

CA & TA:
A Case Analysis Conducted by Trinity FLAC in Association with
Nasc



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A. Introduction

“If you manage to get here in strong mental health, this system will sap your soul and spirit.”

These are the words of TD Pádraig Mac Lochlainn, after visiting direct provision centres in Galway and Limerick over the last month.¹ Direct provision has been the focus of much public attention and sustained negative scrutiny over the last few years. Discussion has stemmed from evidence of degrading conditions in these centres that undermine the dignity of those living in them.

The system of Direct Provision refers to the provision of support by the State in the form of accommodation, food and basic welfare, to a person who is seeking asylum. It was implemented in April 2000 by the Department of Justice in the context of a backlog of asylum applications. Despite being introduced on a temporary basis, the system is still in full force 15 years later. Since its inception, this system has operated on an extra-legislative basis, without any in-depth analysis by the legislature, the executive or the judiciary. At the end of September 2014, there were 4,494 people living in Direct Provision accommodation centres, of which 1,522 were below the age of 18.²

Research and studies have shed considerable light on the standards of living the residents are subject to. They are not allowed to cook their own food, are frequently required to share bedrooms and bathrooms and are subject to unannounced room searches. Furthermore, if residents are not present in the Direct Provision centre for more than three consecutive nights, the Reception and Integration Agency (RIA) will consider that that person does not require further assistance. While only intended to be a short-term service, at the end of 2013, 38% of the residents had been in Direct Provision for longer than 5 years, and 13.6% for longer than seven years.³ Three meals a day are provided for all residents as well as a weekly social welfare allowance of €19.10 per adult and €9.60 per child.⁴ This allowance has remained unchanged since 2000 and asylum seekers are not entitled to enter employment.⁵

Concern is repeatedly expressed for the effects of the system on the mental health of the residents.⁶ It has been reported that 90% of asylum seekers suffer from depression after 6 months in the system.⁷ Moreover, fears are growing as to the effects direct provision is having

1 Clíodhna Russell “If you manage to get here in strong mental health, this system will sap your soul and spirit”, *thejournal.ie* (February 10 2015) <http://www.thejournal.ie/ireland-reputation-direct-provision-1928732-Feb2015/>.

2 Reception and Integration Agency, *Monthly Statistics Report*, December 2014, at 8.

3 Reception and Integration Agency, *Annual Report 2013*, at 12.

4 See RIA website at http://www.ria.gov.ie/en/RIA/Pages/Direct_Provision_FAQs.

5 Refugee Act 1996, section 9(4).

6 UN Committee on the Elimination of Racial Discrimination (CERD), Concluding observations on the 3rd and 4th periodic reports of Ireland, April 2011, CERD/C/IRL/CO/3-4, at para. 20.

7 Council of Europe: European Commission against Racism and Intolerance (ECRI), *Fourth report on Ireland*, CRI (2013) 1, at para. 115.

on children, to the extent that a Northern Irish court has refused to allow Britain to send asylum-seeking children back to Ireland.⁸

Many of these issues have been thrust into the spotlight by way of the recent High Court decision of *CA & TA*,⁹ as it is the first time that the system of Direct Provision has received any notable amount of judicial scrutiny.

The case involves a challenge brought by a young mother, a Ugandan national, who has resided in direct provision accommodation since June 2010. Her son, born in January 2011, is also challenging direct provision on a number of grounds. The outcome of the case is lamentable in that the court failed to find that the system of Direct Provision was in breach of any fundamental human rights.

While the outcome of the case was disappointing, there are some small positive aspects to be gleaned from the final judgment. Most notably, the court found in favour of the applicants in relation to the lack of an independent complaints procedure and the house rules for the particular accommodation. Moreover, the court found that the family's room was their home for the purpose of the Irish Constitution and the ECHR.

The significance of this judgment calls for an in-depth analysis of the legal foundation upon which the decision was based. To this end, this research project will provide a detailed breakdown of the legal points at issue in this case and the judicial reasoning behind the decision. It will consider the court's reasoning in relation to:

1. The alleged breaches of the Irish Constitution, the ECHR and the CFEU;
2. The legality of the Direct Provision as an administrative scheme;
3. The legality of the social welfare payments received by the residents.

Other arguments which did not receive due consideration in court will also be considered.

B. CA & TA

1. Facts

The facts of *CA & TA* are as follows:

- CA is a national of Uganda and the mother of TA, her son born in Ireland. CA claimed refugee status in Ireland upon her arrival in April of 2010.
- CA's application for refugee status was based on fears that if she returned to Uganda she could be subjected to female genital mutilation. In addition to this appeal, she also feared retaliation from the elders of her village as her boyfriend was suspected of burning tomb sites. Her appeal was refused initially by the Office of the Refugee Applications Commissioner, and then rejected by the Refugee Appeal Tribunal in October 2011 and a similar appeal on behalf of her son TA was also rejected.
- CA made an application for subsidiary protection in December 2011, a complementary form of protection for persons fleeing harm who have been refused refugee status. The determination of this application was delayed by another significant legal challenge to the process of awarding subsidiary protection.
- Originally CA was placed in Dublin but was swiftly moved on to Galway where she has resided with her son TA ever since in Direct Provision Accommodation. Before her son was born, CA shared one room and a bathroom with three other occupants.

⁸ *In the Matter of an Application by ALJ and A, B and C for Judicial Review* [2013] NIQB 88.

⁹ *C.A & T.A (a minor) v Minister for Justice and Equality, Minister for Social Protection, the Attorney General and Ireland* [2014] IEHC 523 [hereinafter *CA & TA*].

- Upon the birth of her son, CA was moved into a shared accommodation with another mother and infant, with two double beds, two cots and a bathroom. CA did not get along with the other woman she shared the room with and found the living conditions uncomfortable, rendering privacy impossible. She was moved with her child into another shared room with another mother and her older child, which comprised of two double beds, one cot and a bathroom. The relationship with the other woman was described as amicable. CA and her son were later moved into a one-bed unit with a bathroom where they are not sharing with any other persons.

CA and TA brought claims challenging the Direct Provision system. With the suspension of pleadings on the legality of the prohibition of employment and whether the UN Convention of the Rights of the Child was applicable until other cases on the same issues were resolved, the following pleadings were considered by the court:

- A declaration that the direct provision scheme in respect of the applicants as protection applicants (and as necessary, applicants seeking leave to remain), and in particular the payment of the weekly direct provision allowance and the setting of rates for same, is *ultra vires* the Social Welfare Consolidation Act 2005 (as amended) and unlawful by reason of the lack of any statutory basis for said payments.
- A declaration that the direct provision scheme and system and the operating by the Reception and Integration Agency of the direct provision scheme without any statutory or legislative basis, is invalid having regard to the provisions of Article 15.2.1 of the Constitution and amounts to a breach of the principle of separation of powers.
- A declaration that s. 246 of the Social Welfare Consolidation Act 2005 (as amended) and in particular s. 246(7)(b) and (c) thereof and / or said provisions in combination with the denial to persons such as the first named applicant herein of the right to work / seek work and earn a living is invalid having regard to the provisions of the Constitution and in particular Articles 40.3, 41, 42.1 and 40.1 thereof.
- A declaration that the direct provision scheme, system and arrangements and the operation of same in respect of the applicants and / or said scheme in combination with the denial to the first named applicant of the right to work / seek work and the denial to the applicants of social welfare benefits and / or allowances is in breach of and violates, and / or fails to respect and vindicate the rights of the applicants pursuant to Articles 40.3, 41 and 42.1 of the Constitution, Articles 3, 8 and 14 of the ECHR and Article 2 of the Fourth Protocol of the ECHR and / or that said scheme amounts to unjustifiable unequal treatment for the applicant family within the terms and meaning of Art. 40.1 of the Constitution.
- A declaration that the direct provision scheme and system applicable to the applicants as applicants for subsidiary protection and persons exercising their right to apply for subsidiary protection under EU law pursuant to EU Council Directive 2004/83 is in breach of and / or fails to respect and vindicate the rights of the applicants pursuant to the Charter of Fundamental Rights of the European Union and in particular Article 1, 3, 4, 7, 15, 20, 21, 24, 41 thereof.

2. Background to Direct Provision

The direct provision scheme in Ireland was originally established as a response to the steadily growing number of refugee applications. Over the course of eight years, the number of applications for asylum had risen from 31 applications in 1991 to 7,724 in 1999, indicating an exponential increase in the number of initial applications. This figure further increased by

41% to 10,938 applications in the preceding year.¹⁰ Another concern the Government had to consider was that the demands on accommodation to provide for the Asylum seekers had been centralised in Dublin.

In response to this growth the government set up the direct provision scheme as a pilot programme in November 1999, aiming to provide a fixed form of accommodation and to cater to the basic needs of asylum seekers and people seeking other protection, such as CA in this case seeking subsidiary protection. The system also aimed to combat the centralisation through a policy of dispersal. This system was originally administered by the Directorate for Asylum Support Services, acting under the direction of the Department of Justice, Equality and Law Reform.

The policies introduced by the direct provisions system were on an administrative basis through the Directorate for Asylum Support Services, and later were adopted as government policy by the issuing of the Supplementary Welfare Allowance Circulars 04/00 and 05/00 by the Department of Social and Family Affairs. At no point has a legislative foundation been laid for these policies by the government. The policy of dispersal established by the government's actions sourced accommodation across the health board network to ensure that asylum seekers and those seeking other forms of protection were not all consolidated into one area, but evenly dispersed throughout the country. The Supplementary Welfare Allowance Circulars were established to provide guidance to the staff involved with direct provision on how to initially develop the system, such as locating new asylum seekers in 'reception centres' before being redirected to a designated direct provision facility.

The system also calculated an appropriate weekly allowance for people on direct provision, by taking the amount for providing accommodation away from the Supplementary Welfare Allowance. This balances are currently at €19.10 for an adult every week and €9.60 for a child. If a person refused direct provision without giving a clear and apparent justification, the Supplementary Welfare Allowance Circular 05/00 is used for guidance on the appropriate procedure. The residual direct provision allowance is still given in such circumstances unless an exception arises in limited circumstances. Such exceptions include those justifiable on social or medical grounds. At present there are over 4,000 people in direct provision, with an estimated one-third being children.¹¹ A substantial number of individuals who have been granted asylum in Ireland, still remain in direct provision due to housing shortages¹².

3. Core Issues

(a) Does Direct Provision, in part or because of cumulative effect, breach the applicants' fundamental human rights?

(i) Constitutional Rights

The purpose of this section will be to examine whether the system of direct provision in Ireland breaches or disproportionately interferes with constitutional rights.

Personal Autonomy and Choice

¹⁰ FLAC, *One Size Doesn't Fit All*, November 2009
http://www.flac.ie/download/pdf/one_size_doesnt_fit_all_full_report_final.pdf.

¹¹ <http://www.irishrefugeecouncil.ie/direct-provision/proposal-one-off-scheme-to-clear-asylum-backlog>.

¹² <http://www.irishtimes.com/news/ireland/irish-news/more-than-600-granted-asylum-have-no-homes-1.2131274>.

