there is an obligation for children to attend school until at least 16 years of age and a right for children to be educated until (generally) the age of 18 or 19, see Section 31 of the Education (Welfare) Act 2000.

¹⁹ The *Oireachtas* consists of a Lower House of Parliament, called Dáil Éireann and an Upper House of Parliament, Seanad Éireann. The Dáil is elected by popular vote. The Seanad is a vocational appointment system, with a limited public vote for its members. In general, the core power of the Seanad under the Irish Constitution is simply to delay legislation. See further, Tanya Ní Mhurthile, Catherine O'Sullivan & Liam Thornton, *Fundamentals of the Irish Legal System: Law, Policy and Politics*, Roundhall 2016, Chapter 4 and Chapter 7.

²⁰ Department of Social and Family Affairs (DSFA), Circular 04/00 (10 April 2000) and DSFA, Circular 05/00 (15 May 2000). Circular 05/00 was replaced by Circular 02/03 (30 May 2003).

²¹ 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 allowance to those unlawfully in the State and also to those who had made an application for refugee status. This section has since been replaced by section 198(3) of the Social Welfare (Consolidation) Act 2005.

prohibited initially from 2004,²² and definitively from 2009.²³ So the Irish system for reception of asylum seekers is based on *Oireachtas* exclusion from the social assistance system, but without any positive legal provisions specifically establishing direct provision on a legislative footing. The reasons for this will be discussed in more detail in Section 2.3 of this chapter. There is no obligation upon asylum seekers to enter the system of direct provision, and a 'snapshot study' indicated that about 54% of protection applicants, including those seeking humanitarian leave to remain (on 01 February 2015) had not entered the system of direct provision and may have been meeting their own reception needs.²⁴

That individuals may be excluded from a countries welfare system while they are asylum seekers is not all that unusual within the European Union. When direct provision was introduced in Ireland, emphasis was placed by politicians and administrators that it would be a short-term time limited system, that asylum seekers would generally only endure for a 6-month period.²⁵ What is unusual to a degree is the length of time that individuals remain within the direct provision system, due to significant delays in finalising status determination decisions. The sig-

²² See now, section 246 of the Social Welfare (Consolidation) Act 2005 (which reflects Section 17 of the Social Welfare (Miscellaneous Provisions) Act 2004). This introduced for the first time a 'habitual residence' condition into Irish law. Mary Coughlan, T.D., Minister for Social and Family Affairs, Vol. 528, *Dáil Debates*, Cols. 57-62, 10 March 2004, who stated that the habitual residence condition was being introduced to '...safeguard our social welfare system from ... people from other countries who have little or no connection with Ireland'. The habitual residence condition was introduced purportedly to prevent citizens of then EU accession states from immediately accessing social assistance payments in Ireland. It was applied as a matter of administrative practice to asylum seekers from 2004 to 2009, see also note below.

²³ A 2009 decision of the Social Welfare Appeals Office (SWAO) Chief Appeals Officer decided that in certain circumstances that those seeking asylum can be regarded as habitually resident and entitled to social assistance. However, the *Oireachtas* acted quickly to explicitly state that asylum seekers can never be regarded as habitually resident in Ireland, and therefore wholly outside the confines of the Irish welfare state. See, Section 15 of the Social Welfare (Miscellaneous Provisions) Act 2009 and for a more detailed explanation of the issues, Liam Thornton, 'Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion', (2013) *Journal of Social Security Law*, p. 66-88, in particular p. 84-88.

²⁴ Working Group report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (hereinafter the *McMahon Report*, so named after the independent chair, Mr. Justice Bryan McMahon (retired)), para. 3.12.

²⁵ Letter from B. Ó Raghallaigh, Planning Unit, (DSCFA) to P. Wylie, Principle, RIA (DJELR), 20 June 2001 on Health Boards/CWOs time limiting direct provision to a maximum of six months (Correspondence obtained by a Freedom of Information request). See also: Speech by Mr Michael McDowell, T.D., at the publication of the First Annual Report of the Office of the Refugee Applications Commissioner, available at <http://www.inis.gov.ie/en/INIS/Pages/SPO7000127>.

nificant administrative deficiencies within Ireland’s refugee and subsidiary protection and humanitarian leave to remain determination processes,²⁶ have meant that individuals and families who have had to opt into the direct provision system, will not have their claims determined for a significant period of time as indicated in Table 2 below.

Table 2. Time Spent by Asylum Seekers in the Direct Provision System (as of September 2015)²⁷

1 Year or less	1891
1-2 Years	623
2-4 Years	692
4-6 Years	496
6 Years +	982
Total Asylum Seekers ²⁸ in Direct Provision	4,684

As of February 2015, the *McMahon Report on the Protection Process and Direct Provision* (hereinafter ‘*the McMahon Report*’) identified 7,937 persons who had entered the country as asylum seekers in previous years and who remained within the broad asylum/protection system. There were 3,876 persons within the protection process, awaiting determination on whether they met the criteria for a grant of refugee status or subsidiary protection. 1,189 of these persons have been in the protection determination system for 5 years or more.²⁹ 3,343 persons were in the humanitarian leave to remain process, so their claims for protection had been rejected, but they were awaiting a decision from the Irish Nationality and Immigration Service (INIS) as to whether they would be granted humanitarian leave to remain. 2,530 persons had been in the leave to remain process for 5 years or more.³⁰

²⁶ At the time of copy-editing this chapter (May 2016), Ireland still operates a dual application system for asylum applicants. Asylum seekers must first apply for refugee status, and have this determination (and any appeal) concluded, before consideration will then be given to the subsidiary protection claim (if any). Where neither refugee nor subsidiary protection status is recognised, individuals can apply for consideration of humanitarian leave to remain under Section 3 of the Immigration Act 1999. This tripartite process is due to change when the International Protection Act 2015 comes into force. The timeline for the commencement of the International Protection Act 2015 is, as yet, unclear.

²⁷ See, Reception and Integration Agency, *Monthly Report: September 2015*, RIA 2015, p. 19. Statistics have not been published since September 2015, which in itself is quite unusual.

²⁸ The Reception and Integration Agency do not provide a break-down of the stage that direct provision accommodation residents are at as regards their protection or leave to remain claims. Therefore, this figure does include those whose claims for protection have been decided negatively, but who may be applying for leave to remain in Ireland, or have an outstanding deportation order against them.

²⁹ *McMahon Report*, para. 3.8.

³⁰ *Ibid.*

718 persons were subject to a deportation order, with 628 persons having an outstanding deportation order for 5 years or more.³¹ A core political narrative that has emerged over many years, is that court challenges to the decisions of the status determination bodies and INIS are delaying finalisation of asylum and leave to remain claims. The Irish Minister for Justice, Frances Fitzgerald, responding to a parliamentary question in 2014, stated:³²

'in very many instances the delay in finalising cases is due to applicants challenging negative decisions by initiating multiple judicial reviews at various stages of the process. Thousands of applications cannot be finalised because of these legal challenges...'³³

However, the *McMahon Report* highlights the significant level of settlement and successes against the status determination bodies in Ireland on the basis of a failure to follow fair procedures or to in some way fully examine an asylum applicants claim.³⁴ There were 662 decisions by the Irish superior courts on judicial reviews against the first instance decision maker in refugee and subsidiary protection claims: the Office of the Refugee Applications Commissioner (ORAC).³⁵ 390 (58.91%) of these challenges were unsuccessful or withdrawn. 103 (11.56%) of the

³¹ *Ibid.*

³² Minister Frances Fitzgerald TD, Written Response to Question on the Direct Provision System, *Dáil Debates* [unrevised], Wednesday 18 June 2014.

