High Court of Ireland Decisions

Judgment

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THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 751 J.R.]

BETWEEN

C. A. AND T. A. (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND C.A.)
APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE MINISTER FOR SOCIAL PROTECTION, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 14th day of November 2014

1. Introduction

1.1. The applicants are mother and son who unsuccessfully sought refugee status in Ireland and are now awaiting the outcome of applications for 'subsidiary protection', a complementary form protection for persons fleeing harm who have been refused refugee status. (The term 'protection applicant(s)' is used to describe persons who have sought asylum/subsidiary protection.) The applicants instituted these judicial review proceedings in respect of the absence of formal permission to be in the State during the subsidiary protection process, unlawful procedures for determining subsidiary protection and the prohibition on employment and receipt of social welfare, *inter alia*, but ultimately the focus of the case was on the alleged illegality of what the parties refer to as 'direct provision'.

1.2. 'Direct provision' is not a term of art. No definition is suggested by the applicants notwithstanding their plea that 'direct provision' is unconstitutional, a violation of the European Convention on Human Rights ('ECHR') and of the E.U. Charter of Fundamental Rights.

1.3. 'Direct provision' generally refers to the (cashless) provision of material support by the State to protection applicants to meet their basic needs. This support comprises accommodation, food, education for those under eighteen, healthcare and a small weekly allowance (known as Direct Provision Allowance or 'DPA'). When the applicants use the term 'direct provision' they are also referring to the prohibition on the payment of mainstream social welfare to protection applicants, the prohibition on employment and the detailed rules applied in accommodation centres in which protection applicants live.

1.4. The applicants do not allege that 'direct provision' is per se unlawful. They do not say that the State is prohibited from operating a cashless system of material support for protection applicants (though it is said that prohibition on social welfare and employment are unlawful). The applicants' solicitor describes the applicants' case (at paras. 64 and 65 of her affidavit of 24th April 2014) as follows:

> "….by way of clarification regarding the nature of the applicant's case and to address any misapprehensions which may be harboured by the respondents in that regard, I say that the issues raised in this application do not actually concern whether there are justifiable policy reasons for the State to adopt a direct provision model of some description. Moreover, it is not the case that the applicants in this application contend that they are entitled to full social welfare supports, including equal housing rights and entitlements and indeed, it may well be the case that there are policy factors and considerations which might justify the operation of some form of reception and maintenance arrangements for protection applicants or a model which contains some elements of direct provision. Rather, the issues before the Court are whether the direct provision system, as it currently operates, is in breach of the principle of the separation of powers . . . breaches and/or disproportionably interferes with constitutional and fundamental rights, whether or not the direct provision allowance system is unlawful or ultra vires and/or whether the denial by statutory ban of access to social welfare benefits and/or the labour market for protection applicants . . . is unlawful."

This is a useful summary of applicants' case.

1.5. The applicants acknowledge that EU law allows member states to operate a form of direct provision for protection applicants though the directive in question is not applicable in Ireland. The (recast) Reception Conditions Directive 2013/33/EU aims to establish common standards of living conditions for asylum applicants. (The previous version of the directive (Directive 2003/9/EC) is valid until 21st July 2015). It ensures that applicants have access to housing, food, health care and employment, as well as medical and psychological care. Previously, concerns were raised about diverging practices among Member States which could lead to an inadequate level of material reception conditions for asylum seekers. The Reception Conditions Directive aims to ensure harmonised standards of reception conditions throughout the Union. (Ireland's non-participation is related to the obligation in the Directive to permit protection applicants to work in certain circumstances.)

Background to 'direct provision'

1.6. The number of persons seeking international protection rose dramatically between 1995 and 2002. In 1995 there were 424 applications for asylum and by the year 2002 there were 11,064. In 1999 there were 7,724 and the following year there were 10,938. The State faced a significant challenge in processing applications for protection and accommodating the protection applicants.

1.7. Historically, persons seeking protection were supported through the Social Welfare Code; housing was provided by local authorities. This changed when the Government announced plans for a cashless system of 'direct provision' to meet the principal needs of protection applicants. A statement issued by the Government on 19th October 1999, said:

> "Minister for Justice, Equality and Law Reform announces that asylum seekers will be dispersed throughout the country.
>
> The Minister and Department of Justice, Equality and Law Reform, John O'Donoghue T.D. has announced that the Government at its meeting today decided that he should complete plans for the introduction of a Scheme of Direct Provision - as distinct from a totally cash-based system - to meet the principal needs of asylum seekers.
>
> In order to give effect to this, the Government also decided that the Minister for Justice, Equality and Law Reform should chair the existing Inter-Departmental Committee on Immigration, Asylum and Related Issues. This Committee comprising representatives of Departments/Agencies which are involved in the provision of basic services such as housing, social welfare payments, health services, etc. to asylum seekers, will work immediately on identifying the measures that would need to be put in place by the appropriate Departments/Agencies in order to produce an effective and properly coordinated system of Direct Provision so as to meet the needs of asylum seekers.
>
> The Government has also decided that, in the meantime, due to the very large increase in the numbers of persons seeking asylum in recent months, and in view of the non-availability of accommodation in the Dublin area, it has no option but to make arrangements for accommodating significant numbers of asylum seekers throughout the country.
>
> To this end, local authorities and health boards will be approached immediately to cooperate fully in sourcing suitable accommodation and the provision of the ancillary welfare and health needs of asylum seekers. The Government has also decided that in order to facilitate the sourcing of the

