

Poverty, Race and Vulnerability: effects on children growing up in the Irish asylum system

by Sarah Atkins*

Abstract:

Rather than providing for the welfare needs of asylum-seekers in Ireland within the existing social welfare structure, the Irish State operates the Direct Provision System. This system provides full board in accommodation centres and a small weekly allowance. The problems with this ‘temporary’ system are manifold, and though these issues are individually problematic in their own right, they are compounded by the fact that it has been known for an asylum application to take 7 years or more to reach completion. The Irish State is thus arguably in breach of both international (UNCRC) and regional (ECHR and EU) obligations, as well as their domestic best practice guidelines. This article argues that the intolerability of inadequate long-term living conditions and enforced poverty is undeniable. The effect of poverty and social exclusion, in particular on asylum-seeker children, is highly detrimental and cultivates vulnerability on many levels. Methodologies I use in this article are doctrinal analysis of the relevant instruments and case law as well as engaging in a socio-legal reading of reports and literature in the area, and using this to inform my understanding of the issues. I conclude that such treatment of already vulnerable individuals by the State is manifestly discriminatory and feeds into a discriminatory culture of xenophobia. Political and media discourse engaging in such terminology as ‘welfare tourism’ further exacerbates the issue by creating a marginalised concept the ‘other’ amongst us.

Keywords:

Children; direct provision; asylum; vulnerability; discrimination.

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INTRODUCTION

Ireland has operated an asylum-seeker accommodation system called ‘direct provision and Dispersal’ since 2000. The system provides for asylum-seekers full board within communal accommodation and a small weekly allowance. The accommodation centres are de-centralised and located throughout Ireland. Many centres have come to media attention due to poor conditions, lack of appropriate facilities and being situated at considerable distances from local amenities.

This article asks whether the Irish State’s law (or lack thereof) and policies on asylum-seekers’ reception conditions has detrimental outcomes for children in the asylum system. By ‘children in the asylum system’ I mean both child asylum-seekers and children born within in the State to parent asylum-seekers in the direct provision system.¹ This is an area worthy of research because the children as subjects are voiceless and vulnerable, even more so than adults in Irish the asylum system. Given the young age of the subjects, the long-term impact of growing up in these circumstances is also worthy of analysis. Because of the focus of the research question, issues necessarily outside the scope of analysis include the following: asylum procedure and State criteria for determining refugee status; *non-refoulement*; the justiciability of economic and social rights; the historical development of international refugee law; or a comparative analysis of other jurisdictions’ reception conditions for asylum-seekers. Equally, it will be necessary to limit research to international and European law that is enforceable in Ireland.

In answering this question, socio-legal methodology will be employed, with the concepts of gender, vulnerability, narrative, ‘politics of belonging’ and ‘othering’ occupying a central role. This article has been researched from the child’s perspective, meaning that the best interests of the child are the main concern throughout. This is done by drawing on and interpreting empirical data in NGO reports and official statistics so as to convey the interests of the child in my analysis. To do otherwise (i.e. to conduct original primary research) is beyond the scope of this article.

Even though the research is predominantly socio-legal in nature, the article will rely on the traditional doctrinal definitions accorded to certain terms, and will not be interrogated any further. The literature reviewed will include NGO reports, official statistics and recorded narratives of asylum-seekers’ lived experiences in Ireland. The work of Fineman, Benhabib, Sen, Fanning and Yuval-Davis will provide the basis of the article’s discussion of vulnerability, poverty and exclusion. Although many of the issues

¹ Separated children no longer fall within this category because in the last two years the State has removed these children from the problematic ‘hostel’ accommodation into foster care families. These children remain in foster care until they reach 18, when (if still asylum-seekers) they are placed in the direct provision system, Department of Children and Youth Affairs website, accessed February 8, 2014, <http://www.dcy.gov.ie/viewdoc.asp?DocID=1905&ad=1>. For some further analysis on separated children in Ireland see S. Mullally, ‘Separated children in Ireland: responding to “terrible wrongs”’, *I.J.R.L.* 23(4) (2011): 632-655.

raised by the direct provision system could also be examined utilising a ‘culture of control’ analysis (Thornton, 2011) this article instead seeks to assess the impact of the direct provision system on the lives of those subject to it. Though there has been much published on asylum-seeker reception conditions, recent research on children in the asylum process has either been limited to such groups as trafficked children, separated children or has not applied this methodology.

Part 1 serves to outline some conceptual narratives for our subjects, while Part 2 describes the international and regional legal frameworks that apply to Ireland in relation to children and their care in the asylum system. Part 3 addresses how the Irish State has implemented its international obligations on reception conditions into domestic law. This is done by outlining the nature and operation of the direct provision system. Analysis is then provided of both the beliefs that influenced these decisions and the weaknesses in domestic legislation and policy. Part 4 provides a socio-legal critique of reception condition policy and its detrimental effect on children in the Irish asylum system. This is done by addressing first the reported poor conditions of direct provision accommodation, and secondly the impact of these conditions on children.

This article concludes that this State policy marginalises and institutionalises already vulnerable individuals and their children in accommodations centres. Discriminating against children in the asylum system while they are seeking recognition as refugees unnecessarily places them in an even more vulnerable position. Current legislation and policy manifestly discriminates against asylum-seekers and such marginalisation and segregation only serve to make asylum-seeker children into an invisible and neglected ‘other’ in Ireland. Furthermore, the Irish State-sponsored pre-conceptions and treatment of this ‘other’ effectively lead to ethnocentric discrimination, itself a form of racism.

1 – VULNERABILITY AND CHILDREN IN ASYLUM

When one speaks of asylum, does one mean mere refuge from danger or something broader? I argue that true asylum does not simply mean the former but also that the host State ought not deprive or alienate already vulnerable individuals by restricting State supports and facilities, thus impeding a person’s development as an autonomous individual (Rawls, 1972).² In this section I apply the vulnerability theories of Martha Fineman to asylum-seeker children, as well as applying her arguments regarding State responsibility to both the living conditions and resultant increased vulnerability that asylum-seeker children find themselves in under the Irish system of asylum accommodation. Fineman’s vulnerability model is compelling here because of its ability to be used as a “heuristic device, forcing

² For a criticism of this position see M. Sandel, *Liberalism and the limits of justice* (Cambridge: Cambridge University Press, 1982); S. Mulhall and A. Swift, *Liberals & Communitarians*, 2nd ed. (Oxford: Blackwell publishing, 1996).

us to examine hidden assumptions and biases folded into legal, social, and cultural practices” (2010, p. 266).

Fineman (1995; 2004; 2008; 2010) writes widely on issues of dependency and vulnerability from critical and gender perspectives. She sets out two types of dependency, that of ‘inevitable dependency’ (e.g. children) and a derivative dependency (typically caregivers stemming from the role they embody and their need for resources) (Fineman, 1995). Fineman describes the ‘vulnerable subject’ as a more theoretically powerful development of her dependency thesis, different in that a vulnerable subject may be viewed independently from the family unit, where vulnerability is used to describe “a universal, inevitable enduring aspect of the human condition” (2008, p. 8). This is a very different subject to the Western liberal tradition of a competent social actor with autonomy, self-sufficiency (Fineman, 2004, pp. 18-20) and personal responsibility for life choices (Fineman, 2010). It is clear for our purposes that asylum-seekers, especially children, lack some or all of these attributes.

Dependency and vulnerability often go hand in hand (Fineman, 2008, p. 17), perhaps more so for members of society who tend to be more reliant on State support (such as asylum-seekers). On the other hand, vulnerable people for Fineman are “typically associated with victimhood, deprivation, dependency, or pathology” (2008, p. 16) and therefore asylum-seekers at face value may be classified as vulnerable upon entering a host State. Consequently an already vulnerable subject may subsequently be made ‘doubly vulnerable’ as a result of flawed government policies and poor allocation of resources. In fact, asylum-seeker children could conceivably be ‘triply vulnerable’ under this model, especially if female, disabled or have mental health issues. Such heightened vulnerability arguably mitigates against Fineman’s reservations about narrowly focusing an equality claim by applying a “group-identity-based construct” (2010, pp. 253-254), as child asylum-seekers may share as many vulnerabilities as adult asylum-seekers but are worth distinguishing as a group because of their inevitable dependency and vulnerability.

Deprivation or alienation within a host State is arguably a form of maltreatment and should be considered as such in conjunction with issues of unnecessary delay in processing asylum-seekers’ claims, or problems surrounding the legitimacy of the decision-making and appeals process. Such factors only go further to keep individuals stuck in limbo (both in terms of their lived reality, sense of identity and their legal status). If living conditions provided by a State are lacking to the point of destitution, then that asylum process is rendered so harsh that the rights in reality are illusory. One must ask – from both a qualitative and quantitative perspective – how genuine is the asylum being received from a host State if, through the conditions provided during determination, the claimant is made more vulnerable than upon their arrival? Such vulnerability may be manifest through poverty, limited free movement or facilities, hampered community integration, and subsequent mental health issues.

Fineman's vulnerability analysis "concentrates on the structures our society has and will establish to manage our common vulnerabilities. ... toward a more substantive vision of equality" (2008, p. 8) and argues that a State ought to be both responsive to and responsible for such human conditions in its society (2010). Given that the Irish system of accommodating asylum-seekers fosters segregation and poverty, it would appear that this model demonstrates that Ireland's structures in the form of economic and institutional harms at present embody the antithesis of her vision of equality as far as asylum-seekers are concerned. Fineman makes the case for alleviating vulnerability by the State reconceptualising the vulnerable as central to "our ideas of social and state [sic] responsibility ... [and thus potentially] define an obligation for the state [sic] to ensure a richer and more robust guarantee of equality" (2008, pp. 16-17).

From the above we can deduce that marginalisation, dependency and vulnerability are important concepts when discussing the conditions in which asylum-seeker children find themselves. It is also clear that Western liberal conceptions of the subject are inappropriate for our purposes because of asylum-seekers' relative lack of autonomous agency in this sense of the word, namely an "... active, willing agent, distinguishable from [their] surroundings and [with] capacity for choice" (Sandel, 1982, p. 19). We can also recognise that poor reception conditions for asylum-seekers can impact on collective experiences of marginalisation and exclusion.

Later in Part 4, once we have determined that such individuals are in fact vulnerable on many levels (see Parts 2 and 3), we further theoretically explore the consequences of such vulnerability. Particular focus will be given to potential consequences of when asylum-seeker children grow up subjected to poverty, marginalisation and xenophobia. This will be achieved by applying Forment's theories on narrative to asylum-seekers as a subject group.³ Politicians may counter-argue that poverty is not a valid description for the living conditions of asylum-seekers in Ireland because they have shelter and are not homeless or living rough. Likewise the argument could be made that the allegation of enforced poverty on asylum-seekers is not valid because economic conditions would be much worse in their country of origin. I refute these arguments in Part 4 by employing the theories of Amartya Sen (1987; 1995) on different forms and perspectives of poverty, applying his arguments on 'failure in functioning capacities' and 'relative deprivations' to conditions of asylum-seekers in Ireland. However, it is first necessary to understand the legal basis for asylum reception conditions in Ireland, both from the perspective of applicable international and regional legal obligations (Part 2) and domestic law (Part 3).

³ C. Forment 'Peripheral Peoples and Narrative Identities: Arendtian Reflections on Late Modernity' in Benhabib (ed.) (1996) pp. 314-330. For State-endorsed social exclusion, see G. Taylor, *Ideology and Welfare* (Basingstoke: Palgrave, 2007); B. Abel-Smith & K. Titmuss (eds.), *The Philosophy of Welfare: selected writings of Richard M. Titmuss* (London: Allen & Unwin, 1987), M. Adler & A. Bradley (eds.), *Justice, Discretion & Poverty* (Oxford: Professional Books, 1976), A. Sen, *On ethics and economics* (Oxford : Basil Blackwell, 1987) and A. Sen, *Inequality re-examined* (Harvard: Harvard University Press, 1995).

2 – IRELAND’S INTERNATIONAL AND REGIONAL OBLIGATIONS

This part of the article serves to set out the international and regional legal obligations applicable to asylum reception conditions in Ireland, particularly from the perspective of children in the asylum system. Regional obligations are further divided between those that arise from the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) and the European Union (EU).

2.2 International obligations

This section will synopsis international instruments to which Ireland is a party, with particular focus on those that concern the reception conditions for children in the asylum system. The Convention Relating to the Status of Refugees 1951 (Refugee Convention) shall be addressed below. Subsequently the UN adopted various conventions and Declarations that focus on particular vulnerable groups, particularly the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 and the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.⁴ Though these instruments are relevant to refugee law in general, they do not particularly further our discussion here. Additional to refugee law instruments, there is an increasing momentum towards the applicability of international human rights law more generally to refugee and asylum-seekers rights claims, so in effect refugee and asylum issues are no longer determined solely on the basis of international refugee law (Edwards, 2005). Therefore the following documents will also be discussed below: the International Covenant on Economic, Social & Cultural Rights 1966 (ICESCR), the International Covenant on Civil and Political Rights 1966 (ICCPR) and the UN Convention on the Rights of the Child 1989 (CRC).⁵

Some of the rights contained in the Refugee Convention were considered to be directly influenced by the 1948 Universal Declaration of Human Rights (UDHR).⁶ The Refugee Convention⁷ is relevant for our purposes in that “Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”⁸ and furthermore it provides that

⁴ G.A. Res. 40/144 (1985). Ireland is also a party to the Convention Relating to Stateless Persons, 1954. Article 20-23 of the 1954 Convention sets out that Stateless persons to be treated no less favourably than the Contracting States’ nationals with respect to rationing, housing, education and public relief. However, there is no individual complaints mechanism in place with this Convention as there is with some others. See further A. Edwards, ‘Human Rights, Refugees, and the right “to enjoy” asylum’, *I.J.R.L.* 17(2) (2005): 293-330.