³³ This has been a well-established narrative over success Ministers for Justice. See the speech by the former Minister for Justice, Equality and Law Reform, Mr. Michael McDowell T.D., at the publication of the First Annual Report of the Office of the Refugee Applications Commissioner, available at <http://www.inis.gov.ie/en/INIS/Pages/SP07000127> [last accessed, 16 May 2016]; Mr. McDowell's response to a parliamentary question from Deputy Michael D. Higgins, *Dáil Éireann Debates*, Vol. 623, Col. 1131- 1137 (05 July 2006). Mr. McDowell referred to the 'the level of deliberate abuse of our current [asylum] processes'. See also, DJELR, 'McDowell takes firm action to deal with influx of Romanian asylum seekers', Press Release, 18 January 2007. Minister Fitzgerald's predecessor, Alan Shatter T.D, stated (Seanad Éireann Debate, 23 October 2013) 'it is worth noting that a substantial number of those residing for long periods within the direct provision system, are adults living with their children who have challenged in the courts by way of the judicial review process decisions made refusing applications for asylum and/or permission to remain in the state and whose cases await hearing or determination. There are presently approximately 1,000 such cases pending before the courts.'

³⁴ These statistics are taken from, *McMahon Report*, para. 3.96. See also, Table 7 (Appendix 6). 341 of the 9,434 negative decisions of ORAC were subject to judicial review proceedings between 2009 and 2014.

³⁵ In this regard, the *McMahon Report* states that 662 judicial review proceedings were determined against ORAC between 2009-2014, some of these reviews would have been filed prior to 2009, but determined after 2009, see Table 7 (Appendix 6). See also, *McMahon Report*, para. 3.97. The Refugee Appeals Tribunal (RAT) issued 8,392 negative decisions between 2009-2014. 1,293 (15.41%) of these negative decisions were subject to legal proceedings.

challenges were successful and 92 (13.90%) of these challenges were settled.³⁶ This in essence means that just over one-quarter of all judicially reviewed ORAC decisions were set aside, by means of settlement or court decision, between 2009 and 2014. As ORAC is a first instance decision making body, there is a general expectation that applicants will use the appeal mechanisms provided to the Refugee Appeals Tribunal (RAT), rather than seeking judicial review before the Irish superior courts.³⁷ Of the 1,420 judicial reviews to Refugee Appeals Tribunal decisions determined by the Irish superior courts between 2009 and 2014,³⁸ 819 (57.68%) were unsuccessful or withdrawn. 166 of the proceedings (11.69%) were successful. 288 cases (20.28%) were settled.³⁹ Of the RAT decisions challenged by means of judicial review, over 30% of these judicial reviews (including threats of judicial review) resulted in the case going back to RAT for a fresh determination.

With this context in mind, attention now turns to the modalities for the protection of reception rights for asylum seekers in Ireland. In doing so, comparisons are drawn between the standards set down in the RRCD 2013 and analysis is provided in examining whether, in essence, Ireland complies in spirit with the RRCD 2013.

2.2 Rights Compared: Ireland and EU Laws on Reception Conditions

2.2.1 *The right to accommodation/shelter and food*

Asylum seekers have a non-legislative right to shelter in Ireland. Rather than this right to shelter being provided under legislation, it emerges from practice set down within administrative circulars⁴⁰ and from information issued by the Reception and Integration Agency (RIA).⁴¹ If an asylum seeker chooses not to enter into the accommodation centres, then the asylum seeker is responsible for meeting her own shelter needs and will not be entitled to the social assistance payment, known as direct provision allowance. Ireland operates a systems of dispersal to accommodation centres for asylum seekers. In Ireland, asylum seekers are dispersed to direct provision centres, on a no-choice basis.⁴² If an asylum seeker re-

³⁶ 77 (11.63%) of the applications in Table 7 are labelled 'Other applications', it is not clear what this means.

³⁷ For a judicial explanation why this should be the case, and that applicants should have errors of law/jurisdiction/bias etc. first determined by the Refugee Appeals Tribunal, see *P.D. (Zimbabwe & Malawi) v Minister for Justice & ORAC* [2015] IEHC 111.

³⁸ As with the ORAC statistics, these must include judicial reviews lodged prior to 2009, but determined after this date, see Table 8 (Appendix 6).

³⁹ There are 147 'Other Applications', it is not clear what this means within the *McMahon Report*.

⁴⁰ See now, Circular 02/03 (30 May 2003), obtained via a Freedom of Information request.

⁴¹ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015.

⁴² RIA, *Reception, Dispersal and Accommodation*, RIA 2016, available at www.ria.gov.ie.

fuses to be dispersed to one of the 34 accommodation centres, RIA will not provide any accommodation supports.⁴³ There have been no court challenges to this dispersal system in Ireland and little is known as to how the decision to disperse particular asylum seekers is taken. RIA have noted that when making decisions on where to disperse an individual asylum seeker (and any other family members) the *McMahon Report* states that 'vulnerabilities can be identified and taken into account in decisions on dispersal'.⁴⁴ However, *the McMahon Report* also states that asylum applicants '... do not have any input as such into the [dispersal] decision-making process'.⁴⁵ Accommodation is provided within centres, where families (consisting of two parents and child/children) will be provided with one room;⁴⁶ single parents may have to share with another single parent;⁴⁷ single applicants will usually share dormitory style rooms.⁴⁸ Food is also provided at set times, and there is limited cooking facilities available for asylum seekers to cook their own food in most accommodation centres.⁴⁹ This communal accommodation and food provision mirrors to a degree the obligations under the RRCD 2013. Article 18 RRCD provides that where housing is provided in kind, it can include 'accommodation centres'.⁵⁰ The requirements under Article 17 RRCD on material reception conditions, permit (amongst other things) food to be provided to asylum applicants. This must guarantee 'subsistence and protect their physical and mental health'.⁵¹ In a 2013 Report, Barry argued that the inability of the vast majority of accommodation centre residents to prepare their own food impacted, coupled with the length of time in accommodation centres, negatively impacted on the physical and mental health of asylum seekers.⁵² As one participant in Barry's study explained,

'Frankly I feel like I am eating in Guantanamo (reference to a prison) – security people are standing there with walkie radios talking to each other ... it is not a place you would wish to eat. You tense up – you know? That is why I am not

⁴³ RIA, *Geographical Dispersal of Accommodation Centres*, RIA 2013, http://www.ria.gov.ie/en/RIA/Pages/RIA_Accommodation_Centres.

⁴⁴ *McMahon Report*, para. 3.301.

⁴⁵ *McMahon Report*, para 4.22. The *McMahon Report* did not recommend any system for allowing asylum seekers to challenge the dispersal system (see para. 4.134).