> additional accommodation as quickly as possible, advertisements will be placed in the national newspapers seeking offers of accommodation for asylum seekers."

1.8. A Reception and Integration Agency (RIA) was established in the Department of Justice. An Interim Advisory Board was established to advise the Reception and Integration Agency. This non-statutory body was formed following Government approval with 15 members drawn from 'the wider community' and one representative each of the Departments of Justice, Equality and Law Reform, Foreign Affairs, Social, Community and Family Affairs, Health and Children, Environment and Local Government and Finance.

1.9. It was the Minister's intention to place the Reception and Integration Agency on a statutory footing "at an early date" (according to a background Note for Members of Interim Advisory Board). The minutes of the inaugural meeting of the Interim Advisory Board have been exhibited by the solicitor for Ms. A. The minutes note that the Chairman confirmed that the Board was to advise the Director of the Reception and Integration Agency "on the implementation of Government policy insofar as that relates to the business of the RIA". He envisaged that the Board would submit reports to the Minister. He said that "pending the enactment of legislation to underpin the Agency, the Board is currently a non-statutory, non-executive entity with an advisory role". Minutes of its second meeting of 25th June 2001, were also exhibited by the applicants. Its future work was discussed and the Board expressed a desire to deepen its knowledge of the "legislation, processes and practices right across the wider asylum, immigration area" and "the responsibilities of the various service providers . . ."

1.10. Counsel submitted that the non-statutory nature of the Interim Advisory Board and the functions it sought to carry out thwarted the legislative intent expressed by s. 7A of the Refugee Act 1996, as inserted by s. 11 of the Immigration Act 1999. That amendment to the Refugee Act is in the following terms:

> "7A.—(1) There shall be a board to be known as the Refugee Advisory Board (in this Act referred to as 'the Board') to perform the functions conferred on it by this Act.
>
> . . .
>
> (4)(a) The Board shall, in every second year beginning with the year 2005, prepare and submit to the Minister a report in writing on the operation in the preceding 2 years of this Act and may include in the report information and comment in respect of asylum policy and refugees including any proposals to amend legislation and recommendations regarding the practice or procedures of public or private bodies in relation to applicants and any other matters relating to such operation coming to its attention to which it considers that his or her attention should be drawn and, not later than 1 month after such submission, the Minister shall cause a copy of the report to be laid before each House of the Oireachtas."

1.11. The Refugee Advisory Board was to consist of a Chairperson and 14 ordinary members, including the Refugee Applications Commissioner and one representative of the Minister for Foreign Affairs, Minister for Social Community and Family Affairs, Minister for Education and Science, Minister for Health and Children, Minister for the Environment and Local Government and Minister for Enterprise, Trade and Employment.

1.12. Counsel for Ms. A notes that the Board was never established although s. 7A of the Refugee Act 1996 was commenced in January 2000. He says that the Refugee Advisory Board was intended to perform checks and balances on the executive in the manner in which they operated the 'direct provision'. He says that the failure of the executive to

establish the Refugee Advisory Board is an unlawful avoidance of legislative intent.

1.13. I do not accept this argument. The intention of the legislature is to be discerned by reference only to the words in the statute concerned (see Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101). I am unable to discern in s. 7A any intention to establish a body which would have responsibility to oversee the material needs of protection applicants. In my view, s. 7A is clear. The purpose of the Refugee Advisory Board was to report on the operation of the Refugee Act 1996 (as amended). That Act makes no provision for the manner in which protection applicants are accommodated or receive material support. Though s. 7A of the 1996 Act permits the Refugee Advisory Board to include information and comment on asylum policy, this could not be equated with the establishment of a Board with responsibility to oversee any scheme providing for the material needs of protection applicants. No illegality attaches to the decision of the Minister for Justice not to establish the board envisaged by s. 7A.

1.14. Until the establishment of 'direct provision' asylum seekers were entitled to claim supplementary welfare allowance in accordance with s.189 of the Social Welfare Consolidation Act 2005 ("SWCA 2005") which provides:

> "…every person in the State whose means are insufficient to meet his or her needs and the needs of any qualified adult or qualified child of the person shall be entitled to supplementary welfare allowance."