⁵ The Convention on the Elimination of All Forms of Discrimination against Women, 1979 will not be addressed here, as it deals mainly with promoting equality between men and women.

⁶ G.A. res. 217A, U.N. Doc A/810, p. 71 (1948). It is noteworthy that Article 14 of the UDHR provides for the right “to seek *and to enjoy* in other countries asylum from persecution” [emphasis added], see further Edwards (2005).

⁷ The Refugee Convention was transposed into Irish law by way of the *Refugee Act 1996*.

⁸ Article 3 of the Refugee Convention.

refugees have the right to social security.⁹ The logic behind this provision is not only to keep refugees alive through shelter and food, but also to ensure preservation of dignity (Eide, 2010, p. 234).¹⁰ Although the above refers to refugees it should nonetheless be applicable to asylum-seekers, as until such time as a decision is made on the person's status by the State, a claimant – being legally within the State as an asylum-seeker – should be treated no less humanely than a refugee until the State makes their final decision on their status (UNHCR, 2007, p.3). The emphasis on preservation of dignity also has relevance for Forment's observations on narratives (below), given the way in which asylum-seekers' reflections on their treatment (which at times may entail issues surrounding respect and dignity) ultimately impact on the way in which they will describe their experiences of that system.

Unfortunately this has not prevented State parties seeking to avoid their established obligations through various means. Examples include the creation of such legal loopholes as 'safe third country' agreements,¹¹ international areas/zones within States' points of entry, interception and interdiction measures, carrier sanctions and internal reception procedures aimed at creating a 'push factor' rather than a 'pull factor'. The term 'push factor' has found its way into public discourse in the context of asylum-seekers being encouraged (through State policies/procedures on asylum) to leave a host State, what Hathaway refers to as "[r]epatriation under coercion" and is arguably *refoulement* by another name (2005, p. 464), contrary to Article 33 of the Refugee Convention.¹² 'Pull factors' are based on the proposition that certain host States, through their State policies and procedures on asylum, make themselves more attractive for asylum-seeker applications. This terminology also has some overlap in its usage with 'welfare tourism' and is based on the cynical assumption that asylum-seekers choose their asylum destination. Such politically charged 'push/pull factor' rhetoric can be problematic as not only does it suggest an exclusionary and even suspicious mentality against asylum-seekers by arms of a State, but is also instilled into public discourse and constructs a negative concept of the 'other' (in this case asylum-seekers).¹³ This is despite the fact that an asylum-seeker may be (and often is) ultimately recognised as a refugee by the State. With this in mind we look farther afield to related international documents such as the ICCPR, the ICESCR and the CRC. This is because, as Clark and Crépeau (1999)

⁹ Article 24 of the Refugee Convention. Adequate standards of living are provided by a State through a form of social security, accommodation or food while the asylum process is underway.

¹⁰ Eide links closely dignity with adequate standards of living. States that do make their social welfare system available to refugees awaiting verification include Canada, whereas the UK and Finland allow asylum-seekers to claim 70% and 80% respectively of what a citizen receives on social welfare with a time limit (2 months from arrival), whilst in Italy social welfare payments to asylum-seekers are cut off after 45 days (Hathaway, 2005, pp. 481-484).

¹¹ An example of this at EU level the Dublin II Regulation (Council Regulation (EC) No 343/2003, O.J. L 50, at 2 (2003)).

¹² See also L. Thornton, 'Upon the limits of rights regimes: reception conditions of asylum seekers in the Republic of Ireland', *Refuge: Canadian Periodical on Refugees* 24(2) (2007): 86-100.

¹³ For further reading on exclusion, 'othering' and subtle forms of systematic discrimination at the level of State administration (invariably affecting those of other races the worst) see H. Arendt, *The Origins of Totalitarianism* (1951), Rev. Ed., (New York: Schocken, 2004). J. Young, *The exclusive society: social exclusion, crime and difference in late modernity*, (London: Sage, 1999); S. Benhabib, (ed.), *Democracy and difference: contesting the boundaries of the political*, (Princeton: Princeton University Press, 1996); S. Benhabib, *The rights of others: aliens, residents and citizens*, (Cambridge: Cambridge University Press, 2004) and S. Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006).

argue, the nature of interpreting the rights of refugees demands that not only must the reader go beyond the Refugee Convention but that all subsequent international documents must be read holistically.¹⁴

Article 9 of the ICCPR deals with detention as a form of restriction of all persons' right to freedom and liberty and the conditions by which it is permissible. With regard to Article 26 on non-discrimination, its importance is apparent when considering the scope of the provision and whether it also applies to non-citizens legitimately within the State, according to the UN Human Rights Committee in *Broeks v. The Netherlands* in that it applies to "any field regulated and protected by public authorities".¹⁵ The ICESCR, while not specifically addressing the issues of refugees or asylum-seekers, is applicable to our subject in certain ways. Hathaway (2005) argues that the specificity of refugee entitlements are too often ignored by State parties. Furthermore he and others argue that if States prohibit or restrict employment of asylum-seekers this gives rise to a breach of Article 11 (on adequate standard of living) of the ICESCR (Hathaway, 2005). Hathaway, when citing the UK case of *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants*¹⁶ which held that:

[r]egulations which denied some refugee claimants ... access to ... social support 'necessarily contemplate for some a life so destitute that ... no civilised nation can tolerate it ...' (Hathaway (2005) p. 496).¹⁷

However, clarification as to whether Article 11 is engaged in such cases should be provided once individual complaints start being heard by the Committee on foot of the recent ratification of the Optional Protocol to the ICESCR.¹⁸

The CRC¹⁹ contains articles pertinent to children in the asylum process. If asylum-seeker children are treated differently in terms of social security, housing or support structures than other children by a host State then arguably Articles 2 (non-discrimination – including discrimination based on status), 24 (the right to the highest attainable standard of health), 26 (the right to social security), or 27 (right to adequate standard of living) are genuinely and adequately being observed by that State party. Hathaway (2005) argues that housing provided by the State cannot be considered adequate if it does not provide access to 'basic services'. Basic services for asylum-seekers would include access to legal advice, adult and

¹⁴ Cited in J. Rehman, *International Human Rights Law*, 2nd ed. (Harlow: Pearson Education, 2010), 642.

¹⁵ *Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (1990), quoted in Moeckli *et. al* (2010) p. 195.

¹⁶ *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1996] 4 All E.R. 385.

¹⁷ Hathaway (2005, p. 496). See also *Minister for Home Affairs v. Watchnuka*, (2004) 1 All S.A. 21 (SA SCA, Nov. 28, 2003); R. Cholewinski, 'Enforced destitution of asylum seekers in the United Kingdom: the denial of fundamental human rights', *I.J.R.L.* 10(3) (1998): 462-498; A. Edwards, 'Human Rights, Refugees, and the right "to enjoy" asylum', *I.J.R.L.* 17(2) (2005): 293-330.

¹⁸ OP-ICESCR ratified in May 2013 (GA Res 63/117 (2008)). Though Ireland signed this document in March 2012, it has not been ratified to date.

¹⁹ Ireland ratified this instrument in 1992.

child education, medical services, etc. Public transport to such facilities might not be sufficient if the claimant cannot afford the public transport on a regular basis (Hathaway, 2005, p. 506).²⁰ Regarding those children that are particularly vulnerable due to their experiences prior to arriving in the host State (for example, those who are separated, traumatised or have health issues) then Article 22, Article 24, Article 35 (prevention of harm) and Article 39 (recovery and re-integration after traumatising experiences) are particularly relevant in these cases upon arriving in a host State. Moreover it must be borne in mind that all these articles should be read in conjunction with Article 3 (best interests of the child), being one of the four guiding principles of the CRC. Thus the widespread and faithful application of this Convention would clearly lead to the marked improvement of conditions for all children and especially those in the asylum process, thus going some way to alleviating their vulnerabilities. Some of these vulnerabilities (such as effects of living conditions and isolation from their nearest community) are avoidable and if reformed would improve their lived realities while in the asylum process.

From time to time Committees to UN Conventions issue further clarification on its provisions for the benefit of State parties by way of General Comments. Though not legally binding on the State parties, these instruments serve to ‘add flesh to the bones’ of sometimes vague or open-ended provisions within the Conventions. Such interpretative guidance from the UN Committees can indicate a standard and measurable benchmark for all State parties and may provide suggested frameworks for implementing the obligations to which the States are a party. Of particular note to our topic is that in April 2013 the Committee on the rights of the child published General Comment No. 15 (on the right of the child to the enjoyment of the highest attainable standard of health), General Comment 16 (on the State’s obligations regarding the impact of business interests on children’s rights) and General Comment 17 (on the right of the child to rest leisure and play). Furthermore in May 2013 the Committee published General Comment 14 (on the right of the child to have their best interests taken as a primary consideration).

General Comment 14 provides that authoritative interpretation of Article 3 of the CRC and expands upon the “tri-partite structure” of the best interests principle (Ross & Gordon, 2013, p. 113), namely best interests as (a) substantive right, (b) legal principle and (c) rule of procedure.²¹ The Committee set out the scope of best interests of the child when it clarified that Article 3 also covered decisions of a judicial and administrative nature (incorporating budgetary, guideline and policy functions) that directly or indirectly affect children. Procedural guidance is therefore provided within General Comment 14 to better assure that children’s best interests are met in such decision-making processes.²² Needless to say, the guidance provided within this General Comment – as with Article 3 itself – has relevance to many

²⁰ See further in Part 4.

²¹ CRC/C/GC/14, para 6.

²² CRC/C/GC/14, Chapter III.

other aspects of the CRC such as Articles 2 (non-discrimination), 12 (the right to be heard), 20 (deprivation of family environment), etc.²³ Therefore the publication of General Comment 14 is of paramount importance to asylum-seeker children in that State parties can no longer be in doubt as to the standard of due diligence they must apply when making or delegating decisions that impact on children.

General Comment 15 provides clarification to State parties on Article 24 of the CRC, in that it sets out that this Article should be given its due priority by all State parties in proportion to the available resources of each, so that regardless of the size of the ‘cake’ that it be divided, if not equally then at least fairly (Wallace *et al.*, 2013, p. 35). Also stated in General Comment 15 are issues of child health that are of particular concern and should identified for action by the State parties such as adolescent mental ill-health incorporating depression, anxiety and psychological trauma as a result of abuse, neglect, violence or exploitation.²⁴ General Comment 16 has relevance for the private service providers who provide and run the accommodation centres under contract to a State party,²⁵ as the Committee clarifies that the State have obligations under the CRC regardless of whether or not they outsource their responsibilities.²⁶ The General Comment also clarifies that corporate responsibilities regarding children’s rights exist, and that the State should ensure these are met by the private sector. General Comment 17 seeks to both raise the profile of Article 31 of the CRC and also to address lack of protection or resources applied to this right by many State parties to date. Their concern is particularly emphasized on the issue of equality of access to facilities and discrimination against some groups of children including, amongst others, those in situations of poverty or belonging to indigenous or minority groups. The Committee also referred to special measures necessary for children in, for example, residential institutions.²⁷ Therefore it would seem clear that the UN Committee would consider asylum-seeker children in Ireland to be included in this category. Having discussed international obligations above, we now look to regional obligations.²⁸

²³ See further Ross & Gordon (2013).

²⁴ General Comment 15, CRC/C/GC/15 at para. 36-40.

²⁵ CRC/C/GC/16.

²⁶ The Committee’s position on this issue had previously been mentioned in General Comment 5 (General measures of the implementation of the CRC) in 2003.

²⁷ General Comment 17, CRC/C/GC/17 at para. 16. However, if necessary, further interpretative guidance of the CRC should be provided in due course due to the recent Optional Protocol to the Convention on the Rights of the Child, [OP-CRC] A/RES/66/138 (2011). OP-CRC allows for an international complaints mechanism to be established for breaches of the CRC. Ireland has not signed this instrument to date.

²⁸ See further Wallace *et al.* (2013, p. 35).

2.3 Regional obligations

This section will examine the regional instruments with which Ireland is obliged to comply, focusing first on the ECHR and then on the EU. Therefore Directives such as Council Directive 2003/9/EC²⁹, Return Directive (2008/115/EC),³⁰ recast Qualification Directive (2011/95/EU),³¹ recast Asylum Procedures Directive (2013/32/EU)³² will not be addressed in great detail because Ireland has opted-out of them.³³ The rationale behind such decisions to opt-out will however be explored later in the article.

2.3.1 European Convention on Human Rights

Articles of the ECHR that have application for refugees and asylum-seekers and impose obligations on State parties include the prohibition against torture or to inhuman or degrading treatment or punishment (Article 3), the right to respect for private and family life (Article 8) and non-discrimination (Article 14). The ECHR has also been supplemented by various Protocols since its adoption. Only some of these Protocols have been relevant to the issue of refugees and asylum-seekers, namely the First Protocol (1952) providing new fundamental rights, including the right to peaceful enjoyment of property and the right to education; the Fourth Protocol (1963) providing rights and fundamental freedoms not included in previous texts including right to liberty of movement and freedom to choose one's residence, prohibition of a State's expulsion of a national, prohibition of collective expulsion of aliens; and the twelfth Protocol (2000) regarding non-discrimination. Although Ireland has ratified the 1st and 4th Protocols, the 12th Protocol has not been ratified to date. The above-mentioned articles of the ECHR will now be addressed in turn.