⁴⁶ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 17-18.

⁴⁷ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 17-18.

⁴⁸ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 17-18.

⁴⁹ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 9.

⁵⁰ Article 18(1)(b) RRCD.

⁵¹ Article 17(2) RRCD.

⁵² Keelin Barry, *What's Food Got to Do With It: Food Experiences of Asylum Seekers in Direct Provision*, NASC 2014.

emotionally ready to eat. The security standing there makes me nervous. They (security) turn off the light (in the dining room) at seven o'clock even if people are still eating as dinner is 5pm to 7pm. We don't have anywhere else to go – they don't have any patience to let people finish their meals. You hurry to try to finish or don't finish ... I sometimes think if I was a guard at this camp (Direct Provision centre) in my country would I do in the same way? If you put off the lights that gives a message – I interpret that as, "if you are finished or not. Leave, get out, go now". They also have security cameras in there and I don't know why – maybe they have a reason? I would like to know the reason ...⁵³

Ní Shé and others in a study on migrant and asylum seeking families referred to an activity that had been conducted with children who were resident in direct provision accommodation centres. In research undertaken through consultations with children, a group of children were asked to design homes.

'Not one of the thirteen children designed homes with a lounge or kitchen. For them, as their designs indicated, the priority was a separate bedroom.'⁵⁴

The degree of disempowerment from engaging in an activity as important as food preparation for individuals and families should not be dismissed. Other studies,⁵⁵ have noted the importance of family and individual food preparation and levels of disempowerment that such an intimate aspect of human dignity can be interfered with to such a significant degree, over a prolonged period of time. Recommendations from the *McMahon* Report emphasised the importance of privacy and the ability to cook within centres.⁵⁶ The (former) Minister for State with responsibility for reforming direct provision accommodation centres has stated,

⁵³ Keelin Barry, *What's Food Got to Do With It: Food Experiences of Asylum Seekers in Direct Provision*, NASC 2014, p.35.

⁵⁴ Éidin Ní Shé et al., *Getting to Know You: A Local Study of the Needs of Migrants, Refugees and Asylum Seekers in County Clare*, UL/HSE 2007, p. 50. Many years ago, there were toy collections for children residing in direct accommodation centres in Cork. At the Christmas party where the child (not all who would be Christian) were receiving their presents, one child, who was about six years of age, walked over to a play kitchen (that had a hob, a sink etc). The child looked up to a number of us in the group, and asked 'What is this?' with real puzzlement evident on her face. When we tried to explain what the toy was and how you make food in the kitchen, the child continued to be puzzled. The child had never seen her mother or father cook.

⁵⁵ See for example, Zachery Steel et al, 'Psychiatric Status of Asylum Seeker Families held for a protracted period in a remote detention centre in Australia', (2004) 28(6) *Australian and New Zealand Journal of Public Health*, p. 527-536 and Alastair Christie, 'Unsettling the 'social' in social work: responses to asylum seeking children in Ireland', (2003) 8(3) *Child and Family Social Work*, p. 223-231.

⁵⁶ *McMahon Report*, para. 4.75; para. 4.99 and para. 4.102

'I have seen, smelt and tasted the desperation in those centres and know exactly what is happening in them.'⁵⁷

As is explored in Section 2.3 below, the desperation of those within the direct provision system has not proved enough for there to be any meaningful reforms in this area.

2.2.2 *The right to financial allowances (social assistance payment)*

Article 17(5) RRCD 2013 states that *where*⁵⁸ 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 provided to a Member State's own national. However, nothing prevents Member States from providing applicants for international protection with lesser allowances/voucher levels, in comparison to nationals of the Member States. This imperfect duty on Member States stands in contrast with initial Commission proposals that sought to provide a stronger link between minimum acceptable levels of social assistance payment(s) to nationals vis-à-vis applicants for international protection.⁵⁹ In Ireland, asylum applicants have a very limited, non-legislative, right to a social assistance payment known as direct provision allowance. Adult asylum seekers residing in accommodation centres receive € 19.10 per week,⁶⁰ while children residing in accommodation centres (with their families) initially were entitled to a payment of € 9.60 per week, however this was increased to € 15.60 per week in January 2016. This was the first increase to any direct provision allowance payment since 2000. The rates of payment to asylum seekers in Ireland is significantly less than the minimum core social assistance rates for those with a right of residence and who are habitually resident in the State. The minimum social welfare payment rates are set at € 186 per single adult (with additional supplements paid if that individual is in a sexual relationship and cohabiting with her

⁵⁷ (Former) Minister for State with responsibility for New Communities, Aodhán Ó Ríordáin, Direct Provision: Motion, *Séanad Éireann Debates*, 27 January 2016.

⁵⁸ Note that this is an imperfect obligation and will only be relevant where a Member State provides such financial allowances, in cash or by way of vouchers.

⁵⁹ See, 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, p. 18-20; European Parliament, *1st reading of the co-decision procedure, RRCD* (07 May 2009), para. 6 and European Commission, *Communication on the action taken on opinions and resolutions adopted by Parliament RRCD*, SP(2009)3616 (June 2009).

⁶⁰ 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. See also, Department of Social Protection, *Government announces increase to the Direct Provision Allowance for Children*, 05 January 2016.

partner, of € 124.80 for a qualified adult and € 29.80 for each qualified child).⁶¹ In addition to the weekly social assistance allowance, asylum seekers (generally, but not always) get two exceptional needs payments of €100 per year to cover clothing and other costs. Parents of school-age children may also be provided with a clothing and a footwear allowance to cover the cost of school clothes. The rationale for this disparity in the level of financial allowance was explained by the former Principal Officer in the Reception and Integration Agency, Noel Dowling, who noted, persons in direct provision have a 'generous and nutritious selection of food...' and:⁶²

'They [asylum seekers] are housed in a very large en suite room measuring 35ft. x 12ft. They have no bills to concern themselves with ... are not concerned about heating the premises ...do not have to concern themselves with paying for food and domestic goods.'

In June 2015, the *McMahon Report* recommended an increase in direct provision allowance for adults and children. It was recommended that the weekly adult rate increase to € 38.74 and weekly child rate to € 29.80 (qualifying child allowance under general social assistance payments).⁶³ There was an additional recommendation for the Department of Social Protection to reinstate Community Welfare Service officials in direct provision centres⁶⁴ and strive for consistency in administration of exceptional and emergency needs payments.⁶⁵ Given the exceptionally small level of increase for children to their direct provision allowance payment, it seems unlikely that there will be further social assistance payment increases.⁶⁶ Given that there is no consensus amongst EU Member States subject to obligations under the RRCD 2013 as to the benchmark that financial allowances for asylum seekers should be set,⁶⁷ it is perhaps not surprising that allowances in Ireland are so low.

The decision of the Court of Justice of the European Union in *Saciri*⁶⁸ as regards the level of financial allowances for asylum seekers utilises the European

⁶¹ Note the lesser rate paid to single persons aged 18 to 25, see Social Welfare (Consolidation) Act 2005 (as amended and supplemented by Statutory Instruments).

⁶² *C.A. & T.A v Minister for Justice* [2014] IEHC 532, paras. 3.18-3.20.