1.15. The Department of Social, Community and Family Affairs in a memo dated 4th November 1999 examining the implications of 'direct provision' for the Department states: "The most significant impact Direct Provision will have on this Department will be to reduce the extent to which asylum seekers need to have recourse to the social welfare system in order to meet their basic needs." The memo concludes that this might ultimately eliminate all need for social welfare as the needs of asylum seekers were being met by 'direct provision'. In that memo one can find the genesis of the 'direct provision allowance' ('DPA') weekly payment. The matter was addressed as follows:

> **"Residual Role in Respect of Individuals in Direct Provision**
> Some people in long-term institutional care who have no social welfare or other income are paid between £10 and £15 per week under the SWA [Supplementary Welfare Allowance] system so that they can purchase personal effects such as newspapers, toiletries and so on. The need for such 'comfort payments' to asylum seekers could arise under Direct Provision. The Eastern Health Board has recommended that any such payments should be made directly by the Department of Social, Community and Family Affairs through a new social welfare scheme ('Asylum Seekers Allowance'). This would require legislation and the question of mainstreaming 'comfort payments' currently made to people other than asylum seekers would have to be considered.
>
> . . .
>
> Asylum seekers can qualify at present for payments other than SWA if they satisfy the conditions for receipt of those payments. For example, single people with child dependents can qualify for One Parent Family Payment (OFP). Being an asylum seeker does not debar such people from receiving OFP. Consideration will have to be given to how to deal with such asylum seekers within the wider social welfare system when they first present and perhaps also with asylum seekers under Direct Provision whose circumstances change e.g. if they give birth to a child."

1.16. A further document emanating from the Department of Social, Community and Family Affairs obtained by a Freedom of Information request records the setting of the amount of the weekly allowance. The document is a Memorandum exchanged by email

between officials on the subject of 'Residual Income Payments to Asylum Seekers' and it says:

> "As discussed, when Direct Provision is introduced, asylum seekers will still need a residual income maintenance payment to cover personal requisites. This also applies to asylum seekers who are accommodated on a full board basis pending the introduction of Direct Provision.
>
> In the interest of fairness and equity, the level at which these residual payments are made should be consistent across the State and should be consistent with the so-called 'comfort payments' made to certain people in long-term institutional care.
>
> Having considered the matter, I have concluded that payments to asylum seekers in full board or under Direct Provision should be made at the following levels:
>
> Adult: £16 per week
>
> Child i.e. where a CDA would otherwise be paid: £7.5 per week
>
> As these payments cover personal requisites, it would not be appropriate to pay a couple less than twice the single rate.
>
> I would expect that the Health Boards will see the logic of this approach and will implement the payments at the levels suggested on foot of your ongoing contacts with them. However, if you need anything further on this (e.g. if you feel a formal instruction should issue), please let me know."

1.17. Up until 2004, the support available in the State for asylum seekers was a hybrid scheme comprising direct provision of material support and continuing access to social welfare especially for persons not availing of the accommodation provided by the State. Thus asylum seekers in 'direct provision' might continue to receive benefits under the Social Welfare code. However, in 2004, the Government amended the Social Welfare code to exclude asylum seekers (with minor exceptions).

1.18. Social welfare was made subject to a requirement that a recipient be habitually resident in the State at the time of application for welfare. According to s. 246(7)(b) and (c) SWCA 2005 persons who have applied for subsidiary protection are not habitually resident in the State. Accordingly, the applicants in these proceedings are statutorily prevented from satisfying the habitual residence condition and by extension are excluded from receiving mainstream social assistance payments.

Prohibition on working

1.19. Applicants for asylum are expressly prohibited from seeking to enter employment or carry on any business, trade or profession during the period before the final determination of their application for a declaration of refugee status pursuant to s. 9(4) of the Refugee Act 1996. Similar provision was made in respect of applicants seeking subsidiary protection by Reg. 4(7)(b) of the European Union (Subsidiary Protection) Regulations 2013 whereby an applicant for subsidiary protection is prohibited from seeking or entering employment or carrying on any business, trade or profession.

RIA House Rules

1.20. Particular complaint is raised in the proceedings about the 'RIA House Rules' which apply in accommodation centres. The rules are set out in a document called 'Direct Provision Reception and Accommodation Centres - House Rules and Procedures'. The

introductory part of the booklet says:

> "The Reception and Integration Agency (RIA) would like to welcome you to this Direct Provision Accommodation Centre. This centre provides accommodation for you on our behalf. It is your home while your application for protection is being processed. [emphasis added]
>
> We appreciate how difficult and stressful this period can be. We and the accommodation centre staff will be as helpful as possible during your stay.
>
> …
>
> **What type of accommodation does RIA provide?**
> In line with Government policy, we provide 'Direct Provision' accommodation to protection applicants at a number of centres while they are waiting for the outcome of their protection application. Direct Provision means we provide all your accommodation needs, including full board (all meals).
>
> We are committed to providing safe, quality accommodation which promotes your wellbeing. We expect residents, staff and management to treat each other with respect."