Article 3 states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Article 3 has been viewed as being broader and more complementary in its application than Article 33 of the UN Refugee Convention, because it includes the concept of degrading

²⁹ Council Directive 2003/9/EC (Reception Conditions Directive). This directive laid down minimum standards for the reception of asylum-seekers. Ireland has not adopted this Directive or the Recast. Denmark is the only other Member State not to have incorporated this Directive.

³⁰ This Directive provides for the return of irregular migrants, their treatment during expulsion proceedings, entry bans, procedural rights and the grounds and conditions for detention, see further European Union Agency for Fundamental Rights & European Court of Human Rights, *Handbook on European law relating to asylum, borders and immigration*, (Luxembourg, Publications Office of the European Union, 2013), 108.

³¹ Parliament Directive 2011/95/EU, This directive sought to standardise different Member States' recognition of qualification of third-country nationals or Stateless persons. The directive also sought to provide for the uniform status for refugees or for persons eligible for subsidiary protection specified the nature of such protection, including social welfare (Article 29). Ireland has opted out of this Directive, along with Denmark and the UK.

³² The objective of the recast Asylum Procedures Directive aimed to clarify certain legal concepts contained in the previous 2005 Directive and to make certain amendments, taking into consideration principles of evolving ECHR law and the EU Charter (which did not have full legal effect until 2009). Denmark, the UK and Ireland are not bound by this Directive, though Ireland may opt-in if it so wishes. Ireland continues to be bound by the original Asylum Procedures Directive 2005/85/EC.

³³ See further Part 2.3.2.

consequences from the individual's point of view.³⁴ This, in certain circumstances, would include severe social and health deprivations that are a foreseeable consequence of State measures. The ECtHR case law has thus far largely addressed this principle in relation to prisoners and children (including asylum-seeker children),³⁵ most recently in the case of *O'Keeffe v. Ireland*.³⁶ In *O'Keeffe* the ECtHR found that the State had an "inherent positive obligation ... to protect children from ill-treatment,"³⁷ and had not discharged its obligation by delegating the role to non-State actors. Though the facts of this case concerned sexual abuse in schools, the implications and relevance of this judgment for asylum-seeker children in Ireland cannot be overstated.

Article 3 has also been engaged in respect of asylum-seekers' reception conditions.³⁸ In the case of *M.S.S. v. Belgium & Greece* Article 8 was also engaged and the ECtHR confirmed:

[the] existence of a broad consensus at the international and European level concerning (the need for special protection of asylum-seekers as a particularly underprivileged and vulnerable population group) ...³⁹

However, the ECtHR in *M.S.S.* did not elaborate on its own minimum standards but rather referred to those contained in the EU Reception Conditions Directive as examples.⁴⁰ Despite Ireland not having incorporated the Reception Conditions Directive mentioned above, the Directive was only one factor in the decision that Article 3 of the ECHR was engaged. However, the applicants in such cases as *M.S.S.* were facing complete destitution; if a state provides some shelter or housing to asylum seekers, then the ECtHR has not tended to interfere with Member States' asylum seeker/migrant housing policies. Therefore this case would warrant further consideration by the Irish State. Blake and Husain find parallels between the ECtHR's interpretation of suffering with UK case law, in that "[s]uffering can be caused by deprivation of facilities as well as deliberative harm" (2003, p. 101).⁴¹

Article 8 of the ECHR addresses an individual's right to respect for private and family life. Article 8 imposes a positive obligation on State parties. It is arguable that if an individual is reduced to destitution

³⁴ *Chahal v. UK* (1996) 23 EHRR 413 1996-V. For 5 reasons for this proposition see N. Blake & R. Husain, *Immigration, Asylum & Human Rights*, (Oxford: Oxford University Press, 2003), 95-97. See also *Katrinak v. Secretary of State for the Home Department* [2001] I.N.R.L. 499 at para. 21 being a particular example of this principle applied to refugees.

³⁵ Regarding children see ECHR, Human Rights Files webpage, accessed February 8, 2014, <http://www.echr.coe.int/echr/en/header/case-law/case-law+analysis/other+publications/dossiersdh.htm>, 43-44.

³⁶ *O'Keeffe v. Ireland*, no. 35810/09, E.C.H.R. 2013-I.

³⁷ *O'Keeffe v. Ireland*, no. 35810/09, E.C.H.R. 2013-I, para. 168.

³⁸ *MSS v. Belgium & Greece*, no. 30696/09, E.C.H.R. 2011-I. See also *Sharifi v. Austria*, No. 60104/08; *Affaire Popov v. France* no. 39472/07 & 39474/07, E.C.H.R. 2012-IV.

³⁹ *MSS v. Belgium & Greece*, no. 30696/09, E.C.H.R. 2011-I, concurring opinion of Judge Rozakis, 90.

⁴⁰ Although case law since *MSS* has confirmed that sufficiently poor reception conditions in a host State can amount to a breach of Article 3, findings of a breach of Article 3 by transferring states under the 'Dublin Regulation' to a State which breached Article 3 standards have not been as consistent, see for example *Sharifi v. Austria*, No. 60104/08. For an example of broader European consensus see J. Cotter, 'the German Federal Constitutional Court and welfare benefits for asylum seekers: consequences for the direct provision and dispersal scheme in Ireland? – Part I', [2013] 31(1) *I.L.T.* 6-9.

⁴¹ Citing *Ahmed v. Austria* no. 25964/94, E.C.H.R. 1996-VI. Likewise in the UK case of *R (Husain) v. Asylum support Adjudicator*, (5 October 2001), *The Times Law Reports* 15 November 2001, Stanley Burnton J, it was held that "a total deprivation of social support for asylum seekers would violate Article 3."

- while it is apparently the responsibility of the State to maintain them – then this impacts on the person’s right to respect for bodily and physical integrity as well as their family and the parent’s ability to parent them. This argument recently found support in the ECtHR.⁴² Such destitution can be achieved by, for example, a State setting the amount of financial support for an asylum-seeker at an unrealistically low level or by the withholding of appropriate facilities. In *Ahmed v. Austria*⁴³ Austria was held to have reached this level of ‘severity’ by ECHR standards. Though the ECtHR had found in Ahmed’s favour, Austria failed to supply Ahmed (by then with refugee status) with regular or reliable State support, which (compounded by years of similar deprivation) ultimately led him to commit suicide. This case highlights the importance and gravity of the positive obligation on States to provide an adequate level of State support to vulnerable individuals, made all the more vulnerable by a State’s handling of them while they are asylum-seekers.

Therefore a State party to the ECHR may not avoid its obligations simply by opting-out of certain EU Directives regarding asylum, as these other regional binding instruments are also engaged and often draw on each other’s harmonised principles.⁴⁴ That said, the margin of appreciation afforded to States when setting up such schemes for asylum-seekers is broad and may be trumped by considerations of migration control. Very often States may stop short of imposing complete destitution, but rather put measures in place that may strain the asylum-seeker’s ability to maintain themselves or their families adequately to the point of being detrimental for their and their children’s physical or psychological well-being.⁴⁵

Article 14 of the ECHR deals with prohibition of discrimination for everyone, not just for citizens.⁴⁶ This negative obligation on State parties is of particular relevance to children in the asylum system. However, the wording “national or social origin [and] other status” are often given a broad interpretation

⁴² *Affaire Popov v. France* no. 39472/07 & 39474/07, E.C.H.R. 2012-IV. Note that Article 3 was also engaged in this case. See also C. Smyth, *The Irish asylum system is in need of radical reform*, blog posted November 27, 2012, accessed February 8, 2014, <http://www.humanrights.ie>, reported:

The family were held in a ‘family zone’ of a detention centre with no facilities for leisure, no children’s furniture and few toys, and no access to the open-air. Announcements were made over a tannoy and the general atmosphere was described as anguished and stressed. Of course, asylum seekers in direct provision in Ireland are not in detention. But otherwise the parallels are striking.

Some recent UK High Court cases are also informative as they engaged of Article 8 as regards asylum-seekers not being permitted to work: *Tekle v. Secretary of State for the Home Department* [2009] 2 All E.R. 193; *R (on the application of Negassi) v. Secretary of State for the Home Department* [2011] E.W.H.C. 386 (Admin).

⁴³ *Ahmed v. Austria* no. 25964/94, E.C.H.R. 1996-VI.

⁴⁴ Additionally, Ireland has been called on by such bodies as the ECRI and the Council of Europe Commissioner for Human Rights to introduce temporary work permits to asylum-seekers, see further G. Mellon, *Deprivation of permission to work: asylum seekers and Article 8 ECHR*, blog posted March 24, 2011, accessed February 8, 2014, <http://www.humanrights.ie>.

⁴⁵ See also Hathaway (2005).

⁴⁶ Article 14 of the ECHR states that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

by the ECtHR (Blake & Husain, 2003, p. 315), regardless that asylum-seekers often fall within this category, as persons that are legally within the State while their applications are being processed.

As to whether there is a right to social security under the ECHR, while there is no specific provision to be found in the ECHR with respect to social security or welfare, a right to social welfare was established by the ECtHR in *Stec and others v. United Kingdom*.⁴⁷ Thus, in the spheres of social and medical assistance, Blake and Husain maintain that this form of discrimination “would be likely to engage Article 14 when combined with the concept of physical and bodily integrity under Article 8” (2003, p. 334). Until such time as the decision is made on the claimant’s application – being legally within the State as an asylum-seeker – the claimant should be treated as if they were a refugee until the State makes their final decision on their status (UNHCR, 2007, p. 3). Therefore this principle logically extends to living conditions during asylum. Upon refugee status being granted in Ireland, a person’s material situation significantly improves, as they are then entitled to avail of work, travel, State supports and facilities in the same way as a citizen, despite being the same individuals as prior to the decision, with the same vulnerabilities and needs.

2.3.2 European Union obligations

The Charter of Fundamental Rights of the European Union enshrines into EU law certain political, social, and economic rights for EU citizens and residents.⁴⁸ Article 34 of the EU Charter provides for the right to social security to “everyone residing and moving legally within the European Union”.⁴⁹ Article 35 also provides for the right to healthcare. These rights are separate and apart from ‘citizens’ rights’, provided for in Section 5 of the EU Charter.

The 2009 Treaty of Lisbon also strengthened the position of asylum-seekers by applying new competences to European institutions. Plans were introduced to create a new Common European Asylum System (CEAS).⁵⁰ This treaty expanded upon the older EU treaties,⁵¹ which had provided for

⁴⁷ *Stec and others v. United Kingdom*, 65731/01, E.C.H.R. 2006-VI. See further ECHR Human Rights Files webpage, accessed February 8, 2014, <http://www.echr.coe.int/echr/en/header/case-law/case-law+analysis/other+publications/dossiersdh.htm>.

⁴⁸ The Charter of Fundamental Rights of the European Union, O.J. C 326, at 407 (2012) (EU Charter). The EU Charter was made legally binding in 2009 by the Nice Treaty and carries the same legal value as EU treaties.

⁴⁹ Findings by the European Court of Justice of reception conditions amounting to inhuman and degrading treatment focused not only on host Member State but also when Member States transfer asylum-seekers (under the Dublin procedure) back to the responsible State when they could not be unaware of deficient standards in asylum conditions amounting to inhuman and degrading treatment contrary to Article 4 of the EU Charter. See for example joined cases of *N.S. v. United Kingdom and M.E. v. Ireland*, CJEU - C-411-10 and C-493-10.

⁵⁰ This includes (a) uniform status of asylum, (b) uniform status of subsidiary protection, (c) common system of temporary protection, (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, (e) criteria and mechanisms for determining which Member State is responsible for considering an application, (f) standards concerning reception conditions, (g) partnership and cooperation with third countries, accessed February 8, 2014, <http://www.europarl.europa.eu/portal/en>.

⁵¹ Namely the Treaty on the European Union; Treaties Establishing the European Communities and related Acts.

minimum standards in relation to displaced persons or refugees while at the same time seeking to promote balance between Member States' that receive such persons, thus working towards harmonization of the asylum process within the EU. However, both Ireland and the UK have negotiated an opt-out clause from the CEAS.⁵²

In terms of EU Directives that are of relevance to asylum-seekers or refugees⁵³ and reception conditions, three are worthy of note (though only the second and third are applicable to Ireland): Council Directive 2003/9/EC (Reception Conditions Directive), Council Directive 2004/83/EC (Asylum Qualifications Directive)⁵⁴ and Council Directive 2005/85/EC (Asylum Procedures Directive).⁵⁵ The Reception Conditions Directive established minimum standards for the reception of asylum-seekers, including material reception conditions, recognition of a dignified standard of living, protection of particularly vulnerable asylum-seekers, a limited right to work, etc.⁵⁶ However Ireland opted out of the Reception Conditions Directive,⁵⁷ and is not under any obligation to meet these minimum standards. The Government's reasons for the opt-out were largely based on concerns over employment, as a provision in this Directive extended the right to work to asylum-seekers under certain conditions. Successive Irish governments have asserted that this would have a negative effect on increased asylum applications to Ireland.⁵⁸ The impact of such opt-outs by Ireland for current asylum-seekers' conditions will be considered further in the following sections. The Asylum Qualification Directive acknowledges in its Preamble the EU's objective for a common asylum policy.⁵⁹ However, as this Directive is relevant to beneficiaries of refugee or subsidiary status it does not provide for reception conditions of asylum-

⁵² While Denmark, Ireland and the UK are not a party to the CEAS, the Irish and UK positions are reversible, accessed February 8, 2014, <http://www.ecre.org/component/content/article/36-introduction/194-history-of-ceas.html>.