⁶³ *McMahon Report*, para. 51, 5.27 and 5.30 Bullet Point 1.

⁶⁴ *McMahon Report*, para 5.7, 5.19, 5.29 and 5.30 Bullet Point 2.

⁶⁵ *McMahon Report*, para. 5.30, Bullet Point 3.

⁶⁶ A court challenge to the direct provision allowance in *C.A. & T.A v Minister for Justice* [2014] IEHC 532 (on domestic human rights and constitutional grounds), failed.

⁶⁷ European Migration Network, *Synthesis Report: The Organisation of Reception Facilities for Asylum Seekers in Different Member States*, ENM 2015, p. 17-18. The precise details on each countries financial allowances are set out in individual country reports, available from http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/index_en.htm.

⁶⁸ Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others*, decision of the CJEU, 27 February 2014.

Union Charter of Fundamental Rights ('the Charter') as a base for making its decision. The CJEU note that the RCD 2003, and Article 1 EUCFR require that,⁶⁹

'...human dignity must be respected and protected...'

Once applicants apply for asylum, then the minimum standards established by the RCD 2003 (and RRCD 2013) must be adhered to. The CJEU went on to find that whatever the level of financial aid granted by a Member State,

'[I]t must be sufficient to ensure a dignified standard of living adequate for the health of applicants and capable of ensuring their subsistence.'⁷⁰

The level of financial allowances must preserve family unity and protect the best interests of the child.⁷¹ Whether this decision might reinforce the Irish government's caution on being bound by the RRCD 2013, and the possibility that the low level of financial allowances (coupled with the significant length of time that asylum seekers remain in direct provision), could violate dignity, has to be considered.

2.2.4 *The right to work*

Article 15(1) of the RRCD 2013 provides that asylum applicants shall have access to the labour market within 9 months after a first instance application for international protection has been made. This right only accrues where the delay in first instance determination cannot be attributed to the asylum seeker. Member States may give priority to citizens of the European Union and EEA nationals and legally resident third-country nationals.⁷² In Ireland, asylum applicants are legislatively prohibited from seeking or entering any employment, on pain of criminal conviction.⁷³ The International Protection Act 2015 continues to criminalise asylum seekers who seek and/or enter employment.⁷⁴ This is in spite of recommendations from a government appointed independent group in June 2015. The *McMahon Report*⁷⁵ recommended that once the single procedure for determining

⁶⁹ *Ibid.*, para. 35.

⁷⁰ *Ibid.*, para. 40. See also, para. 46 and para. 48.

⁷¹ *Ibid.*, para. 41.

⁷² Article 15(2)RRCD.

⁷³ Section 9(4)(b) of the Refugee Act 1996. If an asylum seeker breaches this provision, he/she could be fined and/or face up to six months in prison. A concession was made to asylum seekers who were in the country for a period of at least 12 months prior to 27th July 1999. For more information on the limited and unsuccessful nature of this scheme see, Bryan Fanning et al. *Asylum Seekers and the Right to Work in Ireland*, Dublin: Irish Refugee Council 2000.

⁷⁴ Section 16(3)(b) of the International Protection Act 2015.

⁷⁵ For further background on the *McMahon Report* (in line with usual practice in Ireland, reports are referred to by the name of the Chair. For this group, the Chair was Dr Bryan

protection claims is 'operating efficiently' in Ireland,⁷⁶ provision be made for access to the labour market for a protection applicant. This is subject to requirements that the first instance protection decision is not provided within 9 months, and the applicant has been cooperating with status determination bodies.⁷⁷ If this proposal was accepted by the Irish government, this would significantly mirror the obligations of other EU Member States under the RRCD 2013. The right to work, as recommended in the *McMahon Report*, should continue until the end of the protection determination process.⁷⁸ Where an applicant does succeed in entering employment, the State could provide that there may be a proportionate contribution to accommodation and food, if the right to work is provided and exercised.⁷⁹ Given that the single procedure has not yet been enacted in Ireland,⁸⁰ it appears very unlikely that there will be any movement on the right to work for international protection applicants. A recent constitutional and European rights (ECHR and EU law) challenge to the absolute prohibition on protection applicants and the right to work failed. This will be discussed below in Section 3.2 of this chapter.

2.2.5 *Withdrawal or reduction of reception conditions for asylum seekers*

Article 20 of the RRCD 2013 establishes the parameters under which applicants for international protection may have their reception rights reduced or withdrawn. In Ireland, there is no clear legal basis for reducing reception conditions for asylum applicants on grounds similar to those enumerated by RRCD 2013. As regards withdrawal of reception conditions (accommodation and financial allowances), the RIA House Rules set out the broad procedures that will be followed. Abusive or violent behaviour or continuous breach of the House Rules (after individual warnings to desist), may result in an asylum seeker being transferred to another accommodation centre, or expelled coupled with the withdrawal of the financial allowance.⁸¹ In addition, if an asylum seeker has an unexplained absence

McMahon, former judge of the Irish High Court), see Liam Thornton, 'A Preliminary Human Rights Analysis of the Working Group Report and Recommendations on Direct Provision', UCD Centre for Human Rights Working Paper, 30 June 2015, available at: <http://ssrn.com/abstract=2685268> [last accessed: 16 May 2016].

⁷⁶ *McMahon Report*, para. 53, para. 5.49, Bullet Point 1.

⁷⁷ *Ibid.*,

⁷⁸ *McMahon Report*, para. 5.49, Bullet Point 2.

⁷⁹ *McMahon Report*, para. 5.49, Bullet Point 3.

⁸⁰ The International Protection Act 2015 was signed into law in December 2015, however there is no clear timeline for commencement. There were significant criticisms of the amount of time for debate of the International Protection Act 2015 (as well as the substantive content of the Act), see Irish Refugee Council, *New refugee law could store up problems for the future*, 30 November, Dublin: Irish Refugee Council 2015, *Recommendations on the International Protection Bill 2015*, 30 November 2015 and UNHCR Ireland and others, *New Legislation Missed Opportunity to Address Ongoing Issues with Irish Asylum System*, 01 December 2015.

⁸¹ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 35-36.

from an accommodation centre, the space may be reallocated to another asylum seeker and the financial allowance withdrawn.⁸² If an asylum seeker is expelled, after one week the asylum seeker may apply in writing to be re-admitted into the direct provision system.⁸³ In *A.N. v Minister for Justice, Equality and Law Reform*,⁸⁴ A.N. was an Afghan asylum seeker who was expelled from a direct provision accommodation centre due to his behaviour.⁸⁵ Counsel for A.N. argued that he suffered from mental illness and sought an *order mandamus* requiring the Minister for Justice, Equality and Law Reform to provide 'basic subsistence provision' to the applicant as he was living on the streets without access to shelter or money and was legislatively prohibited from working.⁸⁶ Counsel argued that failure by the state to provide a minimum standard of shelter and food constituted a breach of the constitutional right to bodily integrity⁸⁷ and Article 3 and/or Article 8 of the ECHR.⁸⁸ The applicant was also prepared to argue that the manner in which direct provision accommodation and financial allowance was withdrawn were a breach of fair procedures.⁸⁹ However, before the case could go to trial, the Minister agreed to re-admit Mr. A.N. into the direct provision system.⁹⁰ Expulsion from the direct provision system has been described as 'rare', and there were 49 instances of expulsion between 2004 and 2014.⁹¹ If expelled, an asylum seeker has no access to any other form of accommodation or financial allowance. While these statistics may highlight that expulsion decisions are not made often, the lack of clear and public administrative procedures for withdrawing accommodation, food and the financial allowance, to asylum seekers, is concerning.