1.21. The rules indicate that there is a complaints procedure available to residents and management if they cannot informally resolve issues. The booklet indicates that the protection applicants cannot choose what centre to live in and that applicants have no right to be moved to another centre of their choice. However, applicants may make a request for a transfer to another centre. In this regard, the booklet states that "Transfer is possible, but only when we decide to allow it based on its merits and in rare and exceptional circumstances". If an application to move is refused, complaint in respect thereof cannot be made under the complaints procedure available.

1.22. In the affidavit grounding this application, a number of the RIA rules are singled out for particular attention, they are as follows:

> **"STANDARD OF ACCOMMODATION**
> 1.2 Your accommodation must be safe, hospitable and clean. In order to make sure you are safe, our accommodation centres may be monitored by security cameras.
>
> …
>
> **YOUR ROOM**
> **2.4 (a) Centre Manager's instructions**
> You must do what the Centre Manager says in relation to occupying and vacating your room.
>
> **(b) You may have to move**
> RIA requires each centre to make full use of the bed spaces they have to accommodate protection applicants. This may mean that the centre will need you to move from one room to another at some time.
>
> Sometimes, RIA may need a resident to move to another centre.
>
> If centre management or RIA need you to move to another room, or to

another centre, you will be told why.

(c) Cleaning
You must keep your bedroom clean, tidy and aired.

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

• the manager of the centre;

• staff appointed by the manager;

• staff from RIA; or

• other inspectors appointed by RIA

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

You must cooperate with all bedroom inspections.

(e) Electrical appliances
Some electrical appliances and adaptors can be a fire hazard. If you want to use any electrical appliance in your room, you must first ask the manager for permission.

(f) Decoration
You may only redecorate your room if you get permission from the Centre Manager. Decorating can create a fire hazard.

Food and Cooking
2.5 You must not store food in your bedroom. You must not cook food in your room or any area of the centre.

Alcohol and illegal drugs
2.6 You must not consume or store alcohol or illegal drugs in the Centre.

…

Pets
You cannot keep pets in the centre.

…

Visitors
All visitors must report to reception and sign in and out.

• Visitors can come only between 10 in the morning and 10 at night. In exceptional circumstances, Centre management may allow visitors outside these times.

• Visitors under the age of 18 must leave the centre by 8pm unless

accompanied by a guardian.

• You must receive visitors in designated areas and you are responsible for ensuring that your visitors obey house rules.

• The centre can refuse entry to visitors.

Staying away overnight
2.14 If you ever plan to be away from the centre for any overnight period, you must let the centre manager know in advance. The RIA may reallocate your room if:

• you leave it unused for any period of time without letting the centre manager know in advance; or

• if you are consistently absent from the centre.

Absences may affect your allowance
2.15 The centre manager is obliged to notify the Community Welfare Officer (CWO) that you have been away without telling management. This may affect whether or not you are entitled to the Direct Provision Allowance. The CWO can give you more information about entitlement to this allowance. Please also see rules 2.20 and 2.21 regarding children's absence from centres."

2. Applicants' Background and Circumstances
2.1. The first named applicant is a Ugandan national who arrived in Ireland on 12th April 2010 and whose son T, the second named applicant, was born in Ireland on 22nd January 2011. She made an application for asylum on arrival in the State. She was initially given accommodation at Balseskin Reception Centre in Dublin in June 2010 but was moved to the Eglinton Hotel, Salthill, Galway soon thereafter. She has been living there for more than three and a half years.

2.2. At first instance the Office of the Refugee Applications Commissioner recommended refusal of asylum status and the same result was achieved on appeal to the Refugee Appeals Tribunal in a decision dated 10th October 2011. Ms. A's claim for asylum was based on a fear of female genital mutilation (FGM) from the elders of her home in Eastern Uganda. In addition, she claimed to be at risk from the Ugandan Security Services and from members of the Bugandan Community in Kampala because her boyfriend was suspected of burning the Kasubi Tombs which is a UNESCO World Heritage protected site and the ancestral burial ground of the Bugandan King.

2.3. The Tribunal Member did not accept that Ms. A was at risk of FGM. The alleged persecution in relation to her boyfriend's involvement in the burning of the tombs was the subject of negative credibility findings. The Tribunal Member also found that it would be possible for Ms. A to relocate to Kampala where she would be safe from elders and from state security services because they would be seeking her boyfriend and not her.