⁵³ Other equality related EU Directives that have been transposed into Irish law include Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L 180, at 22 (2000), (Race Directive); Council Directive 2004/113/EC, O.J. L 373, at 37 (2004). Whilst these Directives may be applicable to refugees generally they will not be elaborated on here because they do not particularly further the discussion of reception conditions of asylum-seeker children.

⁵⁴ Council Directive 2004/83/EC 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, O.J. L 304, at 2 (2004) has been transposed into Irish Law (S.I. 518/2006).

⁵⁵ Council Directive 2005/85/EC, O.J. L 326, at 13 (2005) was transposed into Irish law by S.I. 51/2011 and S.I. 52/2011. Other sources of EU law on asylum and refugee law include the Eurodac regulation (2725/2000/EC), Temporary Protection Directive (2001/55/EC), Recast Dublin III Regulation (Council Regulation (EC) No. 604/2013) and the Statistics Regulation (2007/862/EC).

⁵⁶ The legal basis for this Directive is Article 63 of the Treaty establishing the European Community O.J. C 325, at 1 (2002).

⁵⁷ Ireland had the option of not adopting this Directive relating to asylum as a result of a Protocol negotiated at the time of the Amsterdam Treaty, O.J. C 340, at 86 (1997). See Department of Justice and Equality website, accessed February 8, 2014, <http://www.inis.gov.ie/en/INIS/Pages/EU%20Legislation>. On reasons subsequently given why Ireland opted out of the Directive see Written Answers by Minister for Justice, Equality and Law Reform, Dermot Ahern TD, 709 Dáil Deb. col. 142 (13 May 2010).

⁵⁸ Written Answers by Minister for Justice, Equality and Law Reform, Dermot Ahern TD, 709 Dáil Deb. col. 142 (13 May 2010); Written Answers by Minister for Justice and Equality, Alan Shatter TD, Unrevised Dáil Deb. col. 236 (27 March 2013).

⁵⁹ Council Directive 2004/83/EC set out the content of the protection granted to "beneficiaries of refugee or subsidiary protection status", with specific reference to vulnerable people and the best interests of the child (Article 20), social welfare (Article 28) and unaccompanied minors (Article 30).

seekers, therefore it does not further our discussion of the topic at hand.⁶⁰ This is also the case with Council Directive 2005/85/EC which was on minimum standards on procedures in Member States for granting and withdrawing refugee status. Contemporaneous with these Directives being introduced there was and continued to be much public discourse surrounding the term ‘welfare tourism’ (Kahanec *et al.*, 2009; Thornton, 2013a).⁶¹ Some States (including Ireland) argue that they did not wish to create a ‘pull factor’ for asylum-seekers to their shores.⁶²

Part I of the article sought to address Ireland’s current obligations on States in relation to asylum reception conditions, both at international and European levels, with some theoretical analysis also provided. The documents to which Ireland has decided not to ratify highlighted some areas where asylum-seekers in Ireland may not expect the same conditions as other States. Part II will now analyse how Ireland attempts to meet its international and regional obligations through its domestic laws and (express or apparent) government policies.

3 – DIRECT PROVISION AND CHILDREN

This part of the article sets out what is meant by ‘direct provision’ and considers the legal basis for this system in Ireland. It also provides analysis of weaknesses in domestic legislation and policy, with particular focus on children in direct provision.

3.1 What is direct provision?

Direct provision, the current institutionalised accommodation system for asylum-seekers in Ireland, was established by the Department of Justice in 2000.⁶³ The Reception and Integration Agency (RIA) is the State agency set up for the oversight and monitoring of dispersal and direct provision. Much of the background and evolution of direct provision may be gained from contemporaneous internal departmental correspondence, ministerial circulars and administrative fiat (obtainable through freedom of information requests).⁶⁴ Such informal methods by government ministers necessarily restricted parliamentary oversight, leading to a marked lack of debate on these areas of reform.⁶⁵ As of December 2013 there are 1,666 residents under 18 in direct provision (or 38% of 4,360 total occupancy) (RIA,

⁶⁰ See further Irish Refugee Council, *Direct Provision: Framing an alternative reception system for people seeking international protection* (Dublin: IRC, 2013).

⁶¹ See also written question from Deputy Seán Kyne to Minister for Social Protection, 758 Dáil Deb. col 294 (6 March 2012).

⁶² The nature of such public discourse can have collateral implications on a broader scale, by potentially fuelling xenophobic attitudes, Forment ‘Peripheral Peoples and Narrative Identities: Arendtian Reflections on Late Modernity’ in Benhabib (ed.), (1996), 314-330. Racist behaviour or at the very least ‘othering’ commentary are mind-sets at all levels of society, Arendt (1951); Young (1999) and Benhabib (1996; 2004; 2006).

⁶³ For a comprehensive examination of reception conditions in Ireland see C. Joyce & E. Quinn, *Organisation of reception facilities for asylum seekers in Ireland*, (Dublin, EMN Ireland, 2014).

⁶⁴ See further Thornton (2011).

⁶⁵ For a detailed timeline of developments that ultimately led to Direct Provision see L. Thornton, ‘Closing our eyes: Irish society and direct provision’ blog posted October 8, 2013, accessed January 29, 2014, <http://www.humanrights.ie>.

2013, pp. 7-13).⁶⁶ Under direct provision, asylum-seekers are given full board within the accommodation centres⁶⁷ and a weekly allowance of €19.10 per adult and €9.60 per child paid by the Department of Social and Family Affairs. This amount is regardless of any special needs. The weekly allowance has remained at this level since its introduction in 2000, despite vigorous debate and lobbying in the last 12 years from NGO's, sections of the media, public bodies, politicians and European bodies alike (ECRI, 2013; Arnold, 2012, p. 22).⁶⁸ Asylum-seekers may reside elsewhere if they have their own resources or have family or friends who will support them, but if they live outside the Direct Provision system then they are not eligible for the weekly allowance (Office of the Ombudsman, 2013, p. 13).⁶⁹ Direct provision was initially meant to be a temporary arrangement (maximum 6 months) because at the time the number of asylum-seekers entering the county gave rise to a housing 'crisis' (IRC, 2013, p. 15; Brady 2010). However the reality is that the average stay is just under four years,⁷⁰ with some staying up to seven years.⁷¹ Asylum-seekers are typically placed in more than one centre for the length of their application process. This provides them with few opportunities to become or feel part of a community.⁷²

The Accommodation Centres themselves vary significantly both in standard and suitability for purpose, consisting of a combination of purpose-built centres, hotels or hostels, former convents or nursing homes, a caravan site and a former holiday site (RIA, 2013, p. 14). As of December 2013 there are total of 31 accommodation centres (excluding 2 self-catering)⁷³ and 1 reception centre (RIA, 2013, p. 14), spread across 16 counties in Ireland.⁷⁴ There have been many reports and studies published by academics, Irish NGOs, charities and research institutes on the failings of the direct provision system since its establishment and the impact that these failings have had on residents, both adults and children alike (Fanning, Veale & O'Connor, 2001; Comhlámh, 2001; UCD, 2002). These failings are manifest in the poor living conditions, lack of accessible facilities and grinding poverty that are endemic in the

⁶⁶ Some of these children are asylum-seekers, others are children of asylum-seekers that travelled with their parent(s) and others are Irish born citizens with asylum-seeker parent(s).

⁶⁷ Most asylum-seekers stay in direct provision for the duration of their asylum application process. Seven of the 31 accommodation centres are State owned, the rest are tendered out to private contractors.

⁶⁸ Medical cards are also made available by the HSE. See also ECRI (2013), 28.

⁶⁹ See also Written Answer by Minister for Justice, Deputy Shatter to Adjourned Motion by Senator Jillian Van Turnhout, Seanad Deb. (18 April 2013).

⁷⁰ As of December 2013 59.6% of asylum-seekers have spent over 3 years in direct provision, RIA (2013), 19.

⁷¹ Written Answers by Minister for Justice and Equality, Deputy Shatter, 761(3) Dáil Deb. col 955 (18 April 2012). This is as a result of the lengthy delays in asylum applications and appeals process, Written Answers Minister for Justice and Equality, Deputy Shatter, Unrevised Dáil Deb. col 235 (27 March 2013). See also Thornton (2012a). However, see also Written Answers, Unrevised Dáil Deb col. 48 (6 March 2013).

⁷² See Part 4

⁷³ The number of accommodation centres that are self-catering has reduced to two as of 2011, see Arnold (2012), 21. Asylum-seekers that are in self-catering accommodation can avail of the same social welfare entitlements that an Irish citizen can, as they are not allowed to work during the asylum process.

⁷⁴ RIA are therefore responsible for a total 34 centres that accommodate asylum-seekers. Many of these centres are in isolated and rural locations, relying on costly public transport for access to amenities from the closest residential areas, RIA (2013).

current system that will be addressed in Part 4. However, first it is necessary to consider the legal basis for direct provision.

3.2 The legal basis for direct provision

Ireland has a dualist system in relation to international and regional agreements. Therefore the contents of international agreements become binding on the Irish State by ratification but cannot be pleaded by individual litigants in proceedings against the State until they are incorporated into domestic law. This is enshrined in Article 29.6 of the Irish Constitution.⁷⁵ A strict understanding of Article 26.9 was upheld in the decisions of *Re Ó Laighléis*⁷⁶ and *Kavanagh v. Governor of Mountjoy Prison*.⁷⁷ The Oireachtas (Irish Parliament) may incorporate such international agreements via primary or secondary legislation.⁷⁸ European Union directives relevant to asylum-seekers and direct provision are incorporated by way of secondary legislation. Examples include the Asylum Qualification Directive 2004/83 and the Race Directive 2000/43/EC.⁷⁹

The ECHR and Optional Protocols 1 and 4 were incorporated into the domestic legal structure through the *European Convention on Human Rights Act 2003*.⁸⁰ What is noteworthy about the 2003 Act is that it does not exactly incorporate the Convention. McKechnie J argued in *Foy v. An t-Ard Chláraitheoir* that it is misleading to state that the Convention was incorporated into Irish law, but rather more accurate to say that the rights contained in the Convention are part of Irish law and that the source of these rights is the 2003 Act.⁸¹

Section 2 of the 2003 Act provides for an interpretative obligation, whereby courts shall interpret and apply any statutory provision or rule of law in a manner compatible with the State's obligations under the ECHR and in the event that it is not compatible, either the High Court or Supreme Court grants a declaration of incompatibility.⁸² However, this does not affect the validity of the rule, and the applicant is not entitled to damages. It therefore has little material effect. Part 3 obliges every organ of the State to perform its functions in a manner compatible with the State's ECHR obligations.⁸³ In the case of

⁷⁵ Article 29.6 of the Irish Constitution (*Bunreacht na hÉireann 1937*) (read in conjunction with Article 15.2.1 states "No international agreement shall be part of the domestic law save as may be determined by the Oireachtas". Article 15.2.1° states that the "sole and exclusive power of making laws for the State is hereby vested in the Oireachtas...".

⁷⁶ *Re Ó Laighléis* [1960] I.R. 93.

⁷⁷ *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97. In both the *Re O'Laighléis* (above) and *Kavanagh* cases the Irish Supreme Court confirmed that agreements to which the state was party did not form part of domestic law and hence could not confer rights on individual citizens. Nevertheless, these agreements can create binding obligations in international law and can help to shape our understanding of domestic legal provisions.

⁷⁸ Due to the mechanism by which the Convention was incorporated it has a legal status inferior to that of the Constitution and cannot be used to invalidate a provision of the Constitution. The ECHR was thus given indirect, sub-constitutional, interpretative incorporation.

⁷⁹ See Part 2.3.

⁸⁰ Note 75-78 and accompanying text.

⁸¹ *Foy v. An t-Ard Chláraitheoir* [2007] I.E.H.C. 470, para. 93. See also Part 2.

⁸² The matter is then referred to the Oireachtas (Parliament) for debate.

⁸³ However, this rule is again of limited value as, first, the definition of "organ of the State" expressly excludes the courts or tribunals, and, secondly, the obligation is subject to "any statutory provision" meaning that if an organ of the State is acting accordance with a legislative provision, this seems to override s 3 of the 2003 Act.

McD v. L & Anor the Irish Supreme Court held that the Convention cannot be directly applied in Irish law.⁸⁴ Rather the Court must identify a rule of law that is incompatible with the ECHR. This implies that even when taking judicial notice of Convention principles, the courts must adopt a narrow reading of the 2003 Act. With that in mind our focus now shifts to direct provision itself.

The direct provision and dispersal system were introduced on an administrative rather than legislative basis in Ireland in 2000,⁸⁵ and by 2003 legislation had been enacted to debar asylum-seekers from receiving rent allowance.⁸⁶ In 2004 Directive 2004/38/EC⁸⁷ (on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) was transposed into Irish law.⁸⁸ This introduced Habitual Residence Condition (HRC)⁸⁹ and was applied as a further prohibitive criterion for non-citizens receiving social welfare payments.⁹⁰ The main impact for asylum-seekers and their children was that administrative barriers were placed on their social welfare eligibility. In 2009 the government introduced fresh legislation⁹¹ to the effect that someone in the process of seeking asylum or protection, and who did not as yet have a right-to-reside, was not regarded as habitually resident for social welfare purposes, thus excluding them from eligibility for child benefit.⁹²

Neither are asylum-seekers entitled to the Supplementary Welfare Allowance Scheme (SWA) (a small basic allowance for those on little or no income), as the weekly cost of direct provision (€166.90 per

⁸⁴ *McD v. L & Anor*. [2009] I.E.S.C. 81. See also F. De Londras & C. Kelly, *European Convention on Human Rights Act: operation, impact and analysis*, (Dublin: Roundhall, 2010), U. Kil Kelly, ed., *The ECHR and Irish Law*, 2nd ed. (Bristol: Jordans, 2009), M. Cahill, 'McD v. L and the incorporation of the European Convention on Human Rights', *Ir. Jur.* 45 (2010): 221-229.