⁸² *McMahon Report*, para.4.21.

⁸³ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p.36.

⁸⁴ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission of the case by the applicant is on file with the author, no further written submissions were made to the High Court. (The author expresses his appreciation to Michael Lynn BL for making this submission available to him). See also, Mary Carolan, 'Refugee who sleeps in factory seeks subsistence aid', *Irish Times*, Friday, October 24, 2008.

⁸⁵ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission, para. 3.

⁸⁶ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission, paras 2-4.

⁸⁷ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission, paras 3-6.

⁸⁸ Counsel for Mr. A.N. relied in particular on the House of Lords judgment in *R (Limbuela) v. Home Secretary of State for the Home Department* [2006] 1 AC 396.

⁸⁹ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission, paras 7-8. This point was not developed in the outline submission and it is unclear what procedures were used to remove the applicant from the direct provision system.

⁹⁰ Mary Carolan, 'State undertakes to house destitute asylum seeker', *Irish Times*, Saturday, October 25, 2008 and Mary Carolan, 'Afghan man wins case on housing provision', *Irish Times*, Friday, October 31, 2008.

⁹¹ *McMahon Report*, para.4.142. For discussion of another successful re-admission to direct provision challenge (whereby legal action was threatened, but ultimately not commenced), see Colin Lenihan, 'Expulsion from Direct Provision: The Right to Housing and Basic Subsistence for Asylum Seekers', *Human Rights in Ireland*, 18 June 2014, available at www.humanrights.ie.

2.3 Irish Reception Conditions and EU Law: The Impact of Politics

The core differences between Irish and EU reception at the macro level relates to the refusal of the Irish government to place reception rights on a firm statutory footing. At the micro level, the right to accommodation and financial allowances do not per se clearly violate the core normative obligations under the RRCD 2013. Where there is a clear departure from the provisions of the RRCD 2013 in Ireland, relates to the right to work and the more structured removal of reception rights under the RRCD 2013. In addition, unlike the RRCD 2013, there is no process to identify particularly vulnerable asylum applicants. The Irish government has proffered two core reasons for its failure to opt-in to the RCD 2003 and RRCD 2013. One, Ireland's Common Travel Area with the United Kingdom,⁹² where there are limited border checks on individuals travelling between both jurisdictions, might impact upon numbers of asylum seekers 'border hopping' between both jurisdictions.⁹³ Second, Ireland argued that while in general it met the norms and standards of both Reception Directives, it did not want to provide asylum applicants with a right to work. This was so as to limit the perceived 'pull factor'.⁹⁴

With Ireland not having legal obligations under the RRCD 2013, it is important to reflect more broadly upon the governance and administration of reception conditions for asylum seekers, the material conditions available to asylum seekers, as well as the role of the Courts in exploring the applicability of EU law to the aforementioned reception conditions. The differing systems of social assistance for those seeking asylum in Ireland came about as a direct result of perceived and manufactured fears for the integrity of the welfare system. Ireland's system for reception conditions is based on non-legislative administrative fiat, with important exclusionary legislative provisions, designed to limit reception rights for asylum seekers domestically. The disciplinary potential of welfare institutions for asylum seekers is more pronounced in comparison to domestic welfare provision. Institutions linked to the justice/immigration functions of government, the Reception and Integration Agency play a major role in meeting the essential living needs of those seeking asylum. The introduction of separated support laws and administrative arrangements occurred at a time that human rights discourse had become more prominent.

Despite the relatively small numbers affected by changes to the system of social assistance in Ireland asylum seekers are an exceptionally vulnerable minority, whose arrival is viewed with deep suspicion by the institutions of government and by the public. Fears of large numbers of asylum and protection seekers in Ireland

⁹² For a more detailed explanation of the Common Travel Area between Ireland and the United Kingdom, see *Pachero v Minister for Justice and Equality* [2011] IEHC 491, in particular paras 14-21.

⁹³ See, Deputy Andrew Doyle (Fine Gael, government party), *Dáil Debates*, 01 October 2014; (Former) Minister for Justice, Alan Shatter, *Seanad Éireann Debates*, 23 October 2013; Written Answers from Minister for Justice, Equality and Law Reform, Dermot Ahern to Deputy Caoimhghín Ó Caoláin (14 October 2010); Written Answers from (then) Minister for Justice, Equality and Law Reform, Brian Lenihan Jnr to Deputy Joe Costello (31 October 2007).

⁹⁴ *McMahon Report*, para. 3.176, para. 3.180 and para. 5.36.

saw the adoption of penal strategies to limit numbers. The focus on the 'abuse' of the asylum system also resulted in significant changes to the Irish welfare state. Public and political concerns with the growing numbers claiming asylum and/or protection in the late 1990s and early 2000s saw the creation of a separate system of social assistance. Luibhéid argues that the system of direct provision, separated asylum seekers away and apart from host communities, as a

'...distinct, undesirable type of person who must be subjected to relations of governance that were intended to deter, control, and incapacitate him or her'.⁹⁵

Lentin and Moreo argue that the core purpose of direct provision is to create spaces for enhanced 'deportability'.⁹⁶ This conclusion is bolstered by the creation of a governmental discourses that creates the dichotomy emphasizing the 'wickedness' of the asylum seeker (and their supporters) seeking to take abuse and take advantage of the hospitality of a 'helpless' sovereign state.⁹⁷ The political opportunities to fundamentally reform direct provision, or reintegrate asylum seekers back into the confines of the Irish welfare state, appear to have passed. The *McMahon Report*, whose task was to set out reforms for the system of direct provision, is not being implemented by the Irish Government.⁹⁸ The recent Programme for Government, agreed post the most recent Irish general election, states,⁹⁹

'Long durations in direct provision are acknowledged to have a negative impact on family life. We are therefore committed to reforming the Direct Provision system, with particular focus on families and children.'

There is no mention of the reform proposals contained within the McMahon Report as any form of basis for the reform of direct provision. This was in spite of an

⁹⁵ Eithne Luibhéid, *Pregnant on Arrival: Making the 'Illegal' Immigrant*, Minneapolis: University of Minnesota Press 2013, p. 91.

⁹⁶ Ronit Lentin & Elena Moreo, 'Migrant deportability: Israel and Ireland as case studies', (2015) 38(6) *Ethnic and Racial Studies*, p. 984-910 at p. 897-898.

⁹⁷ See, speech by then Minister for Justice, Alan Shatter responding to a Dáil Éireann debate on rights of asylum seekers (09 October 2013) and comments of the then Department of Justice, Secretary General, Sean Aylward to the UN Committee Against Torture in 2011, accusing lawyers for asylum seekers of operating a 'legal racket' in order to 'to string out the process of these [asylum] applications and it undermined the credibility of the State and its processes'.

