



<b>Title</b>	Ireland: Asylum Seekers and Refugees
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<b>Publication date</b>	2018-05
<b>Publication information</b>	Thornton, Liam. "Ireland: Asylum Seekers and Refugees." Skein Press, May 2018.
<b>Publisher</b>	Skein Press
<b>Item record/more information</b>	<a href="http://hdl.handle.net/10197/9612">http://hdl.handle.net/10197/9612</a>

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## **Ireland: Asylum seekers and refugees**

**Liam Thornton**

### **A. On Ireland and migration**

Far from the land of one hundred thousand welcomes, Melatu Uche Okorie's work shines a light onto issues that for far too long have been swept under the carpet. Irish society's ability to condemn, institutionalise, and castigate persons due to differences is ever present in 2018. Ireland for generations has been a country of emigration. The experience of the emigrant has been told in word and verse; the mythical Irish emigrant emerging as pining for home, or getting along with life in their new-found land or mapping the struggles and adversities the person succumbed to or overcame. Ireland did not experience any post-World War II inward migration. It was only during the 1990s that any appreciable number of migrants came to Ireland. This question of 'who belongs' has been an underlying current of debates within Irish society. This was most startlingly confronted in the 2004 Citizenship Referendum. Melatu's characters in 'Under the awning' discuss these questions of belonging, asking are children born in Britain, British, children born in Australia, Australians, children born in Ireland, Irish. Yet, in law the answer to this for transnational families is often no – these children are not citizens of where they are born or where they belong. The Referendum saw the right of all children to Irish citizenship where born on the island of Ireland withdrawn. The referendum campaign took place in a sea of hostility, where the Irish state was seen as under an existential threat, with 'illegal' crossings via the birth canal viewed as an issue of significant public comment and decision. This feeling of not belonging, of being an outsider, of challenging or accepting the status quo is threaded throughout Melatu's work. This piece seeks to provide some political and legal context to issues that arise from some of Melatu's stories, to provide some sense of understanding of the quagmires that arise when seeking protection in a land far from home.

### **B. On asylum and protection**

We do not know what happened to the protagonist or her twins in 'The egg broke'. The story raises significant and important questions around the right to seek asylum. Would the protagonist, if she managed to escape from her country, with or without her children, be entitled to refugee protection in another State? The custom of seeking asylum or refuge from harm is ancient. Stories traverse all the major religions about their prophets fleeing their homelands, and having to find sanctuary elsewhere. Within the international community, there is only a limited degree of human rights protection for persons fleeing. To be recognised as a refugee, a person must be outside her country of origin and not want to return to her country of origin as she has a real risk of being persecuted if she does return. The reasons for the real risk of being persecuted must relate to the person's race, religion, nationality,

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membership of a particular social group and/or political opinion. Refugee status is a limited status.. As well as showing that a person cannot return to their country of origin, a person will have to show that the harm they face is 'country-wide'. If there is an area within their own State, that a person can, without too much difficulty, reside away from the persecution that they fear, then that person is not, *in law*, a refugee. Refugee status only comes about if the persecution feared is conducted by, or with the acquiescence, of a State and must be country-wide. Where the State is the persecutor, then the requirement that the person has a real risk of being persecuted can be seen as country-wide. However, where it is private individuals or communities that cause the persecution, then it may be that the person should move elsewhere in the State to escape this persecution, even where the person may not have any familial or social ties with that region of the country. The international community has only committed to protecting a small subset of individuals who face denial of their human rights. As the (now) President of the Supreme Court of the United Kingdom, Baroness Brenda Hale, noted in a 2007 decision:

Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven.

This does not seek to take away from other harms or human rights abuses that persons may face, but it does emphasise the fact that State protection is not absolute.

There has been some recognition of the difficulties people may face in coming within the strict definition of refugee. Therefore, under EU law, another protection status exists – subsidiary protection. Irish law provides that where a non-EU citizen or a stateless person does not qualify for refugee status, but there are substantial grounds for believing that the person, if returned to her country of origin, would face a 'real risk' of 'serious harm' she will be entitled to subsidiary protection. Serious harm is defined as the death penalty or execution, torture or inhuman or degrading treatment or punishment, and a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict

Like refugee status, subsidiary protection does not protect against all types of serious harm, but only harm of a particular quality or character. There have been some interesting judicial decisions on what might constitute serious harm, such as being subject to poverty and/or a wholly inadequate health care system might be seen as inhuman and degrading. In the Court of Justice of the European Union case of *M'Bodj v Etat Belge*, a Mauritian national argued that he was entitled to subsidiary protection where the risk of 'serious harm' emerged from a lack of even the most basic health care to deal with a health condition. The European Court determined that the concept of serious harm cannot include harms emerging due to poor health care within a person's country of origin.