2.4. The claim advanced for asylum in respect of the second named applicant was substantially based on the claim of his mother that he would be persecuted by the Bugandan tribe and also that he would be persecuted for being of mixed race. The minor applicant's claims were rejected at first instance and subsequently by the Refugee Appeals Tribunal on the basis that they referred to the same rejected claim made by his mother and also that the fears expressed in relation to children deemed to be of mixed race were pure speculation with no objective evidence to support such fears. These negative

decisions were never challenged by judicial review. Thereafter, Ms. A and her son made separate applications for subsidiary protection and humanitarian leave to remain on the same basis as that advanced at the asylum stage and decisions are awaited on these protection applications.

2.5. Applications for subsidiary protection on behalf of Ms. A were prepared by her solicitors and submitted in mid-December 2011.

Letter Before Action

2.6. While a decision on the applications for subsidiary protection remained outstanding, Sinnott Solicitors wrote to the Department of Justice and the Department of Social Protection on behalf of the applicants on 10th September 2013. This is the 'letter before action' which presaged these proceedings. The letter complained that living in 'direct provision' was an extremely negative experience and combined with the prohibition on employment and social welfare was a breach of fundamental human rights. Ms. A made complaint about the absence of a formal permission to be in the State, about unlawful procedures for the determination of subsidiary protection applications and also demanded a right to work. This extremely detailed letter of complaint was the first time any such complaints had been expressed on behalf of the applicants.

2.7. On 12th September 2013 the Irish Naturalisation and Immigration Service ('INIS') in the Department of Justice and Equality wrote in reply and referred to the finalisation of a new framework under which applications for subsidiary protection would be assessed in light of the decision in the case of *M.M. v. Minister for Justice (No.3)* [2013] IEHC 9, (S.I. No. 426/2013 - European Union (Subsidiary Protection) Regulations 2013 were signed by the Minister for Justice on 7th November 2013). The letter also goes on to address the applicants' substantive concerns with the 'direct provision' system and the claimed right to work and states:

> "In relation to your clients' accommodation in the Direct Provision system, your correspondence seems to infer that your clients are compelled to remain in RIA/Direct Provision accommodation. This is not the case. They are free to source alternative accommodation as befits their needs. However, unless and until they do so, they, as subsidiary protection applicants, will be provided with accommodation by the Reception and Integration Agency. Additionally, the option of voluntary return remains open to your clients if they consider their position in the State to be intolerable. The specific issues raised in your correspondence about the quality of your clients' accommodation should be addressed directly to the Reception and Integration Agency.
>
> In relation to your request that your (adult) child be granted a right to work, or a right to access social welfare payments, including child benefit payments, while her case is 'pending', this request cannot be accommodated as successive Irish governments have decided that asylum (or protection) applicants cannot access paid employment and, as such, they cannot access job-seeker based social welfare payments. Given the current economic climate, and the fact that there are already over 400,000 people on the 'Live Register', a figure which would be much higher were it not for the numbers of Irish people of a working age who have left the State to seek employment in Australia, Canada and elsewhere, it is difficult to see this position being changed. Additionally, it is difficult to see the Irish tax-paying public being sympathetic to the needs of a person, with no known connections to this State, arriving here with no, or meagre, resources and seeking to have the Irish State meet her and her child's every need, particularly in circumstances where their asylum claims had already been found to be without merit. While the Irish tax-paying public

> are internationally renowned for their generosity to charitable causes, a case such as that of your client is not likely to be viewed sympathetically by the Irish tax-paying public at a time when their own economic and financial circumstances have taken such a hit from the global, and national, economic recession."

Pleadings

2.8. Shortly after this exchange of correspondence proceedings were instituted and leave to seek judicial review was granted on the 21st October 2013. Since the proceedings commenced formal permission to be in the State pending the outcome of their subsidiary protection applications has been granted to the applicants. The procedures for determination of these applications have been reformed and the applicants' applications are being processed under this new regime. Thus the reliefs sought at (a)-(e) and (l)-(n) are not required.

2.9. I have adjourned the issue of the illegality of the prohibition on employment because the High Court has recently heard a case on this issue and judgment is pending. My view is that on an issue of this importance the High Court should avoid the possibility of issuing conflicting findings and the court last in time to hear argument should adjourn the point until the first decision is known unless there is some special reason not to do so. The parties have liberty to re-enter this matter when the result of that case is known. In any event challenges to the constitutionality of legislation should only be determined if necessary and thus it is appropriate to adjourn the challenge to the statutory prohibition on employment and on social welfare until all other issues are determined (see *Cooke v. Walsh* [1984] I.R. 710). The parties agree with this course of action. These prohibitions are presumed to be lawful but this does not mean that the applicants are not entitled to maintain that they cause harm.

2.10. I have also adjourned the questions relating to the UN Convention on the Rights of the Child. Judgment on the applicability of this Convention in Ireland is due to be delivered today in a case entitled *Dos Santos v. Minister for Justice and Equality* and the parties will be entitled to address the court on the implications of the decision of McDermott J. in due course.