⁹⁸ However, see the comments of the (former) Minister for State with responsibility for New Communities, Aodhán Ó Ríordáin, Direct Provision: Motion, *Séanad Éireann Debates*, 27 January 2016.

⁹⁹ Office of An Taoiseach (Irish Prime Minister), *A Programme for Partnership Government*, May 2016, p. 103.

earlier leaked draft of the Programme for Government, containing the following commitment,¹⁰⁰

'Long durations in direct provision are acknowledged to have a negative impact on family life. We are therefore committed to reforming the Direct Provision system, with particular focus on families and children and will seek to implement the recommendations of the McMahon Report as swiftly as possible.'¹⁰¹

Given the lack of political movement on the system of direct provision, it is no surprise that asylum seekers, with the assistance of public interest lawyers, have attempted to challenge direct provision before the courts. As is explored in more detail throughout Section 3 of this chapter, the Irish courts have had to explore the relationship between EU reception law and the Irish system for reception of asylum seekers. This, as we will see (in particular in Section 3.2 of the Chapter) has not resulted in the improvement of reception rights for asylum seekers in Ireland.

3. JUDICIAL CONSIDERATION OF EU RECEPTION RIGHTS IN IRISH COURTS

With reception rights obligations in Ireland seemingly limited to domestic law solely, there are two broad areas where Irish courts have had to engage in an analysis of the relationship between EU law and Irish law. The first of these areas relates to removal under Dublin II and the 'systemic deficiencies' within Greece that prevented removal of an asylum seeker from Ireland. The second area relates to asylum applicants attempts to utilise the European Union Charter of Fundamental Rights ('the Charter'), coupled with applicable EU asylum and protection instruments, in arguing for a more enhanced reception rights regime in Ireland.

3.1 Removal from Ireland: Domestic Courts Engagement with EU Law

While neither the RCD 2003 nor the RRCD 2013 places legal obligations on Ireland to put in place minimum reception conditions for those seeking asylum, there has been some limited consideration of the RCD 2003 in the Irish High Court. In *Mirza*,¹⁰² the three applicants challenged the refusal of the Office of the Refugee Applications Commission (ORAC) to exercise discretion under Article 3(2) of the Dublin II Regulation.¹⁰³ Article 3(2) of the Dublin II Regulation permits an EU Member State to examine a claim for asylum or protection, even if it is the responsibility of another Member State. In *Mirza*, two of the applicants had passed through

¹⁰⁰ The leaked draft of the Programme for Partnership Government is available on www.irishtimes.com.

¹⁰¹ Draft Discussion Document on Partnership for Government, p. 106. My emphasis.

¹⁰² *Mirza v Refugee Applications Commissioner*, Unreported judgment of the High Court, Clarke J., 21 October 2009.

¹⁰³ *Mirza v Refugee Applications Commissioner* at para. 4.

Greece, were arrested and requested to leave the country and made their way to Ireland to claim asylum. The other applicant's claim for asylum in Greece had failed and she made her way to Ireland to lodge a subsequent claim.¹⁰⁴ Initially, the applicants had argued that ORAC were obliged to consider the likely reception conditions (or lack thereof) that would be available for the applicants.¹⁰⁵ However, this argument was not relied upon at the hearing and the sole issue was the consideration of the procedures for determining refugee status within Greece.¹⁰⁶ The applicants therefore did not challenge ORAC's determination that there was no risk of ill-treatment in Greece.¹⁰⁷ Nevertheless, Ms Justice Clark did make reference to the protection of the applicants' rights under the RCD 2003 in Greece throughout her judgment. Clarke J. held that as a Member State of the EU and contracting party to the ECHR, there was a presumption that Greece would comply with its obligations.¹⁰⁸ Clarke J. accepted that a transfer to Greece would not be permitted to take place where the transferred asylum applicant faced 'a real risk of being subjected to treatment contrary to Article 3'.¹⁰⁹ However, the claims made by the applicants related to Greece's non-conformity with aspects of the Common European Asylum System (CEAS). If a Member State is not complying with its obligations under EU law, Clark J. stated that it is for the EU Commission and not another Member State to take steps to put the situation right.¹¹⁰ While Clark J. accepted that the living conditions for those seeking asylum or protection in Greece are 'inadequate and sometimes appalling', this did not reach the level of severity required to breach Article 3 ECHR.¹¹¹

Issues relating to Greek returns continued to come before Irish courts. Clarke J. permitted the applicants an appeal to the Irish Supreme Court in *Mirza* and Ireland suspended all transfers to Greece.¹¹² In October 2010, there were at least 32 cases pending before the Irish High Court on issues relating to Greece and CEAS.¹¹³ In *M.E. v Refugee Applications Commissioner*, the five applicants argued that the procedures and reception conditions in Greece were so inadequate that Ireland was obliged to exercise its discretion under Article 3 (2) of the Dublin II Regulation to accept responsibility for examining these asylum claims.¹¹⁴ No argument was put forward in relation to Article 3 ECHR. The applicants claimed that a return to Greece would violate Article 18 of the Charter (right to claim asylum)

¹⁰⁴ *Ibid.*

¹⁰⁵ *Mirza v Refugee Applications Commissioner* at para. 5(f)(i).

¹⁰⁶ *Mirza v Refugee Applications Commissioner* at para. 19.

¹⁰⁷ *Mirza v Refugee Applications Commissioner* at para. 47.

¹⁰⁸ *Mirza v Refugee Applications Commissioner* at para. 64.

¹⁰⁹ *Mirza v Refugee Applications Commissioner* at para. 84.

¹¹⁰ *Mirza v Refugee Applications Commissioner* at paras 86-90.

¹¹¹ *Mirza v Refugee Applications Commissioner* at para 97.

¹¹² *M.E and others v Refugee Applications Commissioner*, Unreported judgment of the High Court (Clark J., 11 October 2010), para. 14.

¹¹³ *M.E and others v Refugee Applications Commissioner*, Unreported judgment of the High Court (Clark J., 11 October 2010), para. 1.

¹¹⁴ *M.E and others v Refugee Applications Commissioner*, para. 3.

and given that the Charter had the same legal status as the EU Treaties, the discretion under Article 3(2) of the Dublin II Regulation, had to be interpreted in accordance with Article 18 of the Charter.¹¹⁵ In agreeing to make a preliminary reference, Clark J. noted that there was diverging case law emerging on the legal effect of the Charter on the CEAS.¹¹⁶ Clark J. noted that she had already decided in *Mirza* that it would be contrary to the spirit and intention of the Dublin II Regulation if ORAC or domestic courts had to examine the effectiveness of asylum systems in other Member States.¹¹⁷ However, with the Charter now having legal effect post the implementation of the Lisbon Treaty, Clark J. stated that she would welcome guidance on the transfer of claimants to Member States where there is evidence of unfavourable reception conditions and/or ineffective asylum procedures.¹¹⁸ Two questions were referred to the CJEU. Firstly, presuming no Article 3 ECHR issues arose, whether the transferring Member State under the Dublin II Regulation must assess the compliance of the receiving Member State with Article 18 of the Charter and the Procedures Directive, Qualification Directive and the RCD 2003. If the answer to this is yes and if the receiving Member State is found not to comply with the asylum and protection directives, then is a transferring Member State obliged to accept responsibility for examining an asylum/protection obligation under Article 3(2) of the Dublin II Regulation.¹¹⁹ The Court of Appeal in England and Wales had also made a preliminary reference to the CJEU on similar issues. On 09 October 2010, both of these preliminary references were joined.¹²⁰ Given the decision of the ECtHR in *M.S.S. v Belgium and Greece*,¹²¹ the decision of the CJEU was in some ways a foregone conclusion. The approach of the CJEU towards substantive socio-economic rights of asylum seekers, shows the court is willing to conform its findings and jurisprudence to that of the European Court of Human Rights i.e. willing to prevent removal to another EU Member State who will not meet the minimum standards as set down in the RCD 2003.¹²²

¹¹⁵ *M.E and others v Refugee Applications Commissioner*, para. 15.