⁸⁵ Direct Provision "became official government policy in April 2000, when the Department of Social and Family Affairs issued Supplementary Welfare Allowance Circulars 04/00 and 05/00. These circulars were intended to provide guidance to the appropriate staff in relation to the implementation." FLAC (2009b), 13.

⁸⁶ Section 13 of the Social Welfare (Miscellaneous Provisions) Act 2003 (since replaced by Section 198(3) of the 2005 Consolidation Act). Reasons given by Minister for Social and Family Affairs Mary Coughlan at the time were that there was suitable accommodation and that people were by then "spending much less time in the asylum process before their claim for asylum is finalised", *Written Answers of Minister for Social and Family Affairs*, Mary Coughlan TD, 562 Dáil Deb. col. 64 (25 February 2003).

⁸⁷ Directive 2004/38/EC, O.J. L 158, at 77 (2004), of the European Parliament and of the Council of 29 April 2004.

⁸⁸ S. 17 of the Social Welfare (Miscellaneous Provisions) Act 2004. It was later considered to be indirect discrimination against EU Citizens (as an obstacle to their freedom of movement) and that Ireland's implementation of HRC was in breach of EU law under Regulation 1408/71, O.J. L 149, at 1 (1971). See also FLAC (2009b), para 2.1; K. Berkeley, "'Harsh' law offends against most vulnerable", *Law Society Gazette* 101(6) (2007): 14-15.

⁸⁹ See generally C. Tazreiter, *Asylum Seekers and the State*, (Aldershot: Ashgate Publishing Ltd., 2005) and S. Cox, "The habitual residence test and EC law", *J. Soc. Wel. & Fam. L.* 21(4) (1999): 416-426. For more an international and European perspectives see A. Bayefsky, ed., *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers*, (Leiden: M. Nijhoff, 2006).

⁹⁰ Some social welfare payments were affected by this provision, namely child benefit, unemployment benefit, non-contributory old age pension, blind pension, one parent family payment, carer's allowance, supplementary welfare allowance, disability allowance. This affected both EU and non-EU applicants alike.

⁹¹ Section 15 of the Social Welfare and Pensions (No. 2) Act 2009 introduced the additional right-to-reside' test. It did not replace HRC requirement.

⁹² Supplementary Welfare Allowance Circular No. 08/09 stated that the Department did not consider asylum-seekers to be habitually resident in the State, cited in FLAC (2009b), para. 2.1.2. This remains the case to date.

week per adult) is offset against SWA.⁹³ However, if an asylum-seeker applies (and the Community Welfare Officer uses their discretion in their favour) they may receive a once-off urgent or exceptional needs payment to cover e.g. school books, prams, back to school clothing/footwear and travel to legal/medical appointments.⁹⁴ Therefore, as the law currently stands the only consistent and dependable source of financial security for asylum-seekers to provide for themselves or their children is the allowance payable through direct provision.

3.3 Weaknesses in law/policy

Historically Ireland has been more accustomed to emigration than immigration. Though Ireland has in the past been open to program refugees, they were viewed as being temporary guests in the State, rather than new potential communities or citizens (Fraser & Harvey (eds.), 2003, p. 128). With the increase in volume of both program refugees and individual asylum claims “the attitudes of Irish authorities [...] appeared to harden” (Fraser & Harvey (eds.), 2003, p. 129).⁹⁵ It is arguable that Ireland’s historical background has not equipped us to cope with the challenges that come with immigration, neither conceptually nor pragmatically. Since the late 1990’s, and continuing until relatively recently, the official line from government ministers was of growing concern for the increasing number of asylum-seekers entering the country (especially Dublin) and that this was becoming a burden on the capital city. Even as recently as 2007 government ministers have been reported as justifying HRC as preventing “potential floodgates” of asylum-seekers.⁹⁶

The reason given in 2000 for the joint policies of ‘direct provision and dispersal’ was the perception that access to the mainstream welfare system provided an incentivised rise in numbers claiming asylum in Ireland (Thornton, 2012b). Likewise, by the time Directive 2004/38/EC was transposed into Irish law in May 2004 there was growing European and national concern over ‘welfare tourism’ (Kahanec *et al.*, 2009).⁹⁷ Some States⁹⁸ (including Ireland) argued that they did not wish to create a ‘pull factor’ for asylum-seekers to their shores.⁹⁹ Such terminology can have collateral implications on a broader

⁹³ Section 13 of the *Social Welfare (Miscellaneous Provisions) Act 2003*.

⁹⁴ This is an example of a more traditional/charitable approach to social welfare rather than a rights-based approach. However, although these payments are available because of the discretionary element of the SWA scheme, reliability of such payments varies from area to area.

⁹⁵ The rate of asylum applications has been dropping steadily since it peaked in 2010, the total amount of applications in 2012 (at 956) being a reduction of 25.9% on the 2011 figure and at its lowest number since 1996, ORAC (2013), 15. The highest number of applications was over 10,938 in 2000, ORAC (2012), 65. This is a minuscule amount in comparison to Ireland’s European neighbours’ averages. Eurostat News Release (March 2012) ‘The number of asylum applicants registered in the EU27 rose to 301,000 in 2011’, accessed December 18, 2012, <http://epp.eurostat.ec.europa.eu>.

⁹⁶ Minister for Social & Family Affairs Martin Cullen, 642 Dáil Deb. col 1783 (4 December 2007). See also note 13 and accompanying text; note 151 and accompanying text.

⁹⁷ See also written question from Deputy Seán Kyne to Minister for Social Protection, 758 Dáil Deb. col 294 (6 March 2012).

⁹⁸ For example Denmark, UK and Ireland, FLAC (2009b), 118. See also C. Breen (2008) ‘The policy of direct provision in Ireland: a violation of asylum seekers’ right to an adequate standard of living’, *I.J.R.L.* 20(4) (2008): 611-636 at 613. See also Part 2.

⁹⁹ Other arguments in defence of direct provision include that it is cost-effective or that permitting asylum-seekers to enter the labour market would put further strain on national unemployment figures, RIA (2010); Written Answers, Unrevised Dáil Deb. col 236 (27 March 2013); Written Answer by Minister for Justice, Deputy Shatter to Adjourned Motion by Senator

scale, by influencing negative public perception and by potentially fuelling xenophobic, racist or (at the very least) ‘othering’ commentary and mind-sets at all levels of society. Children are not shielded from the political fall-out of asylum, but rather “[t]hey experience its effects, both directly and indirectly and may, indeed be more vulnerable as subjects to political events or decision making than adults are” (James & James, 2004, p. 31) With that in mind, State representatives have responsibility to limit their commentary to responsible, reasoned and empirically-based contributions to such discourse. Apart from this responsibility, States also arguably have human rights obligations to combat poverty as: “[a] State does not discharge its duty under international human rights law simply by having a social welfare system. It must ensure that those who need assistance can access it in a fair and timely way” (Sepúlveda & Nyst, (2012) p. 13).¹⁰⁰ As Fanning points out:

the direct provision system was [...] like a wolf that cut asylum-seekers away from the pack, away from a solidarity of shared welfare rights and entitlements with citizens. Once sundered legally and administratively from the main population, their fates became a matter of greater general indifference (2009, p. 68)

Thornton notes that the Department of Social Welfare was wary of the legal basis for implementing direct provision as early as 2006, and whether it was *ultra vires* the Department’s powers (2012b). The Department therefore sought that the government place the regime on a statutory footing but this has not occurred.¹⁰¹ However at the time it was still arguable that some asylum-seekers may be eligible for certain social welfare payments.

In February 2008 the Department of Social and Family Affairs stated that no-one in the asylum or leave to remain process could be regarded as “resident” in the State for the purposes of HRC (and therefore was ineligible for social welfare payments).¹⁰² In 2009 the Free Legal Advice Centre (FLAC), on behalf of four applicants, were successful in an appeal which clarified that HRC could not be used to restrict asylum-seekers eligibility for social welfare (FLAC, 2009a). Soon after (almost as a knee-jerk reaction to these decisions), the Government introduced legislation¹⁰³ to the effect that someone in the process of seeking asylum or protection, and who does not as yet have a right-to-reside while they await decision (FLAC, 2010b), was regarded as not habitually resident for social welfare purposes (FLAC, 2010a). This development was a retrograde step as far as asylum-seekers were concerned, and is yet another example of the State’s deliberate marginalisation of asylum-seekers and their children, as welfare stratification was reinforced from then on. As mentioned above, and as a result of the 2009 Act asylum-

Jillian Van Turnhout, Seanad Deb. (18 April 2013). For counter-arguments to this cost-benefit analysis of direct provision by the State as well as proposed alternatives see IRC (2013). See also ECRI (2013), 25-28.

¹⁰⁰ As Magdalena Sepúlveda, the UN Special Rapporteur on Extreme Poverty and Human Rights noted, the State must ensure “minimum essential levels of non-contributory social protection – not as a policy option, but rather as a legal obligation under international human rights law”, quoted in Brady (2010).

¹⁰¹ See also Thornton (2013a).

¹⁰² This was based on their interpretation of the High Court decision of *Goncescu & Others v. Minister for Justice* [2003] I.E.S.C. 49. The Attorney General concurred with this advice, FLAC (2009a).

¹⁰³ Social Welfare and Pensions (No. 2) Act 2009.

seekers who do not have their own resources or who cannot rely on charity of friends or family have no other legal recourse to obtaining food and shelter than to avail of direct provision (Office of the Ombudsman, 2013). In the last number of months commentary from both government ministers and individual politicians has been noticeably more sympathetic towards the hardships of asylum-seekers in Ireland (McMahon, 2014). This development has been in step with direct provision being given greater attention by both public figures (O'Brien & O'Shea, 2014)¹⁰⁴ and the media alike.¹⁰⁵ However, such political discourse, though encouraging, has not led to any changes to the lived reality of asylum-seekers in direct provision to date. Though the current Minister for Justice has confirmed her wish to fast track the implementation some aspects of asylum determination procedures by way of a single procedure (O'Brien, 2014a), practical measures to improve the living conditions for those in direct provision have not occurred to date.¹⁰⁶

There remains no legislative basis for direct provision in Ireland, only ministerial circulars and administrative fiat (Thornton, 2013a).¹⁰⁷ Therefore Direct Provision remains a non-legislative system of providing less than adequate bed and board to asylum-seekers for the lengthy duration of their application process. This system lacks transparency, independent oversight or accountability. Given that there is no legislative basis for direct provision to date, and no sign that Irish legislators are inclined to do so now, successive Irish governments' complacency in this regard naturally "raises fundamental questions of democratic accountability in Ireland" (Thornton, 2013b). Such lack of transparency, due in no small part to inaction by Irish legislators has led to the role of the legislature being "diminished and displaced by the strong arm of the executive" (Thornton, 2013a).

Another arm of the Irish State, the judiciary, has recently been availed of to address some of these issues. Former Supreme Court Judge Catherine McGuinness has "predicted that the State's treatment of asylum seekers will be the subject of a future government apology" (O'Brien & O'Shea, 2014). Likewise, within the court system, a number of proceedings recently commenced at High Court level

¹⁰⁴ For example, see commentary from the State's Special Rapporteur for Children, Geoffrey Shannon, former Ombudsman Emily O'Reilly and former Supreme Court Judge, Catherine McGuinness.

¹⁰⁵ See, for example, O'Brien (2014c), available at <http://www.irishtimes.com/news/lives-in-limbo> (date accessed: 20th August 2014).

¹⁰⁶ However, Minister for Justice, Frances Fitzgerald, recently stated that a government working group was to be set up in order to examine issues such as welfare payments for adults and children, restrictions to third-level education and supports for children (O'Brien, 2014a); That said, the Minister has rejected the possibility of changing the law to allow asylum-seekers to seek employment in the State under certain conditions, or for an amnesty for those currently in direct provision, see Written Answers by Minister for Justice, Equality and Law Reform, Frances Fitzgerald TD, 88 Dáil Deb. col. 164 (18 June 2014).

¹⁰⁷ Note 85 and accompanying text.

in which a number of asylum-seeker families are challenging the constitutionality of the direct provision system,¹⁰⁸ though their outcomes are by no means certain.¹⁰⁹

In terms of Ireland's adherence to the principles of the ECHR, the positive obligations imposed by Article 8 are not being met adequately by the State. The level of interference imposed by direct provision on family life is unjustifiable under the exceptional headings set out in Article 8.¹¹⁰ This government policy also hinders and thwarts families in enjoying their private family rights in other ways.¹¹¹ As a further indication of Ireland's lack of commitment, the State has failed to ratify Optional Protocol 12 general prohibition on discrimination (especially applicable to asylum-seekers who are reliant on the State for support) despite signing it in 2000.¹¹² Such lack of commitment to humane reception conditions by the Irish State extends to UN levels also, with the non-ratifications of the OP-ICESCR¹¹³ and OP-CRC¹¹⁴

Furthermore, the Council of Europe has in recent years called on Ireland to improve its conditions of asylum, long delays in processing application and integration issues,¹¹⁵ and to provide intervention and facilities for children in asylum with psychiatric issues (Muiznieks, 2012). Irish low standards are hardly surprising given Ireland's opt-out of the Reception Conditions Directive.¹¹⁶ The UN Committee on the Elimination against Racial Discrimination has reiterated its concern "at the negative impact of 'direct provision' on the welfare of asylum-seekers" (CERD, 2011, p. 4),¹¹⁷ particularly in respect of (amongst other issues) the length of stay and poor living conditions. Furthermore, the UN Human Rights Committee recently mentioned direct provision in its concluding observations on Ireland's fourth

¹⁰⁸ *N.M. and others v Minister for Justice and Equality, Minister for Social Protection, Attorney General and Ireland* [Record No. 2013 553 JR]. However, the family later withdrew the case for reasons unknown. R. Mac Cormaic, 'African family withdraws challenge to direct provision scheme', *The Irish Times*, 10th December 2013. However, the remaining case, *C.A and T.A. (a minor) v Minister for Justice and Equality, Minister for Social Protection, the Attorney General and Ireland* [Record No. 2013/751/JR], came before the High Court in May 2014, and the written judgment in this case is expected in late 2014.