It is submitted that personal autonomy in regard to everyday decisions comes at the expense of living in direct provision. That the dignity and freedom of the individual must be assured is an important principle enunciated in the Preamble of the Irish Constitution:

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.¹³

However, it seems that this right to dignity is of subsidiary importance to the government in their attempts to limit the ‘pull factor’ of migrants to Ireland. The maintenance of an unattractive system that is detrimental to basic human rights is key in limiting this pull factor. The personal rights guarantee under Article 40.3 expressly encompasses a right to life. Article 40.3 implicitly covers other personal rights, and these have been developed by case law. These include the right to personal autonomy/self-determination, bodily integrity, and the right to privacy. This right to personal autonomy protects a person’s “interest in making significant decisions about his or her own life.”¹⁴ This right is usually invoked in issues regarding medical consent, and the patient’s right to make decisions in relation to their own treatment. However it is submitted that those seeking refugee status in Ireland are entitled to make decisions in regard to *their* own treatment. The lives of the protection applicants living in direct provision centres are reliant on those controlling the centres, that being the RIA and private contractors. These parties essentially manage the lives of the applicants, and if applicants are unhappy with their treatment, they must file a complaint within the internal complaints system. One of the complaints made in *CA & TA* was that residents can be moved at will without consent for reasons of economy and without the authorities having regard to their interests or wishes. This is one of the most fundamental rights of every human being. O’Shea has commented, “human dignity is the rock on which the superstructure of human rights law is built.”¹⁵

The system of direct provision denies personal autonomy for a potentially extensive period of time. The average stay in a direct provision centre is unfortunately dangerously long, often amounting to several years. Thornton believes that direct provision is an assault on human dignity and the rule of law.¹⁶ This view is easily understood when one is confronted with the overwhelming evidence of disrespect for personal autonomy apparent in these direct provision centres. Finlay CJ in *State (C) v Frawley* accepted that the right to bodily integrity included a right to freedom from torture and inhumane and degrading treatment.¹⁷ There is

13 Preamble of Bunreacht na hÉireann.

14 Buchanan and Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* (Cambridge University Press, 1989), at 36.

15 John O’Shea, “Direct Provision: Human Dignity, Personal Autonomy and the ECHR” humanrights.ie <http://humanrights.ie/immigration/direct-provision-human-dignity-personal-autonomy-and-echr/>.

16 Liam Thornton, “An Assault on Human Dignity, An Assault on the Rule of Law: Direct Provision in Ireland” humanrights.ie <http://humanrights.ie/immigration/an-assault-on-human-dignity-an-assault-on-the-rule-of-law-direct-provision-in-ireland/>.

17 *State (C) v Frawley* [1976] IR 365.

thankfully no question of torture within the system of direct provision, but ‘degrading’ is a word that could be used to describe the way in which protection applicants are treated. Protection applicants cannot choose which centre they live in, and the applicants have no right to be moved to another centre of their choice. Applicants may make a request to transfer to another centre, but as the RIA booklet states, “transfer is possible, but only when we decide to allow it based on its merits and in rare and exceptional circumstances.” If an application to move is refused, complaint in respect thereof cannot be made under the complaints procedure available.

Right of Parental Control and Autonomy in Protecting Family Life

By virtue of Article 42.5, the State is obliged to supply the place of the parents where those parents have failed for physical or moral reasons, in their duty towards their children. This has been a reasonably high threshold to reach since it is presumed that parents generally do not fail in their duty towards their children. However, the system of direct provision means that decisions that would normally and conventionally be the duty of parents to make are transferred to those running the centres. Important decisions such as where the applicant’s children should go to school are taken out of their hands, culminating in the parents of children living in these centres having very little control over their children’s lives. These parents are treated as if they were not competent enough to exercise their right to parental autonomy, something which the Irish courts have traditionally zealously protected. Murray J in *Northwestern Health Board v HW* commented on the State’s power to make parental decisions:

If the State had a duty or was entitled to override any decision of parents because it concluded, established or it was generally considered that that decision was not objectively the best decision in the interest of the child, it would involve the State and ultimately the courts, in a sort of micro-management of the family. Parents with unorthodox or unpopular views or lifestyles with a consequential influence on their children might for that reason *alone* find themselves subject to intervention by the State or by one of the agencies of the State. Similar consequences could flow where a parental decision was simply considered unwise. That would give the State a general power of intervention and would risk introducing a method of social control in which the State or its agencies would be substituted for the family. That would be an infringement of liberties guaranteed to the family.¹⁸

This passage is of extreme importance when considering Ireland’s system of direct provision. Through direct provision, it is submitted that the State is overriding the decisions of parents, from deciding what their children eat, to deciding which school they attend. This amounts to “a sort of micro-management of the family,” which Murray J was so fearful of in *Northwestern Health Board*. The system does not allow for typical parental freedoms. Parents are not able to make choices for their children relating to food, education or even the time of day at which they share a meal.

Rights of the Child

According to the 2013 statistics from the RIA there are 4,500 asylum seekers, of which 1666 are children currently residing in the 34 direct provision accommodation centres in the State. In *G v An Bord Uchtála* O’Higgins CJ described the rights of a child in the following terms;

¹⁸ *Northwestern Health Board v HW* [2001] 3 IR 622, at 740.

Having been born, the child has a right to be fed and to live, to be reared and be educated, to have the opportunity to of working and of realising his or her full potential and dignity as a human being.¹⁹

Article 42.5 refers to the rights of the child in requiring the State, when taking the place of the parent, to act “always with due regard for the natural and imprescriptible rights of the child.” In *State (Nicolaou) v An Bord Úchtála* Walsh J commented that such rights included “the right to religious and moral, intellectual, physical and social education.” Instead of respecting the above fundamental rights that every child ought to have, the system of direct provision harms these rights and creates a long-term impact on their lives. They are forced to live in hostel-like accommodation standards that were only ever intended to be for short-term stays. These are unsuitable living conditions for children, coupled with the fact that there more often than not is lack of play space. Staff at the centres are Garda vetted but adult residents are not, which means that children can be exposed to violent and sexual behaviour. The marginalisation of thousands of children occurs as a result of the huge disparity between them and the majority of those in their class. Children should not have to experience lesser childhoods because of their migratory status. Payment of €19.60 to adults and €9.60 per child does not cover expenses, such as buying food, school trips school supplies, extra-curricular activities and birthday presents. In theory, direct provision purports to fulfill all of the fundamental rights of a child. However, this is unfortunately not the case. They are denied their right to dignity, as they are not even afforded a chance to realise their full potential. Psychologically speaking, long-term stays in the centres have a detrimental effect on their formative years. Although the Irish Courts have placed a demonstrated emphasis on the importance of accommodating children and placing them in a suitable environment to realise this potential, the State has failed to do so in the context of direct provision.

Right to Work/Right to Earn a Living

Protection applicants are not permitted to seek work and they receive an allowance that is expected to maintain them financially each week. There is a constitutionally recognised right to work, established in the below cases. This raises questions as to whether this ban on seeking work and working is an unjust attack on this right.

In *Murtagh Properties v Cleary*, Kenny J granted an interlocutory injunction to restrain the picketing of a work premises by members of a trade union who objected to the plaintiffs employing women as bar staff. Kenny J granted the injunction on the basis that the plaintiffs had a reasonable prospect of success in their argument that the picket would infringe a constitutionally protected right to work and earn a livelihood.²⁰ In *Attorney General v Paperlink* the right to work again received validation as a constitutional right but Costello J qualified it by noting, “this constitutional right is not an absolute one, however and it may be subject to legitimate legal constraints.”²¹ Is the maintenance of a harmful direct provision system a legitimate legal constraint? It is submitted that the system and its blanket denial of access to employment or even further education is an unjust attack on the right to work and to earn a living.

19 *G v An Bord Úchtála* [1980] IR 32, at 55-56.

20 *Murtagh Properties v Cleary* [1972] IR 330, at 336.

21 *Attorney General v Paperlink* [1984] IRLM 373, at 384.

Private Life and Privacy

It is submitted that the unannounced nature of room inspections are in breach of the right to privacy and the inviolability of the dwelling principle in Article 40.5. The Constitution does not specifically state a right to privacy but the courts recognise that the personal rights in the Constitution imply the right to privacy. A general right to privacy was invoked in *Kennedy v Ireland*.²²

[T]he right to privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, or by the requirements of the common good, and it is subject to the requirements of public order and morality²³

The qualifications set out above are justifiable but none are seen to be directly applicable to justify the intrusion of staff members into the personal space of protection applicants. This claim is further consolidated by the explicit protection of dwellings in Article 40.5: “the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law”²⁴

In the RIA rules, the procedure regarding room inspections is outlined as follows:

The Centre Manager must always keep the accommodation at an acceptable standard, for the benefit of all residents. This means that sometimes your room will be inspected by:

- the manager of the centre;
- staff appointed by the manager;
- staff from RIA;

All of these people will respect your privacy as much as they can. However, they will not always be able to warn you in advance that they need to inspect your room.

You must cooperate with all bedroom inspections.

For refugee applicants living in direct provision, their room is essentially their dwelling, as kitchen and toilet facilities are communal. In *The People (Attorney General) v O’Brien*, the meaning of dwelling was considered:

In a case where members of the family live together in the family home the house as a whole is for the purpose of the Constitution the dwelling of each member of the family. If a member of the family *occupies a clearly defined portion* of the house apart from the other members of the family, then it may well be that the part not so occupied is no longer his dwelling.²⁵

²² *Kennedy v Ireland* [1987] IR 587.

²³ *Ibid.*, at 592.

²⁴ Article 40.5 of Bunreacht na hÉireann.

²⁵ *The People (Attorney General) v O’Brien* [1965] IR 142, at 169 (emphasis added).

The rooms of the protection applicants are clearly their dwelling therefore as they occupy this space as a clearly defined portion of the overall centre. Dwellings of asylum seekers may be and are entered by a wide range of people and no legal justification can be given for doing so. Henchy J in *King v Attorney General* interpreted the phrase “save in accordance with law” to mean, “without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution.”²⁶

It is submitted that unannounced room inspections constitute a breach of a person’s constitutional rights. There appears to be no valid justification for this breach, the only reasoning provided being “the accommodation must be kept at an acceptable standard, for the benefit of all residents.” This does not seem to be an adequate justification for an outright breach of a constitutional right. Walsh J in *O’Brien* opined, “the vindication and protection of constitutional rights is a fundamental matter for all Courts established under the Constitution. That duty cannot yield to any other competing interest.”²⁷ This statement must urgently be adhered to in the context of this system of direct provision. Fundamental constitutional rights are being compromised in order to ensure minimum costs are incurred while hosting asylum seekers in Ireland.

Conclusion

It is submitted that the system of direct provision in Ireland is a disproportionate and unjust attack on constitutional rights. Inadequacies of the system were originally balanced with what was intended to be a time limited system for a maximum of six months. Now that this expectation has changed, the standard of the system must improve to ensure no further encroachment on the fundamental rights of the individual. A long-term solution may be a fast and efficient determination system that will deliver a expedient yet fair transparent process. However until that day comes, change is needed, so as not to hurt fundamental rights further.

(ii) European Convention on Human Rights

One of the arguments put forward by the applicants in *CA & TA* is that the direct provision system amounted to a violation of the applicant’s fundamental human rights. The applicants partially grounded this claim in the European Convention of Human Rights, stating that their rights under articles 3, 8 and 14 of the Convention had been breached. Article 3 of the Convention provides for the prohibition of torture and inhuman or degrading treatment, Article 8 provides for the right to respect for private and family life and Article 14 provides for the prohibition of discrimination. This section will consider Articles 3 and 8 in particular.

(1) Article 3 of the European Convention on Human Rights

Article 3 of the Convention states:

“Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

Article 3 constitutes an absolute prohibition on the infliction of torture and inhuman and degrading treatment and has frequently been asserted as one of the most important provisions in the Convention, as it “enshrines one of the most fundamental values of democratic

²⁶ *King v Attorney General* [1981] IR 233, at 257.

²⁷ [1965] IR 142, at 169.

societies.”²⁸ Some principles on the application of Article 3 can be derived from previous cases which have come before the European Court of Human Rights regarding Article 3 of the Convention. In the case *Ireland v UK*²⁹ it was stated:

ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is...relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, and in some cases, the sex, age and state of health of the victim.³⁰

In the case of *V v UK*,³¹ the court elaborated on the nature of inhuman and degrading treatment, stating

Treatment has been held by the Court to be ‘inhuman’ because... it was premeditated, it was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering and also ‘degrading’ because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliation and debasing them... The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account but the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.³²

From these cases it is clear that in order for treatment to fall within the ambit of Article 3 of the Convention, the degree of suffering inflicted on the victim, whether physical or mental, must be severe to the point that it degrades and diminishes their human dignity. The length of time which the inhuman and degrading treatment lasts is also of importance. Both judgments in *Ireland v UK* and *V v UK* suggest that the treatment must be prolonged over a period of time.