2.11. The reliefs sought by the applicants in respect of the matters now to be determined are:

> "(F) A declaration that the direct provision scheme in respect of the applicants as protection applicants (and as necessary, applicants seeking leave to remain), and in particular the payment of the weekly direct provision allowance and the setting of rates for same, is ultra vires the Social Welfare Consolidation Act 2005 (as amended) and unlawful by reason of the lack of any statutory basis for said payments.
>
> (G) A declaration that the direct provision scheme and system and the operating by the Reception and Integration Agency of the direct provision scheme without any statutory or legislative basis, is invalid having regard to the provisions of Article 15.2.1 of the Constitution and amounts to a breach of the principle of separation of powers.
>
> (H) A declaration that s. 246 of the Social Welfare Consolidation Act 2005 (as amended) and in particular s. 246(7)(b) and (c) thereof and / or said provisions in combination with the denial to persons such as the first named applicant herein of the right to work / seek work and earn a living is invalid having regard to the provisions of the Constitution and in particular Articles

40.3, 41, 42.1 and 40.1 thereof.

(I) A declaration that the direct provision scheme, system and arrangements and the operation of same n respect of the applicants and / or said scheme in combination with the denial to the first named applicant of the right to work / seek work and the denial to the applicants of social welfare benefits and / or allowances is in breach of and violates, and / or fails to respect and vindicate the rights of the applicants pursuant to Articles 40.3, 41 and 42.1 of the Constitution Articles 3, 8 and 14 of the ECHR and Article 2 of the Fourth Protocol of the ECHR and / or that said scheme amounts to unjustifiable unequal treatment for the applicant family within the terms and meaning of Art. 40.1 of the Constitution.

(J) A declaration that the direct provision scheme and system applicable to the applicants as applicants for subsidiary protection and persons exercising their right to apply for subsidiary protection under EU law pursuant to pursuant to EU Council Directive 2004/83 is in breach of and / or fails to respect and vindicate the rights of the applicants pursuant to the Charter of Fundamental Rights of the European Union and in particular Article 1, 3, 4, 7, 15, 20, 21, 24, 41 thereof."

3. The Evidence

3.1. No oral evidence was heard. The applicants have opted to pursue their complaints by way of judicial review. Normally such proceedings do not involve factual disputes. Where such arise, parties may apply for the proceedings to be heard as a plenary action or to cross examine a deponent on his or her affidavit. No application for a plenary hearing was made. Neither party sought cross-examination. What now follows is a description of the (affidavit) evidence of the parties.

3.2. Ms. A arrived at the Eglinton Hotel reception centre in Galway prior to the birth of her son. She initially shared one room and a bathroom with three other residents for seven months. Following the birth of her son in January 2011 she shared one room with another resident and her baby. There were two double beds and two cots and a bathroom comprised in this accommodation. Ms. A says that there was a lack of privacy and that the accommodation was confined. She did not get along with the other resident.

3.3. In the autumn of 2011 Ms. A and her son were moved to a new room to share with another resident and her older child which contained two double beds and one cot and a bathroom. The relations with this other woman were amicable. The accommodation was said to be uncomfortable because it was small and confined. Since February/March 2013 the applicants have a one-bedroom unit with a bathroom/toilet and they are not sharing. There are no cooking facilities in the room. The applicants say that the living arrangements interfere with and restrict their privacy and personal lives. There is no control over aspects of daily life and destiny, according to Ms. A. There are inspections and checks by staff at the accommodation centre and these can be unannounced, with the management holding a master key to the rooms. Residents must sign a register at the reception every day and if Ms. A wishes to leave the centre for more than one night this must be advised to the management and an indication given of the address where she will stay. Absence for over 14 days may result in loss of accommodation. Visitors are not allowed into Ms. A's room but must meet her at the recreation room and cannot stay overnight. These rules, it is claimed, result in an absence of privacy, an invasion of personal life and a restriction on the ability to enjoy normal relationships.

3.4. Ms. A says that her daily life is monotonous and routine and that the environment is unsuitable for her son, especially when endured for a long period.

3.5. A significant part of the complaints made by Ms. A in respect of her circumstances is that she has no control over what food she eats, beyond the menu choices available each day. She says that it is difficult to rear her young child with institutionalised food arrangements. Ms. A has managed to buy a second-hand fridge and microwave and with the cash allowance she receives she is able to supplement her son's diet and prepare some food for him.

3.6. Ms. A says she is mentally drained from her confined living and the lack of choice in relation to normal daily life. She thinks the environment in the accommodation centre is bad for her son. She is concerned that his development and growth is badly affected by the living circumstances. There is a crèche at the centre which he attends but she says that the activities are not age-appropriate and do not provide leisure and learning suitable for him. The first named applicant says she does not have control over her son's interaction and exposure to adults because of the institutionalised nature of her circumstances. There is a €50 biannual clothing allowance for her son and this is inadequate. She says it is extremely difficult to seek to survive on a total of €28.70 per week for all outgoings, and there is simply not enough to cater for basic outgoings and needs.