Fairness and the length of time decisions take is something that has been a central feature of political and legal discussions in Ireland over the last twenty years. Throughout this

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time, various Ministers for Justice have promised that the system was always just one reform away from ensuring decisions were reached in a time-frame of between ten weeks and nine months. In 2005, the then Minister for Justice, Michael McDowell, stated before the Oireachtas Justice Committee:

I'm making it very clear that you will be going home within 10 weeks of making a claim in Ireland, and I would much prefer to have a system where I could have an interview at the airport, find out the cock and bull stories that are going on and put them on the next flight. But unfortunately the UN Convention requires me to go through due process in respect of all these claims.

Due process and providing a person with a fair hearing to determine their protection claim was viewed as nothing more than an inconvenience. In 2006, two members of the then Refugee Appeals Tribunal resigned in protest of what they saw as unfair allocation of refugee cases to those Tribunal Members who were more likely to affirm the negative decision of the Office of the Refugee Applications Commissioner. For many years, Ireland had one of the lowest recognition rates of refugees in the European Union. The then Secretary General of the Department of Justice, Mr. Sean Aylward, stated the following before the UN Committee Against Torture in 2011:

In terms of delays in processing asylum applications, a great deal of the time it was in the best interest of the applicant to drag out the process and delay it and their lawyers used every conceivable human contrivance to delay and defer the outcome when the application was manifestly incorrect and ill-founded. It had almost become a legal racket to string out the process of these applications and it undermined the credibility of the State and its processes.

In 2012, the Irish Refugee Council conducted a study on the low recognition rate of protection claims in Ireland, concluding that:

there is a culture of disbelief that itself informs the approach that some Tribunal Members take and the way in which they set about the task of deciding the appeals.

As of December 2017, the waiting time for an asylum seeker to have her interview before the International Protection Office is 20 months and rising. This will have knock-on effects on the appeals body, the International Protection Appeals Tribunal. It takes time for a decision to emerge as to whether a person is a refugee or in need of subsidiary protection. The waiting for papers, for recognition or rejection comes to the fore in 'This hostel life'. Having decisions made about you by another person is something many of us can relate to. However, only in rare circumstances will such decisions involve potentially life or death. Therefore, the operation of decision makers within the International Protection Office and the International Protection Appeals Tribunal should be beyond reproach. There should be either a strong yes, that this person is entitled to protection in Ireland, or a strong no, this

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person is not entitled to protection in Ireland. This waiting will often take place in a system known as 'direct provision'.

### **C. On Direct Provision**

One of the first documents given to asylum seekers in Ireland who enter direct provision is the Reception and Integration Agency's *House Rules* for accommodation centres. The House Rules proclaim that the direct provision centre 'is your home while your application for protection is being processed.' 'Home' is an interesting concept as, within law, the protection of an individual or families 'home' is a central concern. The right to respect for one's home is an underlying theme of all core international and European human rights instruments. Article 40.5. of the Irish Constitution states that:

The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.

This applies to citizens and non-citizens. The concept of this protection of the dwelling or the 'home' has been used by Irish courts to strike down certain house rules that the Reception and Integration Agency implemented in direct provision centres. Yet, in 'This hostel life' we are immediately drawn into the mundane, the everyday, but also something quite alien – the fact that direct provision does not seem to be like a home. Waiting. Lots of waiting. Waiting for a decision. Waiting to be provided with basic provisions for living. Waiting for somebody to tell you when you can eat, and what you can eat. Subject to the whims of 'the manager'. 'This hostel life' provides such a troubling picture of how Ireland treats asylum seekers. Direct provision includes accommodation and the provision of either meals or, more unusually, the ability for a person to cook their own meals with ingredients provided by the direct provision accommodation centre. Direct provision is also used in a short-hand manner to describe the rights and services all asylum seekers in Ireland should be guaranteed. This includes a weekly payment of €21.60 per adult and per child, the right of children to an education, at least up until completion of the Leaving Certificate and the medical card that asylum seekers are provided allowing them free of charge access to healthcare on the same basis as Irish citizens and other residents who have a medical card. Asylum seekers cannot access most other social welfare payments, nor (until recently) could seek or enter employment, nor can asylum seekers travel outside of the State, without the consent of the Minister for Justice and Equality.