The case *M.S.S v Belgium and Greece*³³ is a recent and relevant authority on the interaction of Article 3 of the Convention with treatment by Member States of non-nationals. The applicant, M.S.S, entered the European Union through Greece where he subsequently traveled to Belgium, where he applied for asylum. In line with the Dublin II Regulation, the Belgian authorities sent M.S.S back to Greece, stating that, as M.S.S had first arrived in the European Union via Greece, it was Greece’s obligation to process the asylum application. Upon his arrival in Greece, M.S.S was placed in a detention centre which was overcrowded, dirty, had restricted access to water and toilet facilities, and where it was impossible to exercise any privacy. Additionally, the detainees in Greek detention facilities for Asylum Seekers were not adequately fed, and were not permitted to leave the detention facility while their application

²⁸ *Chahal v UK* [1997] 23 EHRR 413, at para. 79.

²⁹ [1980] 2 EHRR 25.

³⁰ *Ireland v UK* [1980] 2 EHRR 25 at para. 162.

³¹ [2000] 30 EHRR 121.

³² *Ibid.*, at para. 71.

³³ Application no. 30696/09 21st January 2011).

for asylum was being processed.³⁴ Upon M.S.S's eventual release from the detention facilities and issuance of an asylum seeker's card, M.S.S lived in poverty, with no support from the state, until he attempted to leave Greece with a false travel document and was returned to the detention facility.

Considering the application of Article 3, the Court reasoned that

Article 3 of the Convention requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.³⁵

The Court then found that the treatment of detainees by the Greek state was such a severe affront to the dignity of the detainees that it amounted to a breach of Article 3 of the Convention:

The Court considers that the conditions of detention experienced by the applicant were unacceptable. It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and the anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention.³⁶

Submission of the Applicants that Direct Provision Constitutes an Infringement of Article 3 of the Convention.

The applicants submitted that due to the strict rules enforced by the Reception and Integration Agency as part of direct provision, they felt that they suffered a loss of dignity and control over their lives. The applicants pointed to the fact that people living under direct provision do not have a choice regarding where they live, who they share rooms with, and what and when they eat.³⁷ In addition to this, the rules regulating visitors to the centres and, in particular, rules governing absences of residents from the accommodation centre restricted the control which residents exercised over their personal lives and their leisure time. Residents must register at the centre on a daily basis, and if they wish to spend a night away from the centre they must first refer to the centre manager and provide an address for where they are staying³⁸. The applicants submitted that this had the effect of isolating the residents from the rest of society and prevented them from forming normal relationships with others.³⁹ In her affidavit, the applicant stated that this strict regulation of the residences has a "dehumanising"

³⁴ *Ibid.*, n.10 at paras 161-167.

³⁵ *Ibid.*, at para 221.

³⁶ *Ibid.*, at para 233.

³⁷ [2014] IEHC 532, at para. 3.10"8.

³⁸ [2014] IEHC 532, at para. 3.10"12.

³⁹ [2014] IEHC 532, at para 3.10"9.

effect on her, which “eats away at [her] dignity and [her] capacity to have control and choice over [their] lives.”⁴⁰ The applicant additionally stated that the cramped conditions of her bedroom, which she must share with other people and children, along with the length of time spent in these living arrangements (the applicant at one time spent seven months sharing a bedroom and bathroom with 3 other people, prior to the birth of her son) had an extremely adverse effect on her mental health. She states that she has found these living conditions “extremely difficult” and they have left her “mentally drained.” The applicants submitted that this control exerted by the RIA over the residents through direct provision, which monitored and governed many fundamental aspects of their lives was so harmful to the mental state of the applicant and the development of her son, that it constitutes a breach of Article 3 of the Convention.

Judgment Of the High Court on the question of whether direct provision amounts to a breach of Article 3 of the Convention

The High Court dismissed the applicant’s claim that direct provision constituted inhumane and degrading treatment. The Court differentiated *CA & TA* from *M.S.S* on the basis that in the latter case the claims made by the applicant and the facts alleged the case, which were supported by various reports by non-governmental organisations, were relatively uncontested by Greece, whereas the allegations that direct provision constituted inhumane and degrading treatment were vehemently denied in *CA & TA*. Additionally, the Court distinguished the two cases on the basis that the facts in *M.S.S* were so shocking that the ECtHR considered it unnecessary for the applicant to prove that the treatment had such a negative effect on his mental or physical health, or his sense of dignity to constitute inhumane or degrading treatment. With regards to *CA & TA*, Mac Eochaidh J reasoned that the facts constituted a “sharp contrast” to those presented in *M.S.S* and that there was no evidence of “startling or alarming examples of physical or mental abuse.”⁴¹ The judge reasoned that in order for the applicants to succeed in their claim that direct provision amounts to a breach Article 3 of the convention, they must prove that the treatment reached a minimum level of severity.

Adopting a narrow approach to this burden of proof, Mac Eochaidh J stated, “in order for an applicant to succeed in a claim that treatment is inhuman, the treatment must be proven to have been premeditated, applied for hours at a stretch and caused either actual bodily injury or intense mental suffering. . . . No such case was advanced and no evidence was adduced which might support such a finding. In other words insofar as the applicants say that ‘direct provision’ is inhuman treatment, this claim must fail.”⁴²

With regard to whether direct provision amounted to degrading treatment, the Judge stated that the applicants must prove that direct provision “either humiliates or debases them in a manner which shows a lack of respect for human dignity, or that ‘direct provision’ “arouses feelings of anguish or inferiority capable of breaking [their] moral and physical resistance.”⁴³ Mac Eochaidh J stated that as the applicants had not pleaded that direct provision humiliates or debases them or provided any evidence that direct provision lacks respect for human

40 [2014] IEHC 532, at 3.10”5.

41 [2014] IEHC 532, at para 7.21.

42 [2014] IEHC 532, at para 7.23.

43 [2014] IEHC 532, at para 7.25.

dignity. In light of this, Mac Eochaidh J found that the contention that direct provision constitutes degrading treatment, must fail.

(2) *Article 8 of the European Convention of Human Rights*

Article 8 of the ECHR provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁴⁴

Unlike Article 3, Article 8 of the Convention is not an absolute provision, and an individual's right to respect for their private life and family life can be qualified by the state if it is necessary in a democratic society, and is in the interests of national security, public safety, economic wellbeing of the country, for the prevention of crime and disorder and for the protection of health or morals.

As article 8 is a qualified right, Member States will have a margin of appreciation in terms of to what extent an individual's right under Article 8 can be restricted. Articulation of the margin of appreciation doctrine can be found in *Handyside v UK*.⁴⁵ The breadth of the margin of appreciation afforded to member states to restrict convention rights will depend on the aim and the nature of the restriction. As was established in *Sunday Times v UK*,⁴⁶ the margin of appreciation and the amount of discretion afforded to a Member State to restrict the convention rights of individuals will vary according to the right at stake and the aim of the state measure restricting this right. As was acknowledged in *Handyside v UK*, a wide margin of appreciation will be granted to states where the aim of the restriction is to protect public morality:

it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.⁴⁷

⁴⁴ European Convention of Human Rights, Article 8.

⁴⁵ *Handyside v UK* [1976] ECHR 5.

⁴⁶ *Sunday Times v UK* (1979-80) 2 EHRR 245.

⁴⁷ [1976] ECHR 5, at para. 48.

This said, a state's margin of appreciation to restrict rights will be narrow if the restriction affects "a most intimate aspect of private life,"⁴⁸ or if there is a consensus across Europe on the morality of a particular practice or way of life, the discretion of a member state to restrict this practice or way of life will be further limited. For example, in *Goodwin (Christine) v Uk*,⁴⁹ the Court had regard to the fact that there was a strong European Consensus which agreed that transsexuals had a right to change their Birth Certificates to acknowledge their new gender, when restricting the margin of appreciation of the UK to restrict the applicant's rights under Article 8. Additionally, when the court considers whether a law imposed by the state restricting the convention rights of an individual or individuals is in breach the convention, regard will be had to whether the restriction was prescribed by law, whether it was necessary in a democratic society and whether the restriction was proportionate to the legitimate aim to be achieved.⁵⁰

Caselaw on Article 8 ECHR

Numerous cases outlined below will illustrate general principles of application of Article 8 of the Convention.

With regards to family rights, the case *Marckx v Belgium*,⁵¹ established that article 8 not only prevents member states from interfering with family life (outside the narrow caveats provided for by article 8.2) but it additionally imposes positive obligations on Member States to ensure effective respect for the family life of individuals within the state:

By proclaiming in paragraph 1 the right to respect for family life, Article 8 (art.8-1) signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2 (art.8-2)... Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life... This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties... it must act in a manner calculated to allow those concerned to lead a normal family life.⁵²

Thus it was held in *Marckx v Belgium* that under Article 8, Member States are obliged to "act in a manner calculated to allow these [family] ties to develop normally."⁵³ In addition to this obligation on member states, *Olsson v Sweden* established that respect to family life included the right of family members to live together and "enjoy each other's company."⁵⁴

48 *Dudgeon v Uk* (1982) 4 EHRR 149 at para 59

49 *Goodwin v UK* [2002] ECHR 588.

50 See, for example *A, B and C v Ireland* (2010)

51 *Marckx v Belgium* [1979] 2 EHRR 330.

52 [1979] 2 EHRR 330, at para. 31.

53 [1979] 2 EHRR 330, at para 45.

54 *Olsson v Sweden* 11 EHRR 259 para 59.

Whilst the Court has developed a broad interpretation of what constitutes respect for family life and acknowledges societal changes in prevailing attitudes as to what constitutes a family and family life, the state's positive obligations to respect family life under Article 8 does not encompass a right to financial support from the state for the purposes of family life. As Harris puts it, "the state's positive obligation stops short of support for the substance of family life."⁵⁵ This was found to be the case in *Andersson and Kullman v Sweden*,⁵⁶ where the Commission dismissed the argument of the applicants that by virtue of Article 8, they were entitled to financial support from the state in order that one parent could stay home and raise the children instead of a day care scheme provided by the state so that both parents could work.⁵⁷

The case *Niedzwiecki v Germany*,⁵⁸ however, may be of some assistance to the claim made by the applicants in *CA & TA* with regards to her right to respect for her family life. In *Niedzwiecki*, the court had to consider whether the denial of a child benefit payment to aliens without a resident permit was in line with the Convention. The applicant in that case submitted that the German government, in refusing to pay him child benefit were violating his right to respect for his family life under Article 8 and that this practice was discriminatory and a violation of article 14 of the Convention. The German government argued that the distribution of child benefits did not fall within the scope of Article 8 of the Convention as "the State's general obligation to promote family life did not give rise to concrete rights to specific payments."⁵⁹ The Court rejected this argument, stating that the granting of child benefits on the part of the state "demonstrate[s] their respect for family life within the meaning of Article 8 of the Convention" and went on to hold that the withholding of child benefit payment violated the applicant's Article 8 rights and constituted unlawful discrimination within the meaning of Article 14 of the Convention.⁶⁰

Additionally, the case *Moldovan and Others v Romania*⁶¹ assists the case of the applicants. This case established that unacceptable living conditions provided by the state will fall within the ambit of Article 8 and respect for family and private lives and that depending on the conditions of the accommodation, the intolerable living conditions may amount to inhumane and degrading treatment within the meaning of Article 3 of the Convention. Following the destruction of their houses and forceful expulsion from their village, the applicants in *Moldovan* were obliged to live in accommodation provided by the state, in which the living conditions were so intolerable that it amounted to an unjustified breach of Romania's obligation to respect the family and private lives of the applicants. The ECtHR found:

55 Harris et. al *Law of the European Convention On Human Rights* second ed. Oxford University Press 2009 at 395.

56 *No 11776/85*, 46 DR.