3.7. These circumstances are described against a background where Ms. A is not permitted to work and not permitted to be paid any monies under the Social Welfare code. She says that her fundamental human rights are breached by the negative consequences of living in 'direct provision'.

3.8. During the opening of the case, counsel for the applicants placed emphasis on the fact that it was the length of time to which they were exposed to the allegedly negative conditions which formed a large part of the complaints they brought before the court.

3.9. Ms. A asserts that the fundamental and far reaching nature of 'direct provision' is clear, *inter alia*, from the RIA rules. It is submitted that the invasive nature of the system is evidenced by the control exerted over housing, privacy, food and diet, freedom of movement, monitoring of individuals, social interaction, financial support and personal welfare. In particular, Ms. A claims that 'direct provision' impacts on the well-being, nurture, care and upbringing of children living within the system and interferes with parental autonomy. It is submitted that the operation of the system is at the will of the executive which engages in a micro-management of the daily life of 'direct provision' residents by RIA in conjunction with the contract service providers.

3.10. The affidavit of Ms. A grounding her application for judicial review sets out the background to the applicants' claims and the origins of the complaints raised in these proceedings. I have set out a series of these averments below:

> "5. Living in the direct provision scheme and environment is exceedingly difficult. Direct provision living of its nature with its rules and restrictions on freedom of residence, choice (including in relation to food) and movement and its isolation from the wider community and society is not an appropriate or suitable environment for the proper growth and development of my young son and it is an abnormal environment with respect to family life. This is especially so when we have been living in such an environment for a protracted period. Our time living in direct provision has put very significant strains and stresses on me and I find it a dehumanizing experience which eats away at my dignity and my capacity to have control and choice over our lives and the proper care and maintenance of the welfare and development and nurturing of my son.
>
> …

8. With regard to our accommodation arrangements I say that my son and I are at present living in a single room bedroom (with no cooking facilities), with a bathroom/toilet at Eglinton Hotel Accommodation Centre. I say that when I was initially moved to the Eglinton Hotel from Balseskin (prior to the birth of my son), I shared one room and a bathroom with three other residents who were single. I say that I lived under these particular arrangements and conditions for seven months. It was an extremely difficult setting and environment for me. Following the birth of my son in January 2011, we were placed in a one room bedroom in Eglinton with another resident (from Ethiopia) and her baby. I say that this shared room consisted of two double beds, two cots and a bathroom. I say that this situation was extremely difficult for me in circumstances where, in addition to lack of privacy and confined nature of same, I did not get along with this resident. My son and I were subsequently (Autumn 2011) moved to a different room which we shared with another resident (from the Democratic Republic of Congo) and her older child. I say that this room contained two double beds, one cot (the DRC resident shared her bed with her child) and a bathroom. I say that although my relations with this woman were amicable and we got on, sharing such small and confined accommodation with a baby was extremely difficult for me. As stated above (and since late February / early March 2013) my son and I are accommodated in a one bedroom unit, with a bathroom / toilet (and which has no cooking facilities) and where we are not sharing.

9. The direct provision environment and living arrangements significantly interferes with and restricts our privacy and our personal lives and restricts my freedom to have choice of movement in respect of me and my son. I have next to almost no control over our own daily lives or our destiny. Our unit is subject to inspections and checks by staff at the accommodation centre and these can be unannounced with the management holding a master key for the rooms. Moreover, residents must sign a register at reception every day. If, as a resident of my accommodation centre, I wish to leave the hostel for more than one night, I must advise the hostel of this and provide an address of where I would be staying. If a resident is away for over 14 days, they will lose their room (after 6-7 days absence the hostel will issue a written warning). With regard to visitors, they are only allowed into reception and the visitor/reception room and cannot stay overnight, even if there was space for them to do so. (There is a television in this room, couches/chairs, a small table, a hot water dispenser with tea/coffee making facilities). I find the rules and restrictions above outlined to be a significant invasion of privacy and personal life and capacity to have a normal life and develop normal relationships and they also clearly impair the establishment of a normal family life for me and my son.

10. I say that my daily life in the accommodation centre is monotonous and routine and the environment is wholly unsuitable for us, especially over a prolonged period. I try as best I can to keep occupied. To this end I have attended and recently completed a basic computer course which was provided at the hostel. I had hoped to begin a knitting course at the hostel in September, however, I was advised that this was cancelled owing to a lack of available funds. The only other course I am aware of which is available to me at the moment, is an English course. However, I understand that this is a course for people with basic English and is not suitable for me. I have also done courses previously in Family Planning and a Parent and Toddler Course. I am a Christian and I attend church (Calvary Pentecostal Church in Ballyban, Galway) three times a week. This church is unfortunately not within walking distance, so the church usually organises for residents to be picked up (when this transport is not available every

once in a while I buy a day pass for €3.50 which I have to pay for out of the direct provision allowance).