¹⁰⁹ Such judicial attention given to direct provision is distinct from inter-jurisdictional case law relevant to asylum-seekers in Ireland and impressions of our direct provision system, such as, *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] N.I.Q.B. 88 (14 August 2013), see note 150 and accompanying text.

¹¹⁰ Interference is allowable 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.

¹¹¹ See Part 4.

¹¹² The Council of Europe's Commissioner for Human Rights has interpreted the reluctance of Ireland as being because the Protocol referred to general prohibition on discrimination, rather than a prescriptive list of grounds (Council of Europe, 2008). However, the Irish Human Rights Commission identified that Ireland has already accepted the value of a non-exhaustive list of grounds by its ratification of the ICCPR and ICESCR, see IHRC (2005).

¹¹³ Note 18.

¹¹⁴ Note 27.

¹¹⁵ Though the Immigration, Residence and Protection Bill was published in 2010, it has remained in Committee stage since November 2010. This Bill aimed to create a legislative framework for managing inward migration into the State. However, though the legislation proposes may speed up the processing of asylum applications in the future, and though it makes some amendment to existing provisions on HRC it makes no mention of amending reception conditions or direct provision as it currently stands.

¹¹⁶ See Part 2.3.2.

¹¹⁷ CERD/C/IRL/CO/3-4

periodic review (HRC, 2014). The Committee expressed its concerns and recommended that the Irish State introduce an independent complaints system for direct provision residents and “ensure that the duration of stay in Direct Provision centres is as short as possible and introduce an accessible and independent complaints procedure in Direct Provision centres” (HRC, 2014, para. 19-20). Given the attention the Irish system has received from international human rights bodies, it is apparent that asylum-seekers in Ireland are causing increasing concern to the international community. It will become apparent in the following section that such differential treatment amounting to discrimination does in fact occur.

This part of the article sought to address the implementation Ireland obligations in relation to asylum-seekers’ reception conditions. This involved a brief overview of the direct provision system and some analysis of government policies (express or apparent), concluding that the current legislation (or lack thereof) and State policy manifestly discriminates against asylum-seekers and their children, thus exacerbating existing vulnerabilities. In Part 4 we will examine how direct provision and dispersal has impacted on asylum-seeker children, not least by reduced social welfare provision but also by “the perception that they have lesser rights than Irish children even when they do not” (Fanning, 2009, p. 68). It will also highlight the way in which such institutional discrimination and poverty is not in the best interests of these children.

4 – PERSONAL AND SOCIAL EFFECTS OF DIRECT PROVISION ON ASYLUM-SEEKER CHILDREN

This part of the article analyses the reported poor conditions of direct provision accommodation together with the physical and psychological impact of these conditions on children in asylum (either themselves or through their parents’ ability to parent them adequately). We then consider the societal impact of deprivation and political marginalisation on children in asylum as a result of disqualifying them from most social welfare payments and segregating them through direct provision and dispersal. One theoretical approach framing this part is the concept of the ‘politics of belonging’. Yuval-Davis coined this phrase to describe the contesting identities and debates which mark ‘full’ citizenship boundaries. Though Yuval-Davis (2006) applies his theory to the UK, it is arguably equally as applicable in Ireland as it cultivates the local and national mechanisms by which ‘we’ belong and ‘they’ do not, thus legitimating marginalisation. It is ultimately argued that discriminating against asylum-seekers while they are seeking recognition as refugees unnecessarily places them in an even more vulnerable position than when they entered the asylum system.

4.1 Impact of poor conditions on children in the asylum

There have been many reports and studies published by Irish NGOs and researchers on the various failings of the direct provision system since its establishment and the impacts that this has had on residents, adults and children alike (IRC, 2013; Arnold, 2012; Fanning, Veale & O'Connor, 2001; Comhlámh, 2001; UCD, 2002). These failings are embodied in poor living conditions, lack of accessible facilities and deprivation. The concerns mentioned below are a sample of issues raised by asylum-seekers, paying particular attention to conditions that might impact on children and their parents' ability to parent them adequately. Complaints by residents fall into three categories: physical condition in accommodation centres, management issues within accommodation centres and RIA or Government policy issues.

This section will consistently refer to how direct provision and its implementation fall short of standards articulated in international and regional instruments by which the State is bound, the CRC and the ECHR. Underlying themes of discrimination¹¹⁸ and poverty¹¹⁹ are implicitly present throughout this discussion of “prolonged spatial confinement and social segregation” (Szczepanikova, 2013, p. 130).

4.1.1 Complaints on physical conditions of accommodation centres

Regarding the first category of complaints, specific issues have included extreme temperatures due to faulty or inadequate heating systems, frozen pipes, poor insulation, dampness and condensation (Arnold, 2012, p. 17). Some of these issues were independently confirmed in an *Irish Times* report from 2007,¹²⁰ highlighting that the RIA inspections of accommodation centres yielded the following health and safety concerns:

flooded rooms, cockroaches, fire doors being propped open, kitchens not being up to national hygiene standards, mushrooms growing in a corridor, window chains broken with a reported risk of [a] ‘child falling out of the window’ and general failings in cleanliness and hygiene. (Mac Cormaic, 2007).

Nevertheless, The *Irish Times* reported that the RIA was “generally satisfied that the centres were well-run” (Arnold, 2012, p. 17). By 2013 further inspection reports were made publicly available by the Minister for Justice and again made for disturbing reading, citing instances in certain centres of lack of shower facilities, rotten floorboards, fire safety issues, overcrowding in rooms, hygiene concerns (O’Brien, 2013c; 2013b) as well as cockroaches, damp and carpets in need of replacing (O’Shea, 2014).

¹¹⁸ The instruments that provide the right to non-discrimination include the ICCPR (Article 26), the CRC (Article 2) and the ECHR (Article 14). See Part 2.

¹¹⁹ The right to social security/welfare/assistance is provided for in the CRC (Article 26), the EU Charter (Article 34) and the Asylum Qualification Directive (Article 28). See Part 2.

¹²⁰ Note that RIA Inspection Reports have only been made publicly available since October 2013, see <http://www.ria-inspections.gov.ie/> (date accessed: 22nd August 2014).

There was also noted a lack of consistent training in centres as regards child protection (O'Brien, 2013a).

It goes without saying that such conditions in any accommodation are intolerable, but in State-funded accommodation where the residents have no other viable option but to remain, they are completely unacceptable. What the government deems acceptable when it comes to asylum-seekers, however, is exemplified in the government choosing to opt-out of Council Directive 2003/9/EC which aimed to standardise conditions for asylum-seekers across Europe.¹²¹ Adequate living standards are also supported in discourse surrounding Article 22 of the UDHR, such as Eide's view that the provision is not only to keep refugees alive through shelter and food, but also to ensure preservation of dignity (2010, p. 234). However, the position in Ireland would seem to confirm Yuval-Davis' 'politics of belonging' position, as the State sets explicit boundaries of governance and social control through direct provision, thus legitimising the marginalisation of asylum-seekers as non-citizens (Yuval-Davis, 2006).

In terms of the impact of these dehumanising conditions on residents, there is especially cause for concern for the on-going health of young children, due to erratic temperatures, humidity, cleanliness and food hygiene standards. RIA itself, at inspections of a random sampling of accommodation centres, noted such concerns (Mac Cormaic, 2007).¹²² Compared to other Irish residential institutions such as hospitals, mental health facilities or prisons, direct provision accommodation appears to be held to a lower benchmark,¹²³ and is clearly unsuitable for either lengthy stay or families (ECRI 2013, p. 25-26). In conditions appropriately described as of "disproportionately poor standard," (Fanning, 2012, p. 27), direct provision accommodation is in stark contrast to what would be deemed as adequate for an Irish citizen. We now focus on management issues within accommodation centres.

4.1.2 Management policies

Regarding the second category of concerns, specific complaints included staff entering family rooms unannounced and not respecting residents' privacy, lack of protection from harm to residents, overcrowding or unsuitable co-habitation arrangements, un-nutritious and unvaried food provided or food provided according to a prohibitively strict timetable.¹²⁴ Lack of protection concerns involved harms both from fellow residents and from the surrounding community. Failure to protect residents of

¹²¹ See Part 2.

¹²² Such poor conditions would seem to breach (i) the right to an adequate standard of living under Article 11 of the ICESCR and Article 27 of the CRC; (ii) the right to health protection under Article 35 of the EU Charter; (iii) the best interests of the child under Article 3 of the CRC; and (iv) the prohibition on degrading treatment under Article 3 of the ECHR.

¹²³ For comparative analysis of institutional care systems see the annual reports of the Office of Inspector of Prisons, accessed February 8, 2014, http://www.inspectorofprisons.gov.ie/en/IOP/Pages/Annual_Reports and the Mental Health Commission, accessed February 8, 2014, http://www.mhcirl.ie/Publications/Annual_Reports/.

¹²⁴ See further K. Barry, *What's food got to do with it?: Food experiences of asylum seekers in direct provision* (Cork: NASC, 2014).

accommodation centres was evident when Lissywollen Caravan Site in County Athlone was the subject of racist violence in 2010 when locals attacked mobile homes with hatchets. The perimeter of the property remained unsecured for some time thereafter (Anon., 2010). The adequacy of security at accommodation centres was also raised in the reported rape of a female resident at another accommodation centre in 2011 (Baker, 2011).¹²⁵

Overcrowding and unsuitable co-habitation arrangements vary from case to case,¹²⁶ though four accommodation centres inspected in the last year have raised such concerns when inspected (O’Shea, 2014). In terms of the impact of overcrowding on residents, confined (sometimes inappropriate) shared spaces and communal bathroom facilities can potentially lead to risks to children. These risks range from a greater risk to their immune system, exposure to violence, aggression or sexual behaviour between adults. Instances have been reported of children “playing at imitating sexual intercourse” presumably learned by having inadvertently witnessed such behaviour from sleeping long-term in the same rooms with their parents (Hourihane, 2013; O’Brien, 2013a). There is also the risk of abuse from being raised in close quarters with strangers (Shannon, 2012, p. 32).¹²⁷ Instances have also been reported of other residents disciplining and scolding children (Fanning, Veale & O’Connor, 2001, p. 6), which can understandably cause tension between the adult residents. It has also been noted that the shared toilet facilities has led to some parents having difficulty toilet training their children, thus impacting on the child’s developmental milestones.¹²⁸ Of parallel concern is that some forms of overcrowding also breach of domestic legislation.¹²⁹ Despite this, according to the 2012 RCI report (Arnold, 2012, p. 19), it is not an uncommon trend for a mother to have to share a room with her 12 year old son.¹³⁰

Such circumstances make it extremely difficult and stressful for a child’s parent to protect them adequately from harm whilst in direct provision, despite it being a social norm that a stable family ought to support and provide protection from external threats and pressures, and despite the marital family

¹²⁵ An example of more recent racist attacks against asylum-seekers are evident in 4 reported racist attacks in 5 weeks, against residents en route to the Finglas reception centre in Dublin, Gleeson (2013). These incidents raise concerns as to whether accommodation centres are adequately protecting asylum-seekers’ right to bodily integrity in accordance with Article 8 of the ECHR.

¹²⁶ One example that was particularly striking amongst the complaints was a pregnant woman and a woman who’s baby had recently died having to share the same bedroom, Arnold (2012), 14. See also J. Smyth, ‘It was impossible to get any sleep or rest, says mother who miscarried’, *The Irish Times*, June 18, 2010 at 7. When asked to provide figures on the number of families living in one room recently the Minister could not provide this information, Written Answers by Minister Shatter, Unrevised Dáil Deb. col 234 (27 March 2013).

¹²⁷ There was an incident in County Mayo Centre where a 14 year old girl became pregnant as a result of an alleged rape by a male resident, Baker (2011).

¹²⁸ B. Fanning, ‘Asylum-seeker and immigrant children in Ireland: Racism, institutional neglect and racism’ in Hayes & Humphries, (eds.) (2004), 210.

¹²⁹ Section 63(a) of the *Housing Act, 1996* deems as overcrowded two people of opposite sex over the age of 10 (not living as husband and wife) to shared sleeping space. RIA have previously stated that they are in compliance with the legislation, however NGO’s working with residents and families in direct provision report otherwise, Arnold (2012), 19.

¹³⁰ Such complaints arguably count as violations of (i) the right to respect for private and family life under Article 8 of the ECHR; (ii) the right to an adequate standard of living under Article 11 of the ICESCR and Article 27 of the CRC; and (iii) the prohibition on inhuman and degrading treatment under Article 3 of the ECHR.

unit being guaranteed protection by the Constitution.¹³¹ Families in direct provision are undermined to a large extent by being dispossessed of their parenting competence, independence and autonomy.¹³² As Thornton (2012b) points out: “we allow ... children to grow up in centers [sic], where they never see their mothers or fathers cook, or clean, or work” (Thornton, 2012b). Therefore a child does not see their parent(s) embody traditional roles within this system. Parents often state this raises difficulties and stress for them both individually and between parent and child, and a stressed parent can lead to a stressed child.¹³³

The issue of diet and nutrition in accommodation centres has also received much attention. The Irish Refugee Council reports instances of:

malnutrition among children and expectant mothers, ill-health related to diet among babies and young children, weight loss among children, hunger among adults (as a result of family rationing) and chronic gastric illness among children of all ages (Arnold, 2012, p. 20).