57 *Supra*.

58 42 EHRR 679.

59 *Niedzwiecki v Germany* 42 EHRR 679 para 27.

60 *Niedzwiecki v Germany* 42 EHRR 679 paras 30-33.

61 (Applications nos. 41128/98 and 64320/01 Judgment No.2, 12 July, 2005).

“[T]he applicants’ living conditions... in particular were severely overcrowded and unsanitary environment and its detrimental effect on the applicant’s health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement”⁶²

Regarding the right to respect for private life under Article 8, the European Court of Human Rights has afforded a broad interpretation to what constitutes private life. This broad interpretation, which includes matters involving sexuality, identity and privacy in and of itself, can be gleaned illustrated from a variety of cases. In *Van Oosterwijck v Belgium*,⁶³ where the court held that Belgium’s non-recognition of the applicant’s gender reassignment breached the applicant’s Article 8 rights as the state “refused to recognise an essential element of his personality.”⁶⁴ In *Odievre v France*,⁶⁵ it was acknowledged that knowing one’s identity through knowledge of parentage fell within the ambit of respect for privacy under Article 8. In *Dudgeon v Uk*,⁶⁶ the court recognised that any law intruding on an individual’s sexual relations or sexual life, which is a most “an essentially private manifestation of the human personality”⁶⁷ would be in danger of breaching Article 8 of the Convention. Furthermore, *X v Iceland*⁶⁸ established that there may be some positive obligation on member states to ensure that a measure or law does not restrict a person’s ability to form relations with others, as Article 8 “comprises also, to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one’s own personality.”⁶⁹

The broad notion which the European courts afford to privacy is well illustrated in the case *Von Hannover v Germany*,⁷⁰ in which the applicant’s privacy rights came into conflict with the competing right to freedom of expression of the press:

“The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being’s personality. That protection... extends beyond the private family circle and also includes a social

62 *Moldovan and Others v Romania* Applications nos. 41128/98 and 64320/01 Judgment No.2, 12 July, 2005) para 110

63 40 (1980) 3 EHRR 557

64 *Van Oosterwijck v Belgium* 40 (1980) 3 EHRR 557

65 [2003] ECHR 86.

66 [1981] ECHR 5.

67 [1981] ECHR 5, at para.52.

68 (1976) 5 DR 86

69 *Von Hannover v Germany* (2005) 40 EHRR 1

70 (2005) 40 EHRR 1

dimension. The Court considers that anyone... must be able to enjoy a 'legitimate expectation' of protection and respect for their private life."⁷¹

Submission by the Applicants that Direct Provision breached their rights under Article 8 of the Convention

The applicants complained that the direct provision system violated their rights under Article 8 by curtailing their ability to enjoy privacy within their home. Additionally, Ms. A asserted that certain features of direct provision system frustrated her ability to raise her son in a satisfactory manner and thus did not respect her family life. The applicants submit that the steps taken by the RSA, outlined below, fail to respect their privacy and family rights, and are not proportionate to the aim to be achieved and are therefore not in line with the conditions laid down by article 8.2

In their affidavits and written submissions, the applicants referred to several features of direct provision in order to establish that the system breached their right to privacy. Ms. A first stated that due to the cramped nature of her bedroom, with which she shared with numerous different people over the course of her stay under direct provision, it was impossible to enjoy any sort of privacy in the centre.

Secondly, it was asserted by the applicants that the rule obliging residents to sign a register every morning, and the rule obliging residents to inform the management of the centre of their absence from the centre for an evening amounted to the monitoring of the residents and invaded their privacy.

Thirdly, the applicants asserted that the rule prohibiting guests from visiting the residences in any part of the centre except a designated visiting room, infringed on the resident's ability to form normal, personal relations with others and amounted to a breach of their privacy.

Finally, it was submitted by the applicants that the practice on the part of the management of inspecting the bedrooms of the residents, oftentimes without notice and without the consent of the residents, constituted a significant invasion of privacy and breached the applicant's right to privacy.

It was submitted on the part of the applicants that the restrictions or invasions of privacy stated above cumulatively amounted to a breach of the applicant's Article 8 convention rights. It was additionally submitted, on the part of Ms. A, that direct provision unjustly interferes with her ability to raise her son, and has a negative impact on his growth and development, thus constituting a breach of her right to family life under article 8 of the convention. Ms. A submitted that she was concerned that her son's nutritional and developmental needs were not adequately provided for under direct provision, stating that her weekly allowance was not of a sufficient sum for her to feed and clothe her son in an adequate manner and that this "served to grossly impair the establishment and enjoyment of normal family life and distort the role and parenting function of residents."⁷² Furthermore, Ms. A stated that the conditions of the centre were not suitable for the development of her son as there was no area for him and other children in the centre to play in, nor was there any educational materials provided by the centre for her son or other children at the centre. Ms. A submitted, at paragraph 3.10.5, that "the isolation from the wider community and society is not an appropriate or suitable environment for the proper growth and development of my young son and it is an abnormal environment with respect to family life." Ms. A additionally stated that she has "grave concerns that his development and growth is badly affected by the direct provision living

71 (2005) 40 EHRR 1, at para. 69.

72 [2014] IEHC 532, at para 9.12.

environment and the conditions which are not in the best interests of his welfare and development.”⁷³

Judgment of the High Court with Respect to the Claim that Direct Provision is in Breach of the Article 8 Rights of the Applicants

Mr. Justice MacEochaidh found that in the case of the unannounced room inspections, the requirement to sign a daily register and the obligation to inform management of an absence from the centre was not proportionate to the aim to be achieved by these measures – namely the monitoring of the residents and the assurance that the centre is being used to its full capacity. The Judge noted that the principle of proportionality “requires as little interference with a right as possible” and that the inspection regime carried out by the management under RIA rules “is well beyond what is necessary to reduce risks to persons living in the communal environment and breaches constitutional and ECHR rights to privacy and respect for private life.”⁷⁴

MacEochaidh J found that the practice of obliging the residents to sign the daily register, to report an absence to the management and the rule prohibiting guests after certain hours and outside of a designated areas constituted an unnecessary invasion on the privacy of the residences and that the monitoring of the residents and visitors to the centre could be monitored in ways that did not amount to such an affront on the privacy of the residents. The proposition, however, that the overall effect of direct provision violates the resident’s rights to privacy, private life and family life, was rejected by the Court. MacEochaidh J reasoned that although the state is under an obligation to provide food and shelter to “destitute protection applicants,”⁷⁵ but that this did not impose an obligation on the state to provide a certain standard of accommodation so as to ensure that the private life and rights to privacy of the residents was upheld, and that the state was entitled to provide this food and shelter on a communal basis. With regard to the complaint by the applicants of the requirement of dining with the other residents at specified times, the Judge ruled that the State had justified the prohibition on cooking in private rooms, for reasons of cost, fire and safety considerations and sanitation considerations. On the communal nature of living under direct provision, MacEochaidh J stated:

There are many obvious disadvantages, discomforts and interferences which inevitably flow from communal living. With the exception of the matters that I have addressed at section 8 above, my view is that the State is entitled to provide food and shelter in the manner chosen, notwithstanding the interferences with private and family lives thereby entailed. All of these disadvantages flow inevitably from communal living. Their inevitability is their justification and so long as they do not cause injury, they are lawful... Where unavoidable interference is found, no breach of rights occurs where the interference does not cause actionable harm and the court has found, in the context of the Article 3 claim, that the applicants have failed to prove injurious negative effects arising from ‘direct provision’...⁷⁶

73 [2014] IEHC 532, at para 3.10.12.

74 [2014] IEHC 532, at para 8.8.

75 [2014] IEHC 532, at para 9.4.

76 [2014] IEHC 532, at para 9.9-9.11.

On the question of whether direct provision constituted an unjustified interference with the family life of the applicants, the High Court held that, as per *Costello-Roberts v UK*⁷⁷ the burden was on the applicants to prove that the treatment of the complainant resulted in adverse effects for his physical or moral integrity which were sufficient to bring him under the scope of Article 8. The Court ruled that as the applicants had failed to produce any expert or professional evidence which supported their proposition that direct provision unjustly infringed on the family lives of the applicants and that “more should have been done to persuade the Court as to the negative psychological effects of such an environment.”⁷⁸

Conclusion

The Court rejected the claim of the applicants that direct provision amounted to inhumane and degrading treatment within the meaning of Article 3 of the ECHR, and rejected, in part, the contention that direct provision amounted to a violation of respect for the private and family life of the applicants. This rejection, however, did not rule out the possibility that it might be established in a future case that direct provision breaches Articles 3 and 8 of the European Convention of Human rights. Rather than a rejection of the proposition that direct provision could theoretically violate the Article 3 or 8 rights of the applicants, the Court’s dismissal of the applicant’s claim appeared to be much more grounded on the lack of evidence adduced by the applicants to support their claims which

places the Court in an impossible position to invite it to conclude that there is some serious deficiency in the environment in Eglinton [the direct provision accommodation centre] when I have no evidence other than the mere assertion of Ms. A and the submission of lawyers that this is so.⁷⁹

This requirement for the applicants to adduce expert and professional evidence, however, may prove problematic, given practical constraints which may arise through lack of financial resources, language and communication barriers and a lack of information resources. While *CA & TA* failed, in the Courts view, to overcome the burden of proof that direct provision had a sufficiently adverse effect on their physical, moral or mental integrity to bring them within the scope of Articles 3 and 8 of the Convention, it would seem that this judgment would in no way preclude a future applicant from bringing a claim to court that direct provision infringes the rights of those living under direct provision, assuming that any future applicant would be able to adduce sufficient expert and professional evidence to support their claims.

(iii) EU Charter of Fundamental Rights

The Charter of Fundamental Human Rights is a single document that brings together the civil, political, social and economic rights protected in the EU. The applicant sought a declaration that the direct provision scheme was in breach of their rights pursuant to the Charter, noting Articles 1, 3, 4, 7, 15, 20, 21, 24, and 41 in particular. These rights are listed under the headings of dignity, freedoms, equality and citizens’ rights.

⁷⁷ (Application no. 13134/87, 25 March 1993).

⁷⁸ [2014] IEHC 532, at para 9.19.

⁷⁹ *Supra*

Judgment

Article 51 of the Charter states that it only applies when the state is “implementing Union law.” The applicants sought to establish that they desired protection of the state pursuant to Council Directive 2004/83/EC (the Qualification Directive).⁸⁰ This is a Directive that aims to harmonise the criteria by which Member States define who qualifies as a refugee; it gives minimum standards for qualification.

The applicants argued that as they are in the state to pursue EU law rights that they are entitled to the protections of European Law. They argued that the treatment of protection applicants in the state is linked to the Common European Asylum System (CEAS) established by Union law.

The rules on the CEAS are made under Title V Part III of the Treaty on the Functioning of the European Union. Protocol No. 21 “On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice”⁸¹ excuses Ireland from participation in this section. Ireland is permitted to opt in to participate in any particular measure pursuant to Title V of TFEU. It has opted-in to the Qualification Directive which is connected to the CEAS. It did not opt-in to the Reception Conditions Directive (Council Directive 2003/9/EC).⁸² This establishes common standards for the living conditions of asylum applicants.

The applicants argued, using *Case-36/02 Omega Spielhallen*⁸³ and *Case C390/12 Robert Pflieger*,⁸⁴ that the charter applied if there is a derogation from EU law. However, the court ruled that Protocol 21 is consistent with EU law.