¹¹⁶ *M.E and others v Refugee Applications Commissioner*, para. 16. See *R (Saaedi) v Secretary of State for the Home Department, ex parte Aire Centre, Amnesty International and UNHCR* [2010] EWHC 705 (Admin) (31 March 2010) and *Transfer of Asylum Applicants to Greece*, German Administrative Court, Frankfurt, BeckRS 2009 36287 (8 July 2009).

¹¹⁷ *M.E and others v Refugee Applications Commissioner*, para. 25.

¹¹⁸ *M.E and others v Refugee Applications Commissioner*, para. 29.

¹¹⁹ *M.E and others v Refugee Applications Commissioner and others* [2011] Official Journal C.13/18 (15 January 2011).

¹²⁰ European Agency for Fundamental Rights (FRA), *Coping with a Fundamental Rights Emergency: The Situation of Persons Crossing the Greek Border in an Irregular Manner*, Vienna: FRA 2011, p. 5.

¹²¹ *M.S.S. v. Belgium and Greece* (App 30696) (Grand Chamber, judgment, 21 January 2011).

¹²² See, 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. For Ireland, see more recently, *F.O. v Refugee Appeals Tribunal* [2014] IEHC 123.

Arguments that other EU Member States (other than Greece) do not offer a sufficient level of reception rights protection have generally been rejected.¹²³ In *J.M.O. v Refugee Applications Commissioner*, McDermott J. rejected the argument that Slovakia's reception conditions reached the level of severity to constitute an Article 4 of the Charter (Article 3 ECHR) breach that prevented removal.¹²⁴ In summation, the Irish superior courts have accepted that where an asylum seeker is to be transferred under the Dublin Regulation, this transfer can only be prevented where the applicant shows a 'real risk' of an Article 4 of the Charter/Article 3 ECHR violation if so transferred.¹²⁵ The burden of proof for this rests with the applicant.¹²⁶ Therefore, despite the RCD 2003 and the RRCD 2013 not applying within Ireland, the Irish judiciary are somewhat familiar with the core provisions, given the number of decisions on transfers under the Dublin system.

3.2 Utilising the Charter for Indirect Compliance with EU Reception Rights?

The modalities of Irish reception conditions described above in Section 2 of this chapter emphasise the degree to which asylum seekers enjoy limited legal/legislative rights to reception conditions. Instead, governmental and administrative fiat are the hallmark of Irish reception conditions. The system of direct provision and its relationship with rights under the Charter was first considered, not in the Irish courts, but within the Northern Ireland High Court. (For readers unfamiliar with Irish history, it is important to note that Northern Ireland has its own legal system, and is part of the United Kingdom). The Republic of Ireland's system of direct provision was considered in the Northern Ireland High Court in *Judicial Review by ALJ and Others*.¹²⁷ 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

¹²³ See, *J.G. v Refugee Applications Commissioner* [2013] IEHC 248; *Minister for Justice and Equality v Strzelecki (No. 2)* [2013] IEHC 477; *Minister for Justice and Equality v Eglitis* [2013] IEHC 215 and *Minister for Justice, Equality and Law Reform v Marjasz* [2012] IEHC 233.

¹²⁴ [2014] IEHC 467, in particular para. 68.

¹²⁵ *JMO v Refugee Applications Commissioner & Ors* [2014] IEHC 467, citing with approval the ECtHR decision in *M.S.S. v. Belgium and Greece* (App 30696) (Grand Chamber, judgment, 21 January 2011). See also, *Joined Cases C-411/10 and C-493/10 N.S./M.E.* [2011] ECR I-865.

¹²⁶ *JMO v Refugee Applications Commissioner & Ors* [2014] IEHC 467, para. 75. See also, *Wadria v Minister for Justice* [2011] 3 IR 53.

¹²⁷ *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 of the decision.

Ireland under the Dublin II Regulation.¹²⁸ 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'.¹²⁹ Mr Justice Stephens 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.¹³⁰ Ultimately, Stephens J. was not prepared to find that this constituted a violation of the Charter.¹³¹ However, the UK Border Agency, were statutorily obliged to 'promote the welfare of children who are in the United Kingdom'.¹³² Due to the communal nature of direct provision accommodation centres, the inability of ALJ and Child A (who was over 18) to enter employment in Ireland and the significant physical and mental health issues impacting on asylum seekers due to the direct provision system, Stephens J. refused to permit the UK Border Agency to return the applicants to the Republic of Ireland on the basis that it would be contrary to the best interests of the migrant children in the family.¹³³

As the decision in *ALJ* was firmly grounded in interpretation of (UK) domestic legal obligations as regards the best interests 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 Charter, would this decision have

¹²⁸ 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.

¹²⁹ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88, para. 65.

¹³⁰ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88, paras. 71-90.

¹³¹ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88, para. 84.

¹³² 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.

¹³³ 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/€ 15.60 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 terminal secondary school examination.

had a more profound impact. Not before long, decisions challenging the system of direct provision and the lack of a right to work for asylum seekers came before the Irish courts. In both decisions to date, counsel for the asylum applicants sought to utilise the Charter as a basis for the recognition of enhanced reception rights for asylum seekers. In *C.A. v Minister for Justice and Equality*¹³⁴ the High Court held that the Charter was of no application to a claim that the State's direct provision system for subsidiary protection applicants breached fundamental rights, including Charter rights.¹³⁵ The applicants in this case, a mother and child, had been within the direct provision system for several years. While some aspects of the direct provision system were deemed to violate constitutional rights,¹³⁶ EU law was not deemed to apply, pursuant to Protocol No 21 to the TFEU, an opt out of measures in the field of freedom, security and justice. While Ireland had chosen to opt in to certain measures in asylum law, including the Qualification Directive and the Procedures Directive, it had not opted in to the Reception Conditions Directive. Mr. Justice Mac Eochaidh concluded that by virtue of Protocol 21, issues relating to the reception conditions of asylum seekers were inherently outside the realm of an EU obligation, so that there was no means to give the Charter any sort of domestic effect on this issue.¹³⁷ As Kingston and I have noted on this finding,

'... while the right to subsidiary protection is undoubtedly derived from EU law, the fact of opt-out from a piece of secondary legislation (the Reception Conditions Directive) means nevertheless that the EU's fundamental rights regime does not apply to applicants for grant of subsidiary protection status. As this raises difficult issues of EU constitutional law, one might have thought that it merited a reference to the CJEU.'¹³⁸

However, this finding has been followed in subsequent Irish case law. In *N.H.V. & F.T v Minister for Justice and Equality*,¹³⁹ both applicants were present in Ireland for over 8 years as asylum seekers, seeking protection.¹⁴⁰ Section 9 of the Refugee

¹³⁴ *C.A. & others v Minister for Justice and Equality* [2014] IEHC 532

¹³⁵ For a summary of this challenge, see, Liam Thornton, 'C.A & T.A.: The Direct Provision Case', (2014) 4 *Irish Journal of Family Law*, p. 116-118.