A contributory factor to this is high-calorie fatty or starchy food, namely “a steady stream of chicken nuggets, white rice, ketchup, vegetables and chips daily, and a distinct lack of toddler appropriate foods” (Lentin, 2012).

Likewise, strict meal-times at accommodation centres is a related concern. This is problematic as small babies and toddlers’ feeding times are expected to fit in with this strict adult-orientated timetable (Arnold, 2012, p. 14-15). NGO research conducted in 2004 also indicated that nearly all of residents spent almost half of their weekly allowance subsidising their meals, due to the limited variety of food and not meeting dietary needs by accommodation centres.¹³⁴ However, devoting a large part of their weekly allowance to subsidising food is not sustainable for asylum-seekers, as other needs become unmet in turn, thus having to choose between competing necessities. This can result in:

¹³¹ Article 41.1.2° of the Irish Constitution (*Bunreacht na hÉireann 1937*).

¹³² An example of parental competence being eroded might be where a parent must rely on a child act as interpreter, thus shifting adult tasks and responsibilities to their child, Lauritzen & Sivertsen (2012), 207.

¹³³ Due to the living conditions provided, the tensions can also easily arise between parent and child, leading to both parenting and child protection issues, Long (2012), O’Brien (2014b). See also RTE News, *Ireland criticised over failure to adopt asylum legislation*, 6th December 2012, accessed February 8, 2014, <http://www.rte.ie/news/2012/1206/human-rights-asylum-seekers.html>. These situations are exacerbated further when one considers that 90% of asylum-seekers are reported to suffer from depression after 6 months in direct provision, and “are 5 times more likely than an Irish citizen to be diagnosed with a psychiatric illness”, ECRI website, accessed February 10, 2014, see <https://wcd.coe.int/ViewDoc.jsp?id=2017555&Site=COE>.

The likelihood of lengthy stays in direct provision can only have an exacerbating effect on such issues and is therefore unsuitable for lengthy stays, ECRI (2013), 26. See also FLAC (2009); C. Coulter, *Child Care Law Reporting Project Interim Report* (Dublin, CCLPR, 2013). In 2001 government has acknowledged that 49 asylum-seekers have committed suicide in the previous decade, Cullen (2011). Note however, that the Government now rejects these figures as inaccurate, Written Answers by Minister Shatter, Unrevised Dáil Deb. (27 March 2013) col 237.

¹³⁴ 92% as of 2004, Fanning & Veale (2004).

cases of malnutrition amongst expectant mothers, ill-health related to diet amongst babies, weight loss amongst children and hunger amongst adults as a result of 'within household rationing' of available resources in an effort to provide for the needs of children and babies.¹³⁵

Such arrangements would appear to fall short of the standards set out in both the ICESCR¹³⁶ and the CRC¹³⁷ in terms of children's physical development through proper nutrition.¹³⁸

4.1.3 Government or RIA policy issues

Regarding this third category of complaints, specific complaints included locations picked for accommodation centres that are long distances from local amenities coupled with lack of affordable transportation to local amenities, lack of childcare and pre-school facilities, lack of appropriate and designated space for homework or play, baby food denied 6 months after birth and transferring children between accommodation centres during academic years (Doras Luimní, 2011; O'Shea 2014).

The policy of the RIA of cutting off the supply of baby food to mothers once their child reaches 6 months forces parents to wean the child to adult food when they are told to. This overly strict and inflexible policy, once rolled out, was understandably complained about by residents (Arnold, 2012, p. 15), as such a sudden adaptation in diet often led to feeding difficulties, especially if the canteen food provided did not contain all the vitamins and nutrients that a 6 month old required to meet developmental milestones. Again this often leads to parents supplementing their child's food out of their meagre allowance.¹³⁹

It was not unheard of for the RIA to transfer families between accommodation centres during academic years (Doras Luimní, 2011, p. 9). This can impact on a child's coping mechanisms and stress levels. Arguably, the timing of such transfers is unnecessarily disruptive to children's education, and only serves to dislocate a child from friendships and stability they had developed to date.¹⁴⁰

One source of concern to parent residents is the lack of appropriate stimulation facilities for children at the centres, some to the point of protest.¹⁴¹ The recognised developmental needs of children include

¹³⁵ B. Fanning, 'Asylum-seeker and immigrant children in Ireland: Racism, institutional neglect and racism' in Hayes & Humphries, (eds.) (2004), 209, citing Fanning, Veale & O'Connor (2001).

¹³⁶ Article 11 of the I.E.S.C.R.

¹³⁷ Articles 27 and 3 of the CRC.

¹³⁸ A child's failure to thrive due to malnutrition is also considered a form of neglect under domestic *Children First* Guidelines, Department of Children and Youth Affairs (2011).

¹³⁹ Note 124 and accompanying text.

¹⁴⁰ Such disruptive measures can interfere with the child's right to education under Article 28 of the CRC and not in the best interests of the child under Article 3 of the CRC.

¹⁴¹ In June 2013 dozens of residents of Drishane Castle Accommodation Centre in Millstreet in County Cork protested due to attempts by management to stop children playing in the hallways during their summer holidays unless accompanied by an adult, leaving only the individual rooms of the residents. According to residents there were no safe communal areas of play elsewhere at the centre, Anon. (2013).

emotional, behavioural, cognitive, educational, capacity to develop social relationships, physical needs and mental needs (DCYA, 2000, p. 46).¹⁴² Age-appropriate play facilities are essential for a child's development. Denying children the opportunity to engage in recreational and play activities is arguably a breach of Article 31 of the CRC. A few centres have provided pre-school facilities 'in-house' since 2005 but these (now only 2 centres) are reportedly unable to meet demand of all the children in these centres.¹⁴³

Although child residents have acknowledged the positive aspects of attending school (having a normalising effect on children and often their only avenue for integration), unfortunately they have few opportunities for engagement in after-school/peer activities, often due to financial and/or transportation limitations, thus depriving both child and parent of independence and autonomy (Lauritzen & Sivertsen, 2012). Sen would argue that such conditions amount to "failure of basic capacities" to function for asylum-seekers due to lack of income (Sen, 1995, p. 110). This puts these children at a disadvantage, not only developmentally, but by being isolated from the community.¹⁴⁴ Sen maintains that social functionings in society can range from the elementary physical (nourishment, adequate clothing and shelter, avoiding preventable morbidity) to the complex social achievements (taking part in the community, being able to appear in public without shame) (Sen, 1995, p. 110). Applying Sen's model of social functionings to asylum-seekers in Ireland, it is clear that their social functionings are impaired across Sen's spectrum. Some commentators and politicians might defend the current policies on asylum-seeker conditions by pointing out that some asylum-seekers may receive more State financial support in Ireland compared to their country of origin and that therefore they are not deprived.¹⁴⁵ However, Thornton contradicts this standard, arguing that "[w]e should judge any standard of State-provided supports for asylum-seekers by the standards of Irish society, not other European States nor the countries of origin" (Thornton, 2013d, p. 18). Sen would also dispute the above assumption on the basis of 'relative deprivation', namely that "[b]eing poor in a rich society itself is a capability handicap ... " (Sen, 1995, p. 115-116). Sen further argues that:

[r]elative deprivation in the space of incomes can yield absolute deprivation in the space of capabilities. In the country that is generally rich, more income may be needed to buy enough

¹⁴² Likewise the right of the child to a standard of living adequate to meet their physical, mental and social needs (under Article 27 of the CRC) is relevant. Robinson, in research conducted in Australia noted a range of developmental delays among young children and boredom, depression, sleep issues among older children, K. Robinson, *Children growing up in Direct Provision: An Occupational Therapy Perspective*, for Doras Luimni and Irish Refugee Council Invisible Children Event (November 20, 2012) cited in S. Arnold (2013).

¹⁴³ Of particular note is that the Committee on the rights of the child recently issued further clarification for State parties on their obligations by way of General Comment No. 17: The right of the child to rest, leisure, play, recreational activities, cultural life and the arts, with particular references to children in asylum at para. 16 and 23. These lack of facilities (and no income to pay for private childcare) means that parents (especially single parents) can understandably feel overwhelmed through lack of support, Arnold (2012), 25.

¹⁴⁴ This situation that has been highlighted by NGO's and service providers alike, who recognise that "[t]here is a growing catalogue of evidence to suggest that asylum-seeking families experience social isolation" P. Grady, 'Social work responses to accompanied asylum-seeking children' in Hayes & Humphries, (eds.) (2004), 140. For an inter-jurisdictional study that confirms such findings see Lauritzen & Sivertsen (2012).

¹⁴⁵ Topical Issue Debate, response by Minister Shatter, Unrevised Dáil Deb. (9 October 2013), 34.

commodities to achieve the same social functionings, such as ‘appearing in public without shame’. The same applies to the capability of ‘taking part in the life of the community’. These general social functionings impose commodity requirements that vary with what *others* in the community standardly have (Sen, 1995, p. 115-116) [emphasis in original].

This point seems particularly apt when one considers the frustrating and humiliating position of both parent and child alike when they cannot partake in extra-curricular activities and sport with their peers in the community due to lack of income.

Given that “an entire early childhood, virtually an entire adolescence can be spent in direct provision accommodation” (McGarry, 2013, p. 5; Office of the Ombudsman, 2013), and taking all the above issues into consideration, it is not unreasonable to state that these dehumanising conditions which children must endure for many years can amount to neglect, which in itself is a form of abuse.¹⁴⁶ This claimed impact on children in direct provision was borne out when the Health Services in Ireland reported recently that over the past five years they had been alerted to more than 1,500 child protection or welfare concerns over young people living in centres for asylum seekers (O’Brien, 2014b).¹⁴⁷ Such a large volume of referrals in proportion to the number of children in direct provision children, and for that matter the population as a whole,¹⁴⁸ is revealing indeed.¹⁴⁹

There has emerged a certain amount of consensus, both nationally and from abroad, that such conditions amount to inhuman and degrading treatment. For example, in the Northern Ireland High Court case of *In the Matter of an Application for Judicial Review by ALJ and A, B and C* the court was to determine whether a family of asylum-seekers should be returned back to Ireland.¹⁵⁰ Mr. Justice Stephens, though not finding that conditions in direct provision in the Republic met the severity of breaching Article 4 of the EU Charter of Fundamental Rights (the right to freedom from torture, inhuman and degrading treatment) he nonetheless expressed discomfort with the Irish system. Ultimately the family succeeded in their case on the basis that the Court held that it would not be in the best interests of the child asylum-seeker to return them to the Republic, with direct provision being a major factor in the determination. Such a case highlights that the State’s obligation to ensure that best interests of the child applies to all children, whether citizen or non-citizen. Unfortunately the sustained reality of conditions in direct provision as set-out above, both in terms of inspection reports, observations by residents, child

¹⁴⁶ Neglect is considered a form of abuse according to the *Childcare Act 1991*. For a definition of neglect, see generally Department of Children and Youth Affairs (2011), 8.

¹⁴⁷ The alerts were a combination of matters raised elsewhere in this article, such as inappropriate sexualised behaviour among children, the inability of parents to cope, young people not being supervised and mental health problems, O’Brien (2014b).

¹⁴⁸ This figure is between three and four times the rate for young people living in the general community, O’Brien (2014b).

¹⁴⁹ See further reported child care cases in the District Court involving families in direct provision, for example see 2013 (vol. 1) no.19, 2013 (vol. 3) no.3, 2013 (vol. 3) no.16, available from the Child Law Reporting Project, <http://www.childlawproject.ie/archive/> (date accessed: 22nd August 2014).

¹⁵⁰ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] N.I.Q.B. 88 (14 August 2013).

protection reports and in perceptions abroad of the direct provision system further perpetuates the implied distinction in Ireland between ‘us’ and ‘them’ (Yuval-Davis, 2006). This leads us to next focus more broadly on the socio-cultural impact of deprivation and marginalisation on asylum-seekers (especially children) brought about by the introduction and on-going policy of direct provision.

4.2 Broader impact of direct provision policy on asylum-seeker children

The individual harms caused by the above-mentioned issues are further compounded when one considers perceptions of asylum-seekers as a collective ‘other’ group in society due in no small part to the policy of direct provision. Such broader societal outcomes, though perhaps less tangible than individual grievances, are no less damaging as harms to both adult and child alike. This section first addresses how children as a group in the asylum process can be affected by direct provision, then progresses onto an analysis of their isolation and difference within a community.