Why is it not applicable?

The main issue here is that the Charter was not in fact applicable. Article 51 has been criticised as vague and it is hard to establish when states are “implementing EU law.” While the applicants sought to present a broad interpretation, implying that the Charter applied when the state was acting within the scope of EU law, the judge took a narrower view. He stated that Protocol 21 allowed Ireland to exempt itself from participation in the Reception Directives, and hence to establish the Charter as applicable would create an incorrect EU law obligation on Ireland.

The judge acknowledged that the obligation to provide support is related to an EU obligation and facilitates the implementation of the Qualification Directive, but providing the support does not mean that the state is implementing EU law.

The rights under the Charter that the applicants claimed were violated are also protected under the ECHR and the Irish Constitution. The judge found that the system of direct

⁸⁰ Council Directive 2004/83/EC of 30 September 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12-304/23.

⁸¹ Protocol on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice [2010] OJ C 83/295.

⁸² Council Directive 2003/9/EC of 6 February 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States [2003] OJ L 31/18-31/25.

⁸³ *Case-36/02 Omega Spielhallen* [2004] ECR I-09609.

⁸⁴ *Case C390/12 Robert Pflieger* (Court of Justice, 30 April 2014).

provision did not breach these rights. Article 41 of the EU Charter of Fundamental Rights, ‘the right to good administration’ which is not covered by the Constitution or the ECHR, was violated in terms of the complaints handling procedure. However, this was not established using the CFEU but using principles of domestic law.

This judgment regarding whether or not the Charter applies is a narrow one. There is certainly a link between provisions for asylum seekers and EU law even though the direct provision system is governed by the State. The fact that the State’s actions are within the scope of EU law and yet one’s fundamental rights as stated by the EU are inapplicable in such a case seems irrational.

It is not logical that in cases where EU legislation impacts upon how a state performs a function, without resulting in immediate control regarding state implementation of the procedure, that one cannot rely on one’s fundamental rights as protected by the EU.

If a Member State is acting at all within the scope of EU law, it should not act in a way contrary to the fundamental rights enshrined in the Charter. Fundamentally, it can be argued that human rights should not be suspended such that they only become applicable in certain situations.

Although under Protocol 21 Ireland is exempt from the chapter under which the rules on the Common European Asylum System are made, it has opted-in to all bar one of the measures. This would imply that Ireland is effectively participating in the CEAS. In the Court of Justice judgment *NS v Secretary of State for the Home Department*⁸⁵ it was stated the ‘raison d’être’ of the EU and the CEAS in particular, is amongst others things, based on fundamental rights. Therefore it is unconvincing that asylum seekers should not be protected under the EU Charter of Fundamental Rights.

In the Northern Irish case *Judicial Review by ALJ and Others*,⁸⁶ in which the UK Border Agency sought to return the applicants to the Republic of Ireland under the Dublin Regulation II, applicants submitted that direct provision violated the right to private and family life and would subject applicants to degrading and inhumane treatment. Although the judge was not prepared to hold that direct provision is systematically deficient, the judge noted, “figures and other reports are disturbing.”

The Reception Directive

This section of the judgment raises the concerning issue that Ireland has failed to opt-in to the Reception Directive. This sets minimum standards for the reception of asylum seekers regarding housing, health care and the right to work during the asylum procedure. Ireland opted-out of this procedure under Protocol 21. Denmark is the only other Member State to opt-out. The principal reason given by the government for opting-out was that extending the right to work to asylum seekers would “almost certainly have a profoundly negative impact on application numbers.” The Minister for Justice and Equality stated that any change in public policy in this area would have to have regard to the large amount of people unemployed in Ireland.⁸⁷ There is an unwillingness to give asylum seekers the right to work as it is felt this would lead to an increase in refugees and impact on Irish citizens’ access to employment.

⁸⁵ Joined cases (C 411/10) and (C 493/10), *NS v Secretary of State for the Home Department and ME and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] ECJ I-13905.

⁸⁶ *Judicial Review by ALJ and Others* [2013] NIQB 88.

⁸⁷ Alan Shatter TD, Minister for Justice and Equality, Parliamentary Question No.236, Written Answers, 27 March 2013.

The European Commission in 2008 offered reasons as to why migrant employment would benefit the state, promoting self-sufficiency among asylum seekers. They also noted that mandatory unemployment imposes costs on the state.⁸⁸ Participation in the work force is “fundamental to individual self-esteem and dignity.”⁸⁹ Employment would be particularly beneficial to asylum seekers’ health and well-being, as it gives them independence and self-respect.⁹⁰ This is seriously needed among asylum seekers living in direct provision for long periods of time, as the lack of privacy and control over their own lives has led to high levels of anxiety, depression, frustration, aggression and social withdrawal.⁹¹ Sue Conlan, CEO of the Irish Refugee Council, stated the decision to opt-out put Ireland “out of line” with other EU countries and that the failure to sign up “removes asylum seekers in Ireland from a number of important protections, including the opportunity to work and be self-sufficient if their application is delayed through no fault of their own.”⁹² Furthermore, in its third report on Ireland, the European Commission against Racism and Intolerance reiterated its recommendation that the Irish authorities consider enabling asylum seekers to engage in paid employment.⁹³

(b) Is Art 15.2 of the Constitution breached because direct provision is an administrative scheme without legislative basis?

(i) Delegation of legislative power?

Introduction

‘Today’s public opinion, though it may appear as light as air, may become tomorrow’s legislation’⁹⁴

At section 14 of the judgment in *CA & TA*, the plaintiffs proposed the argument that direct provision constitutes a breach of the separation of powers on the grounds of the delegated legislation doctrine. This claim was ultimately unsuccessful, with Mac Eochaidh J holding, “the mere fact that ‘direct provision’ could have been placed on a legislative footing does not mean that this must happen.”⁹⁵ The academic commentary that has been hitherto published on

⁸⁸ European Commission, *Amended proposal for a directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers* (2004).

⁸⁹ United Nations High Commissioner for Refugees Discussion Paper *The Right to Work for Refugees and Asylum Seekers: A comparative view* (2006).

⁹⁰ UNHCR *Reception of Asylum Seekers* (2001).

⁹¹ Department of Health/ National Institute for Mental Health in England *Celebrating Our Cultures: Guidelines for Mental Health Promotion with Black and Minority Ethnic Communities*, Department of Health (2004).

⁹² Shannon Waters, “Asylum seekers in Ireland will not benefit from measures negotiated under Irish Presidency” (Irish Refugee Council, 27 March 2013) < <http://www.irishrefugeecouncil.ie/news/asylum-seekers-in-ireland-will-not-benefit-from-measures-negotiated-under-irish-presidency/1851> > accessed 11 March 2014.

⁹³ European Commission against Racism and Intolerance, *ECRI Report on Ireland* (2013).

⁹⁴ Earl Newsom, *American Petroleum Institute Newsletter* (1963).

⁹⁵ [2014] IEHC 532 at [14.25] (Mac Eochaidh J)

this case appears to suggest that Mac Eochaidh J was correct in deciding that direct provision is not in breach of the separation of powers.⁹⁶ However, it is submitted that this basis remains a strong ground upon which the constitutionality of direct provision can be challenged and thus warrants further analysis. This section intends to examine the non-delegation doctrine, refute the reasons given for its failure in the High Court and propose ways in which this argument may be strengthened.

The Non-Delegation Doctrine

The non-delegation doctrine stems from Article 15.2.1⁹⁷ of the Constitution, which states, “the sole and exclusive power of making laws for the state is hereby invested in the Oireachtas: no other legislative authority has power to make laws for the state.” Respect for this principle can be traced as far back as the writings of John Locke, who wrote that

the legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.⁹⁸

It follows from this that, within the traditional model of a separation of powers, only the legislative power may create laws and only the executive may implement them. Carolan comments that

delegated legislation, it would appear, is a matter of serious democratic and constitutional concern. It is variously argued to undermine democracy, to undercut the protections provided by the separation of powers and to increase the prospect of arbitrary, unfair or unaccountable government.⁹⁹

In *Cityview Press v An Chomhairle Oiliúna*,¹⁰⁰ the much discussed ‘principles and policies test’ was established. This test effectively stated that matters of principles and policies had to be dealt with by the primary legislation of the Oireachtas and that details could be filled in by

⁹⁶ See Liam Thornton, “C.A & T.A: The Direct Provision Case” (2014) 4 *Irish Journal of Family Law* 116.

⁹⁷ Art 15.2.1.

⁹⁸ John Locke, *The Second Treatise of Government* (1690).

⁹⁹ Eoin Carolan, “Democratic Accountability and the Non-Delegation Doctrine” (2011) 1 *DULJ* 220.

¹⁰⁰ *Cityview Press v An Chomhairle Óiliúna* [1980] IR 381.

secondary legislation.¹⁰¹ The doctrine was further applied in *McDaid v Sheehy*,¹⁰² in which section 1(d) of the Imposition of Duties Act¹⁰³ was found to be unconstitutional. Up until very recently, *Laurentiu v Minister for Justice*¹⁰⁴ remained the only case in which legislation has been struck down on the basis of this provision of the Constitution. The appellant had been refused both asylum and leave to remain in the country,¹⁰⁵ and thus challenged section 5(1)(e) of the Aliens Act 1935¹⁰⁶ as a breach of article 15.2.1. This section states that

The minister may, if and when he thinks proper, do by order (in this Act referred to as an aliens order) all or any of the following things in respect either of all aliens or of aliens of a particular nationality or otherwise of a particular class, or of particular aliens, that is to say:

(e) make provision for the exclusion or the exclusion or the deportation of such aliens from Saorstát Éireann and provide for and authorise the making by the minister of orders for that purpose.

Looking at the wording of this provision nowadays, it is not difficult to see why it was a clear and obvious breach of the separation of powers. Carolan comments that “Laurentiu seems to show that the Supreme Court is of the view that the doctrine retains some constitutional or democratic value” whilst also conceding that the judgment acknowledges the limitations of the traditional doctrine.¹⁰⁷ The case of *Leontjava v DPP and Chang v DPP*¹⁰⁸ followed, which considered whether section 5(1)(h) of the Aliens Order 1946 breached the ‘principles and policies test’ and thus article 15.2.1^o. The applicants were initially successful in the High Court, however the Supreme Court held on appeal that there was no breach of the test and that the policy was plain.¹⁰⁹ Doyle does not agree with this decision, stating that the Supreme Court “made the false inference of concluding that the primary legislation dealt with all matters of principle and policy, simply because that legislation dealt with some matters of principle and policy”¹¹⁰ It is interesting that much of the case law dealing with this case law involves the issue of immigration and asylum seekers.

101 Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Claurus Press, 2008) 313.

102 *McDaid v Sheehy* [1991] 1 IR 1.

103 The Imposition of Duties Act.

104 *Laurentiu v Minister for Justice* [1999] 4 IR 26.

105 [1999] 4 IR 26 (Geoghegan J).

106 The Aliens Act 1935, s 5(1)(e).

107 Carolan, N64.

108 *Leontjava v DPP and Chang v DPP* [2004] 1 IR 591.