¹³⁶ For a fuller discussion on these domestic aspects of the case, see: Liam Thornton, 'C.A & T.A.: The Direct Provision Case', (2014) 4 *Irish Journal of Family Law*, p. 116-118 and Liam Thornton, 'Socio-Economic Rights and Ireland', in: Suzanne Egan (ed.), *International Human Rights: Perspectives from Ireland*, Bloomsbury 2015, p.171-198, in particular p. 195-198.

¹³⁷ *Ibid.* at paras. 11.8-11.9.

¹³⁸ Suzanne Kingston & Liam Thornton, *A Report on the Application of the European Convention on Human Rights Act 2003 and the European Union Charter of Fundamental Rights: Evaluation and Review*, Law Society 2015, p. 1-158 at p. 119. References omitted. It should be noted that neither the applicants nor respondents requested a reference to the CJEU.

¹³⁹ *N.H.V. & F.T v Minister for Justice and Equality* [2015] IEHC 246.

¹⁴⁰ For a glossary of terms of regards phrases such as 'asylum seeker', 'protection seeker', 'refugee' and 'subsidiary protection' in Ireland, see, L. Thornton, *Glossary of Terms: Irish Asylum Law*, Office of the Houses of the Oireachtas 2013.

Act 1996 (as amended) prohibits asylum seekers from seeking or entering employment, including self-employment. Mr. Justice McDermott rejected the applicants' contention that they had a constitutional right to work,¹⁴¹ and even if they did,

'the scope and exercise of such rights may be defined and regulated pursuant to the very wide power which the State has to control aliens and their entry into the State and activities whilst present.'¹⁴²

Turning to the Charter argument, relying on the reasoning employed in case-law in England and Wales,¹⁴³ McDermott noted that Article 15 (3) of the Charter clearly excludes the right to work for third country nationals who have not been granted a right to work within a Member State. McDermott J. further found that given that Ireland did not opt into the Reception Directives (2003 or 2013), EU law on the issue did not impact on Ireland's prohibition of the right to work.¹⁴⁴ The Charter distilled no rights for protection applicants in Ireland. This conclusion was accepted by the Irish Court of Appeal in March 2016.¹⁴⁵ Mr. Justice Hogan (although dissenting on the constitutional issue), concluded that,

'... it must be accepted that the topics which were the subject matter of the Directive itself remained entirely within the sovereign realm of this State and, accordingly, fell outside the scope of EU law. As the right of asylum seekers to participate in the labour market pending the determination of their claim is one of these very topics which were addressed by the 2013 Reception Directive, legislation enacted by the Oireachtas regulating the rights of asylum seekers in relation to employment and the labour market equally falls outside the scope of EU law. One may thus say that by electing to opt-out of the Directive (and, in that sense, not to implement the Directive), the State could hardly be said to be implementing Union law.'¹⁴⁶

¹⁴¹ The applicants arguments under the ECHR Act 2003, and Article 8 ECHR in particular, as well as under the European Union Charter of Fundamental Rights, were also rejected, see: *N.H.V. & F.T v Minister for Justice and Equality* [2015] IEHC 246, paras. 36-46 and paras. 47-62.

¹⁴² *N.H.V. & F.T v Minister for Justice and Equality* [2015] IEHC 246, para. 32.

¹⁴³ *Rostami v Secretary of State for the Home Department* [2013] EWHC 1494.

¹⁴⁴ *N.H.V. & F.T v Minister for Justice and Equality* [2015] IEHC 246, para. 46.

¹⁴⁵ *N.H.V. v Minister for Justice and Equality* [2016] IECA 86. It should be noted that in this decision, two judges found that the applicant had no entitlement to work either under EU law, ECHR law or domestic law. One judge would have found that the absolute prohibition on an applicant for asylum not been permitted to work was unconstitutional. Given the EU focus of the chapter, I am restricting my analysis to the EU elements of the decision.

¹⁴⁶ *N.H.V. v Minister for Justice and Equality* [2016] IECA 86 at para. 44, per Hogan J. The case is currently under appeal to the Irish Supreme Court. It remains to be seen whether the Supreme Court will engage with EU legal argument, see *N.H.V. v Minister for Justice and Equality* [2016] IESCDT 51, in particular para. 16.

Therefore, while the Irish courts will consider whether an EU Member State is complying with their obligations under the RCD 2003 or RRCD 2013 as regards transfer of an asylum seeker under the Dublin system, this will not be extended to providing an interpretation of the Charter that encompasses reception rights for asylum seekers who are actually present in Ireland.

4. CONCLUSIONS

Ireland's approach to reception conditions and rights for asylum seekers has not been overly influenced or impacted by the convergence of European Union law under the RCD 2003 and RRCD 2013, or by a more rights based interpretation of the Charter. This stands in contrast to Ireland's opt outs of the Recast Qualification and Procedures Directives, which are generally softly opted into within the new International Protection Act 2015. While the non-return of asylum seekers within Ireland to Greece has been prohibited by the Irish courts (but only after confirmation by the Court of Justice of the European Union), the Charter has failed to pierce the sovereign veil of Irish asylum reception law and policy. The *McMahon Report* has recommended that Ireland opt-into all the Recast Asylum Directives, including the Recast Reception Directive, 'unless clear and objectively justifiable reasons can be advanced not to'.¹⁴⁷ It is, in my view, unlikely that the Irish Government will want to limit its administrative discretion or impose upon the State obligations surrounding reception conditions for asylum seekers. It took fifteen years for the existence of direct provision to become a matter of governmental and public concern. The publication of the *McMahon Report*, which contains significant recommendations on reform of reception conditions for asylum seekers in Ireland,¹⁴⁸ did not offer an opportunity for the government and wider society to reflect on 'the rights of others'. For now, the *McMahon Report* appears to have been simply a way to deal with political and public concern surrounding reception rights and systems for asylum seekers in Ireland. Overall, the EU reception *acquis* has not impacted upon the reception rights of asylum seekers in Ireland.

¹⁴⁷ *McMahon Report*, para.3.178.

¹⁴⁸ Although I do have significant concerns with many of these recommendations from a human rights perspective, see further Liam Thornton, *A Preliminary Human Rights Analysis of the Working Group Report and Recommendations on Direct Provision*, UCD Centre for Human Rights Working Paper, 30 June 2015, available at: <http://ssrn.com/abstract=2685268>.