From a broader, societal perspective it becomes necessary to evaluate how mounting restrictions of social welfare entitlements have impacted on asylum-seekers, especially Irish born children of asylum-seekers, not least by “the perception that they have lesser rights than Irish children even when they do not” (Fanning, 2009, p. 68). This is yet another example of the State fostering an ‘us and them’ distinction by setting boundaries for governance and social control between social groups, thus marginalising the ‘other’ (Yuval-Davis, 2006). Furthermore, in regard to deprivation through lack of income, it has been argued by many stakeholders both nationally and internationally that “the income poverty experienced by children in direct provision is a form of institutional discrimination and does not reflect the best interests of the child” (Arnold, 2012, p. 13). As Benhabib would say ‘they’ therefore bear the “stigmas of inequality, oppression and marginalisation” throughout their childhood into adulthood (2004, p. 124). Yet the State has not as yet engaged constructively with either debate or proposed reform in this area.¹⁵¹ Fanning perhaps identifies the political ‘elephant in the room’ on the issue of income deprivation when he writes “lesser benefit entitlements of asylum-seekers ... are all too easily excluded from debates about racism and inequality” (Fanning, 2009, p. 6). That said, Sen would argue that the first step in policy change is to accurately diagnose deprivation (Sen, 1995, p. 108), i.e. common minimal living conditions for citizens and non-citizens alike, rather than inequality. Sen may have a point, in that the State does not currently acknowledge the legitimate grievances of asylum-seekers’ or their children’s unmet needs as valid, therefore this first step would be crucial in order to avoid non-consensus, partisan or ill-conceived policy changes in the future.

Vulnerability can be evident through deprivation, limited free movement and hampered community integration. Furthermore, such failings by a State can impact in the longer term on children in asylum,

¹⁵¹ However, see Note 106 on recent government responses to public discourse on direct provision and Note 115 on the current status of the Immigration, Residence and Protection Bill 2010.

through the potentiality for subsequent mental health issues as a result of long term institutionalisation¹⁵² or loss of initiative (Fraser & Harvey (eds.), 2003; CERD, 2011).¹⁵³ Such long-term economic and institutional harms can understandably impact one's self-perceptions. Perceptions may range from their own sense of identity to how the claimant continues to view themselves in relation to rebuilding their lives or their perceptions of 'home', their family, service providers,¹⁵⁴ the community at large and in the State generally, with the potentiality for alienation and a sense of 'otherness'. The construction of the 'other' also occurs within the same conceptual framework as racism or xenophobia because it is often used as a mechanism to exclude or exploit.¹⁵⁵ Lentin & McVeigh go further when they state:

[o]f primary importance here is the role which processes of discrimination play in the racialisation [i.e. racialised inequality] of poverty. One of the most important features of recent policy debates about 'race' have centred on the question of the 'underclass'[,] mean[ing] a group of people at the bottom of the class structure, permanently removed from the labour market and with no economic power" (Lentin & McVeigh (eds.), (2002), p. 14).

Though Lentin & McVeigh apply this line of reasoning to further discourse of African-American males in the US, nonetheless this reference to 'racialisation of poverty' forms an apt description of the situation of asylum-seekers under direct provision in Ireland. This phenomenon of identity, when influenced by one's experiences of poverty, education and difference, could lead to what Bauman (2001) calls 'individualised society', which leads to alienation and other negative effects for individuals and society alike. This is the case regardless of whether 'they' are ultimately allowed to remain or must return to their country of origin. However, should an asylum-seeker obtain refugee status or leave to remain, the vulnerabilities of the parent and/or their child¹⁵⁶ would quite possibly have intensified as a result of their asylum reception experiences.

Carlos Forment approaches the experiences of peripheral peoples in societies (focusing particularly on second class citizens who occupy marginalised positions in society) and frames them within a narrative discourse.¹⁵⁷ Though he does not explicitly give asylum-seekers as an example,¹⁵⁸ nonetheless I argue

¹⁵² Thornton (2012c) likens this form of State institutionalisation with the States approach to the existence of Magdalene laundries and reform/industrial schools in Ireland's recent past.

¹⁵³ Sen corresponds with this argument, linking the causal effect between long-term deprivation and reduced aspirations.

¹⁵⁴ For more on the role and perspectives of healthcare providers towards vulnerable children see H. Buckley *et al.*, *Service users' perspectives on the Irish child protection system*. (Dublin: Official Publications, 2008).

¹⁵⁵ Anthias & Yuval-Davis, *Racialised Boundaries: Race, nation, gender, colour, class and the anti-racist struggle* (London: Routledge, 1992), cited in R. Lentin & R. McVeigh (eds.), (2002).

¹⁵⁶ See note 126-128 and accompanying text.

¹⁵⁷ Note 3. See also Fineman (2010), 268.

¹⁵⁸ Forment cites examples of children of immigrants, 2nd generation immigrants or refugees, colonial citizens, ex-patriots returning home, etc. All such examples must adapt to a new society, as well as shift their expectations and identities according to their new-found roles within these societies. The child example is particularly striking because often the child of an immigrant or refugee (who may identify with the country they were raised in) may have a markedly different narrative and sense of belonging than their parent, who still may not truly feel part of society.

this framework is equally applicable to this group. Their experiences while in Ireland are relevant to our discussion regardless of whether asylum-seekers ultimately obtain refugee status or return to their country of origin. Therefore the narratives of asylum-seekers and their children can equally include experiences of exclusion, of not belonging to a society, and of marginalisation or xenophobia.¹⁵⁹ Either way, from a Formentian perspective, narratives are relevant to asylum-seekers regardless of the outcome of their application because the way in which an asylum-seeker experiences the asylum system's operation ultimately impacts on the way in which they will describe their experiences of that system (i.e. how they tell their stories). Perhaps, based on this, if one were to forecast how asylum-seeker children's narrative develops from now on:

[i]t looks like we're going to have to wait until the Irish children of asylum-seekers are old enough to write novels and films and television documentaries [...] about their blighted childhoods before we [...] begin to look at how these families are living in [Ireland] at the moment (Hourihane, 2013, p. 14).

Hopefully such an outlook is overly cynical, but only time will tell. Our analysis now progresses to issues surrounding some accommodation centres' isolation from their nearest communities, by making children in asylum 'different'.

Applying Weberian reasoning, Fanning noted regarding difference that "what mattered were the consequences of such beliefs upon how societies were organised and segregated. ... [B]eliefs in ethnic identities often came to set limits upon how a community was politically defined" (Fanning, 2012, p. 17).¹⁶⁰ Fanning's perspective on the importance of belief in difference can arguably be applied to Ireland.¹⁶¹ This belief in difference is perpetuated by what Yuval-Davis (2006) refers to as the 'politics of belonging' and the discourse surrounding it, whereby politicians and the media strike a discord between apparent politico-ideological rhetoric and irresponsible or sensationalised reporting in the media (NCCRI *et al.*, 2003, p. 32).¹⁶²

In terms of isolation, the types of local amenities that the residents might need/wish to avail of would include legal services, postal services, language class, school, doctor, dentist, library, internet, playground/park and religious gatherings. However, for those accommodation centres that are not based within safe walking distance of urban centres, the financial and logistical difficulty in travelling

¹⁵⁹ Note 3. For further reading on theoretical aspects of both philosophies and economics of welfare as well as State-endorsed social exclusion, see G. Taylor, *Ideology and Welfare* (Basingstoke: Palgrave, 2007), B. Abel-Smith & K. Titmuss (ed.), *The Philosophy of Welfare: selected writings of Richard M. Titmuss* (London: Allen & Unwin, 1987), M. Adler & A. Bradley (ed.), *Justice, Discretion & Poverty* (Oxford: Professional Books, 1976), A. Sen, *On ethics and economics* (Oxford : Basil Blackwell, 1987) and A. Sen (1995).

¹⁶⁰ Citing Weber, *Wirtschaft und Gesellschaft*, first published posthumously in 1922, trans. E. Matthews, in W.G. Runciman (ed.), *Max Weber: Selections in Translation* (Cambridge: Cambridge University Press, 1978), 234-240.

¹⁶¹ This is despite "anti-racist and rights-based approaches to social problems ... often [being] endorsed by the political mainstream", Fanning (2007), 6.

¹⁶² See also A. Haynes, E. Devereux & M. Breen, 'Public exercises in Othering: Irish print media coverage of asylum seekers and refugees' in Faragò & Sullivan, (eds.), (2008).

to such amenities can often be prohibitive. Such isolation also leaves few opportunities for residents or their children to mix easily with the Irish community (Comhlámh, 2001, p. 25), what effectively amounts to “State fostered segregation” (Fanning, 2012, p. 101).¹⁶³ Certainly where there is little or no possibility of children forming connections with their community there is the risk of creating a sense of social exclusion for that child.¹⁶⁴ This argument is also supported in social work discourse:

The marginalisation of these children excludes them from the principles on which the modern welfare system is based. It could also be suggested that this exclusion may in itself create some of the factors which increase the risks to children living in the community.¹⁶⁵

Thornton (2012c) argues that the Irish State has “an obsession with containment of those who we, as a society, find problematic or difficult to deal with. ... We dislike their difference, their otherness, their presence in this country.” Therefore, it seems clear that isolation and imposed segregation from the community has negative effects on all children in accommodation centres. It encourages a perception of difference and forms both physical and conceptual barriers between ‘us’ and them’.

In this part of the article we have seen how direct provision and its implementation fall short of standards articulated in international and regional standards by which the State is bound, for example under the CRC and ECHR. We can therefore conclude that poor reception conditions for children in asylum - as a result of racially discriminatory policies by the State - can impact on their collective experiences of imposed dependency, marginalisation, vulnerability and exclusion. While Fineman acknowledges that although vulnerability may not be eradicated in society, she argues that a responsive State can potentially “mediate, compensate, and lessen our vulnerability through programs, institutions, and structures” (2010, p. 269). Unfortunately, the Irish State seems to be intent on achieving the opposite effect as far as asylum-seekers are concerned, despite feasible alternatives being proposed (IRC, 2013). Therefore children in asylum are put in a doubly (sometimes trebly) vulnerable position while they or their parents are seeking recognition as refugees. Asylum-seekers and their children are part of every society and the sooner this fact is accepted by the Irish State, the more likely ‘they’ are to be treated as part of ‘our’ society.

¹⁶³ Furthermore Thornton states that “[t]he political rhetoric regarding asylum seekers stood in stark contrast to government objectives on social inclusion, solidarity, integration, multiculturalism and anti-racism”, Thornton (2011), 79.

¹⁶⁴ Thus the right to an adequate standard of living to meet a child’s social needs under Article 27 of the CRC as well as a child’s need for physical/psychological recovery and integration when they have been victimised (as is often the case for children asylum-seekers) under Article 39 of the CRC.

¹⁶⁵ P. Grady, ‘Social work responses to accompanied asylum-seeking children’ in Hayes & Humphries, (eds.) (2004), 139; for more on the role of the community in preventing risk to children see J. Waldfogel, *The future of child protection: how to break the cycle of abuse and neglect*, (London: Harvard University Press, 1998) and P. Dolan, & B. Brady, *A Guide to Youth Mentoring, Providing Effective Social Support*. (London: Jessica Kingsley Publishers, 2012). See also McGarry (2013); Hourihane (2013).

CONCLUSION

Poor reception conditions can result in collective experiences of imposed dependency, marginalisation, vulnerability and exclusion for children in the asylum system. The manifest denial to children in the asylum system of ‘belonging’ to a community also leads to an internalisation of ‘the other’ amongst such isolated groups, which hinders the future possibility of any future integration.

In Ireland, the themes highlighted above are realised in the ‘direct provision and dispersal’ policy, which was meant to be a temporary (6 month) measure but which some asylum-seekers, including children, must endure for up to 7 years or more. Even as a temporary measure it was flawed but as medium to long-term accommodation it is certainly not fit for purpose and arguably inhumane. One of the reasons for this system being introduced over a decade ago (i.e. to cope with large numbers of applications) can no longer be relevant, as – according to the latest annual figures - the number of asylum applications is at its lowest since 1996. As the State’s Special Rapporteur on Child Protection, Geoffrey Shannon, has appropriately stated, “[w]hen we look back in 10 years’ time, we may ask ourselves how we allowed the system to exist...” (O’Brien & O’Shea, 2014). In short, direct provision and dispersal is a racially discriminatory policy by the State inconsistent with current international or regional best practice on asylum reception conditions. As a result of the Irish asylum process already vulnerable individuals, though ultimately acknowledged as refugees, are often more vulnerable (and sometimes more damaged) than when they entered the system, and the Irish State is responsible for this.

To summarise, Part 1 provided some theoretical analysis into concepts of vulnerability, dependency and marginalisation. Part 2 concluded that Ireland’s stance on standards for reception conditions is not in line with growing consensus at International and European levels. Therefore, while awaiting determination of their refugee status, children in the asylum system may not expect the same living conditions in Ireland as elsewhere. Part 3 looked at how Ireland had addressed asylum-seeker reception conditions, i.e. the ‘direct provision and dispersal’ system. The article also reflected on alarmist political and media commentary of ‘opening floodgates’ and ‘welfare tourism’ at the time that influenced this policy that manifestly discriminates against already vulnerable children in the asylum system. Part 4 found that children in asylum lack social welfare entitlements while also experiencing poor living conditions and being segregated from the community. Drawing from findings of NGOs (which included healthcare and social worker input), government publications and official statistics, it was concluded that this has detrimental consequences on health, developmental and social levels, thus neglecting the best interests of the children concerned.

How the Irish State might remedy this situation by opting-in to the Reception Conditions Directive, thus becoming a full member of the CEAS. This would lead to Ireland being obligated to meet EU-

wide minimum standards for asylum reception conditions. Furthermore, by ratifying the optional protocols to both the ICESCR and the CRC, such incorporation would provide enforcement remedies for individual asylum-seekers (including children) as an aggrieved party to an international judicial body, thus making the State party accountable for any lack implementation of measures that they have previously committed to. Finally, should the State be adamant to continue with the Direct Provision system then it should be placed on a legislative basis, thus rectifying existing lacuna in the law regarding both the resources allocated to asylum-seekers, as well as providing democratic accountability regarding their living conditions. For these individual rights holders such developments could make all the difference to whether their legitimate grievances are acknowledged and addressed or not.

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