109 Doyle, N66, ay 318

110 *Ibid.*

Recent Applications of the Non-Delegation Doctrine

There are a number of recent Irish cases that suggest that the courts are continuing to apply the non-delegation doctrine. *John Grace Fried Chicken v Catering JLC*¹¹¹ somewhat rejuvenated the doctrine in 2011. This case involved a challenge to multiple sections of the Industrial Relations Act 1946 on the grounds that they were, *inter alia*, in breach of article 15.2.1 of the Constitution. Feeney J held that

this is a case where the delegated power is excessive. Such a delegation would be lawful if the Act delegating the power had either in 1946 or by subsequent amendment provided policies or principles to guide, inform and direct the Labour Court or the joint labour committees established under the Act of 1946. If that had occurred then those expert bodies could have used their expertise and knowledge to fill in the details, on an ongoing basis, based upon principles or policies identifying standards, goals, factors and purposes laid down by statute. As that did not occur, the delegation in issue in this case amounts to a transfer of power. The legislation in issue in this case permits not even the Executive to be at large but the Labour Court and permits that body to make laws.¹¹²

Thus it was found that the relevant sections of the 1946 act were invalid. *McGowan v Labour Court Ireland*¹¹³ is a case with similar facts: here, section 3 of the aforementioned 1946 act was found to be in violation the non-delegation doctrine. Not all notable applications of the doctrine have been successful, however; in *O'Connell v The Turf Club*¹¹⁴ the Applicants sought judicial review to challenge, *inter alia*, sections 39 and 45 of the Irish Horseracing Industry Act as in breach of Article 15.2.1¹¹⁵. Ultimately, McGovern J rejected this argument, stating, "one cannot ignore the fact that the Rules of Racing are rules governing a sport (albeit a professional sport) which more properly come within the sphere of control of the body or bodies governing the sport and not the Oireachtas, nor indeed the Courts."¹¹⁶ Recently, since *CA & TA*, the Court of Appeal passed the controversial judgment of *Bederev v Ireland*¹¹⁷ which held that a section of the Misuse of Drugs Act 1977¹¹⁸ was in breach of the Article 15.2.1⁰ as it sought to give the government law making powers constitutionally vested solely in the Oireachtas.¹¹⁹ This decision rendered certain drugs that were criminalised under this section 2(2) of the act (including ecstasy, ketamine and certain headshop drugs) legal for

111 *John Grace Fried Chicken Ltd v Catering JLC* [2011] IEHC 277.

112 IEHC 277 at para. 33, per Feeney J.

113 *McGowan v Labour Court Ireland & anor* [2013] IESC 21.

114 *O'Connell v The Turf Club* [2014] IEHC 175.

115 The Irish Horseracing Industry Act 1994, ss. 39 & 45.

116 [2014] IEHC 175 at para 33, per McGovern J.

117 *Bederev v Ireland* (Court of Appeal, 10th March 2015, not yet reported at time of writing).

118 The Misuse of Drugs Act 1977, s. 22.

a short period pending the passing of emergency legislation. This case proves that the courts may be willing to invoke the non-delegation doctrine, even where there are far-reaching and potentially troublesome consequences. Declaring direct provision unconstitutional would create a challenge for the government and put the state to large expense, but the Court of Appeal's decision in *Bederev* shows that the doctrine may be applied despite its consequences.

The non-delegation doctrine argument in CA & TA

In this case, the argument as outlined above was advanced. Direct Provision has been criticised from its inception as having no legislative basis but this issue has not been presented to the courts until this case. This case differed from much case law surrounding the non-delegation doctrine, as there was no challenge to the constitutionality of legislation, but rather – there is no legislation whatsoever. This is a greater breach of the separation of powers as the Oireachtas did not legislate for direct provision at all – it is a brain-child of the executive power alone. Counsel for the Respondent submitted that the case law discussed above should not apply as it relates “to the exercise of delegated legislative power and not to executive power.”¹²⁰ However, it is submitted that direct provision cannot continue without a legislative footing. Ultimately, the argument was rejected for a number of reasons which are analysed below.

From the outset, the applicant's argument that direct provision should be placed on a legislative footing due to the fact that it affects fundamental rights was rejected due to a lack of authority to support it. However, there are many other schemes and institutions governing fundamental human rights that have been placed on a statutory footing. It is widely accepted that the right to education is a fundamental human right,¹²¹ and our Constitution solidifies this right in Article 42.¹²² In *CA & TA*, the counsel for the respondents alluded to the fact that national school education was administered without a statutory basis for many years “although it regulated the constitutional right to free primary education and involved the expenditure of vast sums of money.”¹²³ However, eventually national education was placed on a statutory footing in the Education Act 1998.¹²⁴ It is submitted that the fact that national education was ultimately codified could be used to strengthen the argument that direct provision should be placed on a legislative basis – it is clear that there was a need for the 1998 Act to regulate and legitimise the fundamental right to education. This is a strong example of where legislation was ultimately needed to regulate a fundamental right. There are other examples of where a fundamental right was placed on a statutory function, such as the right to fair and just working conditions, which has been given a statutory footing in

119 <http://www.irishtimes.com/news/crime-and-law/courts/district-court/significant-health-risks-spur-emergency-law-on-drugs-varadkar-1.2133353> (visited 11th March 2015).

120 [2014] IEHC 532 at para 14.7, per Mac Eochaidh J.

121 See The United Nations Declaration of Human Rights, the Convention on the Rights of the Child and the European Convention on Human Rights.

122 Art 42.

123 [2014] IEHC 532 at para 14.27, per Mac Eochaidh J.

124 The Education Act 1988.

numerous Acts of the Oireachtas between 1993 and 2014.¹²⁵ Whilst there is no explicit provision stating that legislation is required where state action affects fundamental rights, looking at the way in which the Oireachtas has dealt with other rights it may be argued that legislating for these kinds of issues is, at worst, a custom and, at best, a norm.

One of the reasons laid down by Mac Eochaidh J for the failure of this argument is based on his observation: “the use of an administrative scheme to execute government policy, even where fundamental rights are involved is not unusual.”¹²⁶ He further referred to a number of bodies that exist in Ireland without a legislative basis, such as the ‘National Fuel Scheme,’ ‘Job Bridge, the National Internship Scheme’ and ‘the Back to School Clothing and Footwear Allowance.’¹²⁷ It is submitted that the list of bodies given fails to provide one single example of where fundamental rights of the calibre of those at issue in direct provision are contained in another non-statutory body. As has been discussed previously in this research project, people living under direct provision suffer breaches of their fundamental rights on a daily basis. It is frankly insulting to the asylum seekers that must live under direct provision to have the system compared to the ‘School Meals – Local Project Scheme.’ Direct Provision is a breach of fundamental rights in a way entirely unlike any other system currently in place in Ireland. On the basis that the direct provision system is a breach of rights unlike any other, it should not be allowed to continue without a legislative basis.

Furthermore, the precedent that the applicants presented to the court in *O’Neill v The Minister for Agriculture*¹²⁸ should not have been distinguished by Mac Eochaidh J.¹²⁹ Mac Eochaidh J distinguished *O’Neill* from this case on the grounds that there was never any legislation for direct provision, “save in so far as it has approved of the expenditure required to operate ‘direct provision.’”¹³⁰ As previously discussed, this is an even greater breach of the separation of powers than in *O’Neill*. There is little case law dealing with instances where schemes have operated without any statutory footing whatsoever as it is a particularly rare occurrence, and on the basis that this breach is even worse than the breach in *O’Neill*, it should serve as precedent. In addition, Mac Eochaidh J claimed that the decision of *Bode v Minister for Justice*¹³¹ provided an example of where an administrative scheme affecting fundamental rights was allowed “without negative comment from the Supreme Court.”¹³² However, it is difficult to see how the *Irish Born Child ’05*¹³³ could possibly be compared to

125 See the Unfair Dismissals Act 1993, the Protection of Employees (Fixed Term Work) Act 2003 and the Industrial Relations (Amendment) Act 2012.

126 [2014] IEHC 532 at para. 14.12, per Mac Eochaidh J.

127 [2014] IEHC 532 at para. 14.12, per Mac Eochaidh J.

128 *O’Neill v The Minister for Agriculture* [1988] 1 IR 539.

129 [2014] IEHC 532 at para. 14.16, per Mac Eochaidh J.

130 [2014] IEHC 532 at para. 14.16, per Mac Eochaidh J.

131 *Bode v Minister for Justice* [2008] 3 IR 663.

132 [2014] IEHC 532 at para. 14.29, per Mac Eochaidh J.

133 The scheme is available at <<http://www.inis.gov.ie/en/INIS/IBC05Renewal.pdf/Files/IBC05Renewal.pdf>> (Visited 13th March 2015).

direct provision. Direct Provision is a system that effects people's daily lives and dignity and has been likened to the Magdalene Laundries. The fact that a purely administrative scheme, which, although important, does not impact on the standard of living of many, was found not to be in breach of the separation of powers does not imply direct provision should be viewed in the same way.

Ways in which the argument may be furthered

It is submitted that it may be prudent to expand the argument that direct provision is in breach of the separation of powers doctrine even further. It is submitted that direct provision is in breach of aspects of the doctrines of 'democratic accountability' and 'the Rule of Law.' The fact that direct provision has not been legislated for by the democratically elected Oireachtas means that effectively no one is or has been accountable for its shortcomings. This is contrary to our democratic ideals.

The concept of democratic accountability in relation to the non-delegation doctrine is relevant to the issue of direct provision. Denham J provided interesting commentary in *Laurentiu* in relation to the government's power to abdicate legislation. She argued, "the Oireachtas may not abdicate its power to legislate. To abdicate would be to impugn the constitutional scheme. The scheme envisages the powers (legislative, executive, judicial) being exercised by the three branches of government - not any other body."¹³⁴ Our political and legal system is based on the principle that the people, who are sovereign, elect representatives who make laws, representatives for whom we may choose not to vote if we are unhappy with the laws they pass. If a body other than those elected enacts a law, they cannot be held democratically accountable to the populous. At present, direct provision does not have statutory footing and so there is nobody whom the people may hold accountable.

Another ground on which this argument could be furthered is the argument of the unconstitutional delegation of the legislative power being in conflict with the concept of the 'rule of law'. Due to the lack of statutory grounding, direct provision never passed through the usual path that all legitimate legislation must in this country. There is a long line of case law that solidifies the link between the legislative power and the general principles of the rule of law, including *The State (Walshe) v Murphy*,¹³⁵ *Murphy v Attorney General*¹³⁶ and *Kennedy v Law Society of Ireland*.¹³⁷ In addition, Henchy J stated in *Cassidy v Minister for Industry and Commerce*¹³⁸ that

the general rule of law is that where Parliament has by statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation. Otherwise it will be held to have been invalidly exercised for being *ultra vires*.¹³⁹

134 [1999] 4 IR 26 at [61] (Denham J).

135 *The State (Walshe) v Murphy* [1981] IR 275.

136 *Murphy v Attorney General* [1982] IR 237.

137 *Kennedy v Law Society of Ireland* [2002] 2 IR 458.

138 *Cassidy v Minister for Industry and Commerce* [1978] 1 IR 297.

139 [1978] 1 IR 297 at [310] (Henchy J).

Carolan comments, “it has been argued that the non-delegation doctrine serves as a safeguard against arbitrary government action by ensuring that rules are made through processes that conform to these principles.”¹⁴⁰ There are many stages through which direct provision has not been able to pass through: for example, the President has thus far been unable to refer direct provision to the Supreme Court on an Article 26 reference. President Higgins has commented that the system is “totally unsatisfactory”¹⁴¹ and so it is possible that he may have referred it to the Supreme Court had he been presented with a bill proposing direct provision. Direct Provision was initiated as an emergency response to the large influx of asylum seekers in Ireland – it is not acceptable that, nearly two decades later, the same system is still in place without having passed through the processes through which all other schemes of its kind pass. Direct provision is not only a usurpation of the legislative power but also a violation of democratic fair procedures.

Conclusion

To sum up, it cannot be said that this basis of challenging direct provision is the most powerful weapon in the arsenal of activists all over the country, yet it should not be disregarded. For the reasons outlined in this section, it is not acceptable to our democratic or legal standards that direct provision continue without formal legislation being promulgated. There is clear scope for expansion of the ways in which this argument may be presented to the court and, in light of the *Bederev v Ireland* case, advocating the application of the non-delegation doctrine appears to still find favour with the higher courts. Thus, it is submitted that this argument be included should the applicants in *CA & TA* wish to appeal the high court decision, or should any other of the thousands of people suffering in direct provision centres challenge the system through court proceedings.