There was a time before direct provision, a time when need was catered for through the general social welfare system. So, for a period of time, it was thought that the general welfare system could cater for asylum seekers. Asylum seekers would receive supplementary welfare allowance if they met conditions for this payment, or one-parent family payment if the person was a single parent, or non-contributory old-age pension if the asylum seeker was over 65. The then Minister for Justice in Ireland, John O'Donoghue T.D. in March 1998 proclaimed:

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It is a source of puzzlement to many people that at a time when there are no conflicts taking place near our borders ... when we have no colonial links with countries in which political turmoil is taking place and when the number of claims for refugee status is declining in other European states, the Irish state shows a major increase.

In introducing direct provision, the then Minister for Justice, John O'Donoghue gave assurances that direct provision was a time limited system which, in the normal course of events, would end within six months after an asylum seeker's protection claim was determined. In fact, in its early years of existence, up until about 2003, stories abound about how particular Community Welfare Officers would grant asylum seekers rent allowance and access to the full rate of supplementary welfare allowance payments so that they could move out of direct provision. This practice was stopped in its tracks by a change in the law in 2003. From its very foundation, serious concerns were raised about the alien nature of the system of direct provision. In *Beyond the Pale*, Dr Angela Veale and Professor Brian Fanning explored the impact of the system of direct provision on the rights of children. This 2001 report noted the significant level of social control over asylum seekers lives, the condemnation of children to poverty by design, and the highly institutionalised nature of the system of direct provision.

Yet, in Ireland this system of direct provision accommodation centres and near cashless living grew roots. Now standing at 32 accommodation centres across Ireland, the direct provision system seems like it is here to stay. Since 1997, governments of different hues, Fianna Fail-Progressive Democrats, Fianna Fail-Green, Fine Gael-Labour, Fine Gael-Independents have all made similar pronouncements, about how just a few more changes were needed before all asylum seekers would have a decision on their protection claim within six to nine months. Political parties that ferociously opposed the system of direct provision while in opposition, happily lived with, and often defended, the system of direct provision once they had reached the dizzying heights of governmental office. Throughout the last 18 years, platitudes from various politicians abound. So, in 2018, Ireland excludes asylum seekers to accommodation centres, away and apart from Irish society. That such a situation may last for many years, with years of queuing for food, a miserly €21.60 per week and highly institutionalised hostel living speaks volumes about how Irish society protects the weakest.

The system of direct provision is a system of enforced poverty, the core purpose of which is to make Ireland a deeply unattractive location for asylum seekers to have their protection claim determined. In 2015, a group composed of a chairperson, Dr Bryan McMahon, civil society organisations, one asylum seeker and representatives of government departments were tasked with, amongst other things, suggesting improvements to the system of direct provision. The McMahon Report made a significant number of recommendations about making the system of direct provision more bearable for those subjected to it such as the ability for asylum seekers to cook their own food and an increase in the direct provision allowance. Some of these recommendations have been implemented, many more have yet to be implemented. The McMahon Report could not suggest alternatives

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to the system of direct provision in Ireland, as its terms of reference were restricted to considering improvements to the system of direct provision.

Only recently has the absolute nature of this enforced poverty been challenged, with the partial relaxation on asylum seekers working. The rationale for prohibiting asylum seekers from working between 1996 and 2018 boiled down to two core reasons. First, it may attract more asylum seekers from other countries if Ireland were to allow asylum seekers to work. Second, the shared border with the North of Ireland and wanting to ensure that the 'common travel area' would not be 'abused' by those who did not hold Irish or British citizenship. A decision of the Supreme Court finally ended the absolute prohibition barring asylum seekers from working. In response to the judgment, the Government indicated in November 2017, that Ireland would agree to be bound by the EU Reception Directive on the rights of asylum seekers. Until such time as EU law applies, asylum seekers in Ireland can only enter employment where the position pays over €30,000 per annum. There is an extensive list of prohibited employment areas, mainly in the hospitality, retail and social care sectors. If these restrictions were not enough, an asylum seeker or her potential employer will have to pay €1,000 for a 12-month work permit. Additionally, an asylum seeker must have a passport to apply for the work permit. Given that asylum seekers can often only access Ireland by travelling on false identity documents, many asylum seekers will not be able to meet this condition.

Over 5,000 men, women and children remain in direct provision centres today. Convicted of no crime, the system of enforced dependency and institutionalisation reminds me of the crueller and less understanding Ireland of the borstal, the Magdalene laundry, the mother and baby home, the mental institution. Using the law and appeals of human rights will not fundamentally change the degrading nature of direct provision. Only by engaging with the political sphere, by telling our elected representatives that direct provision is simply not unacceptable, can we hope to see this system abolished.

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