(c) Legality of Social Welfare Payment

(i) Introduction

The applicants claimed that the direct provision allowance was unlawful due to the lack of statutory basis for the payment, following section 246(7) of the Social Welfare Consolidation Act 2005. Mac Eochaidh J who held that, as a matter of law, the allowance was not a social welfare payment rejected this:

The applicants have suggested that the fact that DPA looks like social welfare, that DPA uses the language of social welfare, that the amounts less deductions are identical to certain social welfare payments and that the payments are made by the same Minister who operates payments under the SWCA 2005 means that these DPA are either unlawful payments under the Act or a manipulation of the Act. None of these factors either alone or together establishes that DPA is a disguised social welfare payment. The State is not prohibited from making cash payments to protection applicants.

Mac Eochaidh J found that the applicant did not have legal standing to challenge the legality of the payments. Mac Eochaidh J notes that the direct provision allowance is the only

¹⁴⁰ Carolan, N64, at 230.

¹⁴¹ Stephen Collins & Bill Corcoran, “President Says Direct Provision System ‘Totally Unsatisfactory’”(Thursday November 20th 2014).

payment that has not been increased with regards to inflation since its inception in 2000. However, he stated that the proper place to seek change in this area is the political arena.

(ii) Timeline of Legislative Changes

- Prior to the introduction of the direct provision system in 2000, asylum seekers in Ireland could claim social assistance payments once the legislative conditions were met. However, they could not claim unemployment related social assistance payments as they were prohibited from working and therefore could not satisfy the job-seeking conditions.
- In 2001, direct provision was introduced based on the Department of Social Protection Ministerial Circular 04/00 of 10 April 2000 and Circular 05/00 of 15 May 2000 (now repealed). Bed and board accommodation and a payment were provided: €19.10 per adult and €9.60 per each dependent child to be paid weekly. Two additional payments of €100 are also given. Free schooling for under-18s and medical care is provided.
- DCSFA provided for a number of exceptions including that asylum seekers were still entitled to the contingency welfare payments (child benefit, blind pension, disability benefit...) once they met the conditions.
- Rent supplement could also be granted in three circumstances:
 1. Asylum seekers gave birth to an Irish born child
 2. Asylum seekers had lived in the system for six months
 3. Where a particular decision-maker felt that the direct provision accommodation was of a poor standard
- In 2003, legislation was introduced preventing asylum seekers from receiving rent supplement; section 13 of the Social Welfare (Miscellaneous Provisions) Act 2003 inserted section 174(3) and (4) into the Social Welfare (Consolidation) Act 1993. This is now contained in section 193(3) of Social Welfare (Consolidation) Act 2005.
- The habitual residence condition was introduced into law in 2004.
- Section 246 of the Social Welfare (Consolidation) Act 2005 prevented those who were not habitually resident in the State from accessing social welfare payments (except in limited and exceptional circumstances).
- This was added to by section 30 of the Social Welfare and Pensions Act 2007 which provided that the Deciding Officer can examine five factors when determining whether a person is habitually resident in the State;
 - a. the length and continuity of residence in the State or in any particular country;
 - b. the length and purpose of any absence from the State;
 - c. the nature and pattern of the person's employment;
 - d. the person's main centre of interest; and
 - e. the future intentions of the person concerned as they appear from all the circumstances.
- Guidelines were issued by the Department of Social And Family Affairs that stated that asylum seekers could not be considered habitually resident with regards to the collection of welfare payments.
- Thornton states, "since the introduction of direct provision for asylum seekers, fundamental shifts were occurring from an inclusive welfare system, to one which viewed legal status as key to gaining access to social assistance."¹⁴²

¹⁴² Liam Thornton, "Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion," [2013] *Journal of Social Security Law*, at 17.

- In 2006, the Department of Social Protection proposed legislation to establish the direct provision allowance as a social assistance payment in law, due to concerns that the payment was ultra vires. Draft section 24 of Social Welfare Bill 2007 sought to insert section 202(A) into the Social Welfare Consolidation Act 2005. Section 202(A) provided that a weekly supplement be paid to those who have made an application for refugee status and who reside in accommodation provided by RIA. However, the Department of Justice rejected this, giving no reasons.
- A number of successful cases were taken by FLAC in 2009 that challenged the presumed exclusion of asylum seekers from receiving all forms of social welfare.
- On the foot of this, legislation was introduced in 2009 which prohibited asylum seekers from receiving all forms of social welfare; section 15 of the Social Welfare and Pensions (No 2) Act 2009.

(iii) Lack of Legal Basis

Prior to the legislation introduced in 2004,¹⁴³ some asylum seekers residing in direct provision did successfully challenge the refusal to provide them with access to mainstream social security payments. There seemed to be a lacuna in the law between 2003 and 2009, the habitual residence condition had been introduced but there was no provision in legislation prohibiting asylum seekers from satisfying the five conditions of habitual residence. Thornton notes, “therefore the presumed legal basis for introduction of direct provision has, since 2009, no longer existed.”¹⁴⁴ He argues that since 2009 and the introduction of the ban on asylum seekers qualifying for habitual residence, there is no legal basis for the Department of Social Protection to continue to make the allowance payment. So despite this prohibition, asylum seekers still receive bed and board accommodation and an allowance, yet are excluded from receiving most social assistance payments. Due to the fact that asylum seekers are prohibited from the social welfare system, the legality of their allowance payment is questionable at best.

(iv) Case Law in Ireland

- *Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*¹⁴⁵

Here, the Supreme Court held that non-nationals and aliens constitute “a discrete category of persons whose entry, presence and expulsion from the State may be the subject of legislative and administrative measures which would not, and in many of its aspects, could not, be applied to its citizens.”¹⁴⁶

As a result of this, the Supreme Court endorsed the system of direct provision and accepted that asylum seekers were not entitled to enjoy full access to social assistance payments and supports under Social Welfare Law.

¹⁴³ Section 13 of the Social Welfare (Miscellaneous Provisions) Act 2003 inserted section 174(3) and (4) into the Social Welfare (Consolidation) Act 1993. This is now contained in section 193(3) of Social Welfare (Consolidation) Act 2005.

¹⁴⁴ Liam Thornton, “Reception Conditions for Asylum Seekers in Ireland: The Need for a Legislative Basis,” (April 15, 2012) humanrights.ie.

¹⁴⁵ [2000] 2 IR 360.

¹⁴⁶ [2000] 2 IR 360, at 379.

- *Case 'A': Review of the Appeal Officer's Decision under s318 of the Social Welfare (Consolidation) Act 2005*¹⁴⁷

In this case, the Chief Appeals Officer decided that in certain circumstances asylum seekers could be regarded as being habitually resident for the purposes of collecting social assistance. Here, the applicant had been rejected from claiming child benefit because she had not been granted status as a permanent resident and therefore was not habitually resident. The Chief Appeals Officer applied the five factors in section 30 of the Social Welfare and Pensions Act 2007 and found that she was habitually resident.

(v) Constitutional Rights and the European Convention on Human Rights

In *CA & TA*, Mac Eochaidh J said that there was no evidence advanced to establish that the system of direct provision interfered with the right to respect for family life. However, he also stated that much more could have been done to persuade the court as to the negative psychological effects of the direct provision environment on the boy.¹⁴⁸

The courts have held that the constitutional rights of those not entitled to be in the state are not as co-extensive as the constitutional rights of citizens or those who are lawfully within the state.¹⁴⁹ In the *CA & TA* case, Mac Eochaidh J also rejected claims that direct provision was in breach of the Constitutional or the family's human rights.

However, there is a case due in the High Court in April 2015 where the applicant intends to challenge the constitutionality of the social welfare laws in Ireland. Here, the applicant has been refused child benefit. She is claiming that because her child was born in Ireland, to an Irish father and is an Irish citizen, and because she has been in the State for nine years, she should be considered habitually resident for the purposes of receiving social assistance. She is challenging the social welfare laws on the grounds of discrimination and breaches of the personal and family rights of the mother and daughter under the Constitution and the ECHR.¹⁵⁰

(vi) Lawfulness of Amount Itself

The value of the direct provision allowance has not been changed since 2000, and is the only supplementary welfare payment that has not been increased.

If the allowance were to be placed on a statutory footing, it would have to be adjusted for inflation.

(c) Other Arguments

(i) Failure to Establish Refugee Advisory Board

The Refugee Advisory Board was envisaged to be established under s. 7A of the Refugee Act 1996.¹⁵¹ Prior to this, the Reception and Integration Agency (RIA) was established by the

¹⁴⁷ Decision of the Chief Appeals Office of the Social Welfare Appeals Tribunal, 12 June 2009.

¹⁴⁸ Ruadhán Mac Cormaic, "Direct provision system does not breach human rights, court rules," November 15 2014, *The Irish Times*.

¹⁴⁹ Article 26 and the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360.

¹⁵⁰ Mary Carolan, "Woman who has spent nine years in direct provision in legal case," February 9, 2015, *The Irish Times*.

¹⁵¹ Inserted by s.11 of Immigration Act 1999.

Department of Justice, on a non-statutory footing. In conjunction with RIA, the Interim Advisory Board was created to advise the Reception and Integration Agency.

According to Mac Eochaidh J, there was an intention to put the RIA on a statutory footing, as supported by the background Note from the Members of Interim Advisory Board.¹⁵² The Refugee Advisory Board has never been established, and instead RIA continues to operate, without any legislative footing, nearly 15 years after the Immigration Act 1999 commenced in January 2000.

Counsel for the applicant contended that, firstly, the duty of the Refugee Advisory Board would be to conduct check and balances on the executive and scrutinise the manner in which they operated direct provision. Secondly, the applicant claimed that the failure of the executive branch to set up the Refugee Advisory Board was “an unlawful avoidance of legislative intent.”¹⁵³

However, Mac Eochaidh J rejected these arguments, simply stating that the intention of the legislature can be construed through the words of the statute and that there was no intention in s. 7A to oversee the needs of the protection applicants, but merely to report back on the efficacy of the Refugee Act 1996 and to suggest ways in which future legislation should be amended. The Judge was adamant in illustrating that there is no provision within the Act that would require the Refugee Advisory Board to oversee the manner in which the applicants are accommodated or how they receive material support. He finished his point by concluding that there is nothing illegal about the Minister not establishing the Refugee Advisory Board.

The logic of the Judge’s findings is not consistent regarding the interpretation of s. 7A. The role envisaged by the Oireachtas for the Refugee Advisory Board is more far-reaching than what Mac Eochaidh J has indicated. While one of its primary functions is to comment on asylum policy and submit recommendations, its functions by no means stop there, as is clearly illustrated in s. 7A(4)(a). The Board also has the assigned role of submitting proposals as to change in relation to “the practice or procedures of public or private bodies in relation to applicants and any other matters relating to such operation coming to its attention to which it considers that his or her attention should be drawn.”¹⁵⁴ It is apparent on the face of the Act that the primary role of the Board was to inspect the manner in which applicants are accommodated and supported. Most importantly however, the Board, when making their findings in their report every two years, would submit it to the Minister, and the Minister would be obliged to put forward the Board’s findings, within one month, to each house of the Oireachtas. The implication of this provision is extremely important, as it supports the applicant’s argument in the present case.

By laying the report before each House of the Oireachtas, the legislature would be able to examine the actions of the executive and amend their legislative policy accordingly if direct provision was not run according to their principles. By not establishing the Board, the executive has circumvented this integral process, which was not envisaged by the legislature. Furthermore, the Interim Advisory Board (IAB) appears to be assuming the role of the Refugee Advisory Board, but without any legislative footing. Unlike the Refugee Advisory Board, the IAB can only advise RIA, and then RIA would submit the report to the Minister. As a result, the Minister has no obligation to present the Report for the approval of the Oireachtas. The conclusion of this is obvious; the legislature has no way of knowing how

¹⁵² *CA and TA v Minister for Justice and Equality, the Minister for Social Protection, Attorney General and Ireland* [2014] IEHC 532, at para. 1.9.

¹⁵³ *Ibid.*, at para 1.12.

¹⁵⁴ S. 7A(4)(a) Refugee Act 1996, inserted by s. 11 Immigration Act 1999.

direct provision is run and is unable to amend legislation, as they do not know whether there are any problems with the current running of direct provision.

Without the establishment of the Refugee Advisory Board, the executive is solely in charge of running direct provision, without the legislature being able to check their conduct. This offends greatly against the doctrine of the separation of powers.

When Mac Eochaidh J found there to be no illegality in the Minister failing to establish the Refugee Advisory Board, he simply deferred to precedent of the Supreme Court, in particular the case of *T.D. v Minister for Education*.¹⁵⁵ In that case, the Supreme Court refused to grant a mandatory order for the Minister to build a detention centre as they did not wish to encroach upon executive and legislative power. One of the main arguments in opposition to granting a mandatory order was that it was up to the legislature and executive to decide upon the State's allocation of resources.. Denham J strongly dissented in the case, stating that it was democratic to hold the Government to account when it comes to the implementation of policy.

Overall, there is nothing the learned trial judge can do in respect of forcing the Minister to set up the Refugee Advisory Board, because of the precedent of *T.D.* from the Supreme Court. However, the legislature can step in to hold the Government to account, as they are blatantly disregarding the implementation of policy. The 'lack of funds' argument that the Government may put forward in explaining why the Refugee Advisory Board was not set up is weak at best, as not one, but two agencies are set up at the moment and being funded: IAB and RIA. The only possible reason for the avoidance of setting up the Board could be the wish to circumvent the entire process of submitting the report to the legislature on how direct provision is being run and refusing to be democratically accountable.

(ii) Prohibition on working

Regulation 4 (7)(b) European Union (Subsidiary Protection) Regulations 2013 governs Ireland's policy in relation to the employability of asylum applicants. The judge invoked this regulation in the present case to prevent the applicant from seeking or entering employment during the application process.

Unlike other European Union countries, Ireland is not a participant of the Receptions Conditions Directive 2013/33/EU. This particular directive has the intention of harmonising all of the Member States' practice in relation to asylum applicants. It relates to housing, food, healthcare, employment and medical and psychological care. The reason for Ireland's failure to implement the directive is arguably because of its established practice of not allowing asylum applicants to work. Also, Ireland and the United Kingdom are in a unique position because of Protocol No. 21¹⁵⁶, which excuses them from participating in the common asylum system that falls within the scope of Title V of Part III of the Treaty on the Functioning of the European Union. Ireland may opt in or out of measures adopted by the Council in relation to Title V.¹⁵⁷

The letter written by the Irish Naturalisation and Immigration Service (INIS) is quoted at length within the judgment.¹⁵⁸ The substance of the argument is as follows.

155 [2001] 4 IR 247.

156 "On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice."

157 Articles 3 and 4 of Protocol No. 21.

158 [2014] IEHC 532, at para 2.7.

- The unemployment rate at present is very high, and there are over 400,000 people on the ‘Live Register’. On top of this, young people are emigrating from the country because of the lack of employment prospects, and INIS contends that if it were not for them emigrating the number on the ‘Live Register’ would be even higher.
- INIS finds it difficult to envisage that the Irish tax-paying public would be sympathetic to the needs of the applicant as they have no prior connections to the State, and are arriving to the State with scant resources, yet demanding their every need to be met, especially when their application for refugee status has been denied as their fears were found to be (allegedly) groundless.
- INIS concludes that they cannot see the present prohibition on employment ceasing in the near future as the State’s own economic and financial well-being has taken a hit from the global recession.

This is a pessimistic and scathing outlook. One of the most efficient ways to eradicate poverty is through social inclusion. Therefore, if asylum seekers had the right to work, while their application was being processed they could greatly improve their quality of life, and they could even stop relying on the social welfare payments. Moreover, they would be paying taxes on their income to the government, generating greater government revenue overall. If what INIS says is correct, the Irish tax-payer would surely be less adverse towards the asylum seeker if they no longer had to fund their living to such a great extent.

Without commenting on the letter written by INIS, Mac Eochaidh J adjourned the decision regarding the illegality of the prohibition on employment, as another judgment on a High Court case dealing with the same issue is going to be delivered at a later date. The learned judge did not want to make conflicting findings, and stated that it was for the best to delay ruling on the constitutionality of legislation until it was absolutely necessary. Until the pending High Court decision is delivered, the prohibition on working will be deemed to be constitutional.

The applicant has very little room to manoeuvre within the current Irish law, and even less when it comes to European Union law. She cannot mount a challenge to the European Court of Human Rights based on the prohibition of employment, as the regulation is not applicable to Ireland. Apart from Ireland, Denmark is the only other country within the EU that prohibits the employment of applicants.

In FLAC’s report,¹⁵⁹ they outline several government initiatives up until 2009, which purported to address social exclusion and poverty. In particular, in the ‘Renewed Programme for Government,’ the aim was to ensure that Ireland, even in the economically difficult times, would not revert to self-interest but would continue to protect those who cannot protect themselves and further government policy to help people reach their full potential while reducing long-term reliance on income support payments.

Moreover, before 1999, asylum applicants were afforded the right to work, after having their skills individually assessed by FÁS. However, this policy was soon stopped, because of the fear that this would cause an increase in asylum seekers’ applications, and that human-traffickers would exploit victims by sending them to work in Ireland.

If the current situation persists, there could be asylum seekers who will take up illegal employment, and if this occurs it could cost the State money in the long-term and compound existing problems. Moreover, there is both social and economic utility to the State if the applicants, like in the present case, would be able to work. This would not only help their

¹⁵⁹ FLAC “One size doesn’t fit all-A legal analysis of the direct provision and dispersal system in Ireland, 10 years on” November 2009.

integration into Irish society, but also give them great dignity and the government could justify the current low payment.

(iii) UN Convention on the Rights of the Child

Article 3(1) of the United Nations Convention on the Rights of the Child states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Can it be said that the best interests of the applicant child (TA) in this case were a primary consideration? Article 6(2) puts a positive obligation on State parties to “ensure to the maximum extent possible the survival and development of the child.” Has living in direct provision for the entirety of his life stunted the child’s development? In this section, I will seek to answer these questions.

In *CA & TA*, the decision on the rights of the child in regards to the Convention was adjourned pending decision of the case *Dos Santos v Minister for Justice & Equality*.¹⁶⁰ The Court in *Dos Santos* took the aforementioned Articles into account in their decision to refuse the order for judicial review of the decision of the Minister for Justice to deport a Brazilian family.

The best interests of the child *must* be a primary concern for the decision-maker. The United Nations Convention on the Rights of the Child does not form part of domestic law; it may be taken into account but is not enforceable. Article 29.6 of the Constitution provides that:- “No international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas.” The Court in *Dos Santos* held that Article(1) does not have direct effect on Irish law, therefore, it does not confer any directly enforceable rights on non-national children. Following *Dos Santos*, the court would be satisfied if the best interests of the child were a primary consideration of the decision-maker.

In regards to the TA’s best interests and development; CA has found it increasingly difficult to feed TA as the food provided in the hostel is not suitable and does not adequately meet his needs: the hostel provides food for adults and babies, but does not cater in a suitable manner for children of his age. As a result, TA must eat adult food, but because of his age and the type of food provided, he is reluctant to eat it. TA also becomes hungry outside of kitchen hours, so CA attempts to feed him with snacks purchased with her meagre allowance. She has also saved up for a lengthy period to purchase a second-hand fridge and microwave. Another huge issue for TA is that the hostel is a bad environment for him. His mother has grave concerns that his development and growth is badly affected by the direct provision living environment and the conditions which cannot be considered to be in his best interests. The activities in the crèche hostel are not age appropriate for TA so he is not receiving the right stimulation for his mind, neither are the leisure activities suited to him.

One play area provided for children is actually a room used for storage, containing a bench and a bookcase filled with books not for the use of residents. There are no toys or educational aids provided for the children. There is a computer room, but children under the age of 6 are not allowed to enter.

The children then resort to playing on the corridor, which can cause friction with other residents in the hostel.

CA contends that she does not have the normal level of control or choice in respect of the

¹⁶⁰ *Dos Santos v Minister for Justice & Equality & ors* [2014] IEHC 559.

daily life of her own son. One important issue is that CA does not have control over his exposure to adults; she particularly worries that this results in him being exposed to inappropriate language and behaviour. TA is at a very sensitive age of development and she fears that his development will be further stunted by him only even knowing the environment of direct provision.

While the best interests of TA should have been taken in to account by the decision-maker, it is not the primary concern of the decision maker, nor would he/she have to abide by the Convention on the Rights of the Child. Unfortunately, this means that the plight of children is but another tragic product of the direct provision system that cannot be rectified without legislative interference.

4. Analysis of Issues Relating to Evidence and Judicial Review

(a) Evidence

Essential evidence for the applicant's case was deemed inadmissible due to certain issues. There was a lack of oral evidence, and the evidence of CA and TA was disputed. The largest issue was that the applicants had sought to open a wide variety of reports before the courts but could not because of the rule against hearsay. These reports by governmental organisations, non-governmental organisations, international organisations and institutions support the applicant's case by corroborating the evidence the applicants themselves gave. These reports support the contention that direct provision has serious adverse effects and support the proposition that it constitutes inhumane and degrading treatment. Therefore, they are essential corroborating evidence for the applicants.

The respondents argued that this evidence must be deemed inadmissible, as they were given no opportunity to cross-examine those who made the statements, and get their views on the case at hand. MacEochaidh J decided that the evidence should be inadmissible hearsay regardless of the fact it was exhibited in the applicant's solicitor's affidavit. It was deemed necessary for the applicants to have someone with first hand evidence of these reports to authenticate the findings. Should the manner in which reports are routinely written in a matter-of-fact way not lend authenticity to them, making them an exception to the rule against hearsay? Ireland has a range of narrow statutory provisions allowing for the admissibility of some business records created in the ordinary course of business in civil proceedings, should this not be widened to include official reports? The Law Reform Commission has recommended that there should be an exception for business records in civil proceedings; there should be a statutory framework for the admissibility of documentary framework, which would embrace documentary evidence in the field.

(b) Judicial Review

MacEochaidh J contended that evidence issues in the case would not have existed had the applicants taken plenary proceedings rather than judicial review. With judicial review, the court simply examines the manner in which the relevant law was applied to the case at hand, and whether it was done so correctly. A plenary hearing, on the other hand, is a full High Court action in which the plaintiff files a complaint and the defendant enters their defence, with notice for particulars and orders for discovery included. Witnesses will be required to attend court with all supporting documentation, and at this stage it would have been imperative to CA and TA to call those who wrote the reports they had as evidence for the purpose of cross-examination. With regards to cases in which there exist some factual disputes, parties may apply for the proceedings to be heard as a plenary action or to cross-examine a deponent on his or her affidavit. For CA and TA to have had a more successful case, plenary proceedings may have been more suitable for them. Plenary proceedings would have enabled them to call witnesses for the purpose of cross-examination. Calling those who

had written the reports that CA and TA were relying on as corroborative evidence would have rendered the reports admissible.

C. Conclusion

The decision of Mac Eochaidh J in CA & TA is very disappointing, namely for the judge's refusal to address and explore certain arguments. It is hoped that a fresh appeal, by means of full plenary proceedings, could be taken soon and given fresh consideration by the Court.

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