11. In addition to the above outlined, we do not have choice in terms of meals and food which is provided centrally by the hostel. With respect to my son, it is extremely difficult to feed him from the food provided in our hostel, as the food is not suitable to and does not adequately meet his needs (the hostel provides food for adults and babies, but does not cater in a suitable manner for children of his age). As a result my son has to eat the adult food but, because of his age and the nature of the food, he can be reluctant to eat the food provided. He also becomes hungry outside the hostel's kitchen hours (which are 8:00am - 10am, 12.30pm - 2.30pm and 5.30pm - 7.30pm). In these circumstances, I must provide food for my son (and supplement the food I receive / eat from the hostel) using some of our direct provision allowance. I buy such things as crackers, tinned spaghetti, pasta and noodles (I spend about €9 - €10 per week on food). Owing to the difficulties regarding feeding my son, and in circumstances where my bedroom does not contain any cooking facilities, I bought a second hand fridge and microwave (€80 for the fridge and €25 for the microwave) from a former resident at the hostel (which is in our bedroom). I say that I had to save up money for a period of time out of my direct provision allowance to buy these necessary items. I say that having to provide food for my son depletes our direct provision allowance payment.

12. Being restricted and confined to one room with my son is extremely difficult, and I feel mentally drained from the situation and from my overall experiences living in direct provision. With regard to my son, I consider that the hostel in general is a bad environment for him. I have grave concerns that his development and growth is badly affected by the direct provision living environment and the conditions which are not in the best interests of his welfare and development. Whilst there is a crèche at the hostel which he attends, much of the activities in the crèche are not in my view age appropriate activities and do not provide leisure and learning suitable to him / children of his age. I say that with regard to the general facilities, there is no specific play room for children. There is just the crèche. Sometimes children play with each other in a room primarily used for storage in the hostel known as the 'church room' (as detailed below), but there are no toys or educational aids provided. The children also play in the corridors, but this can cause friction with other residents due to noise and inconvenience and is certainly not an appropriate setting including in relation to safety for such activity. There is one computer room with four computers, and children under 6 years of age are generally not allowed in. There is a room next to the computer room (the church room) as referred to above. It is primarily a storage room which contains bicycles and some benches (which are cushioned) to sit on. There are also books stored in this room but they are locked behind shutters and residents do not have access. Not many people use the room.

13. I say that the welfare and safety of my son living in such a system where I as a parent do not have the normal level of control or choice with respect to his daily life and exposure to inappropriate situations and circumstances is of considerable concern to me. I do not, like a normal parent, have control over his interaction and exposure to adults or his development and activities and I worry about his exposure to inappropriate language and behaviour in the direct provision system. I say that owing to the financial limitations on me, I am in a permanent state of intense financial pressure and I am greatly restricted with regard to other activities (outside the hostel crèche / playgroup) that I can provide for my son. I do

worry that he is growing up at a very sensitive stage in his development in such a setting and environment and that he has never known anything other than this abnormal environment as against a normal family environment.

…

15. All told and taking everything together in terms of direct provision living and arrangements, I say and am also advised by our legal advisors that the direct provision scheme, system and environment (and the direct provision scheme along with the denial of a right to work or recognition of any formal permission to remain in the state and the denial of access to social welfare benefits and allowances) does not respect our fundamental rights and is a wholly inappropriate environment for the rearing, nurturing and development of my child and the establishment and enjoyment of normal family life and is unlawful. This is particularly so where we have been living under these arrangements for a prolonged and protracted period. I deeply desire to be in a position where I can regain a proper degree of control over the running of mine and my son's life, our living environment and accommodation circumstances and to be in a position to have a normal family life for my child and a degree of choice in respect of the running of our lives and to have a level of basic resources sufficient to cover our needs and outlay."

3.11. In the Supplemental Affidavit of C.A. dated 21st May 2014, Ms. A also makes the following complaints:

"18. It is the case that under the rules and arrangements, the centre management and staff do have a role in respect of monitoring the care of children by their parents. As a parent living in direct provision, I am very conscious that if a view is taken that I am not caring for T appropriately, it can lead to actions and warnings against me and a report to the authorities. I am conscious of this threat and possibility in the way I behave and in carrying out my parenting role. No parent wants to be the subject of intervention regarding the standard of their care of a child by a third party. The RIA rules and procedures make it absolutely clear that 'if the centre sees that a child is not being adequately cared for, they will tell the relevant authorities. They will keep a written record of any children who are not being well cared for and send a copy to the Reception and Integration Agency.' The rule as I understand it is directed at the manner in which parents care for their children and is not confined to the issue of leaving a child unsupervised although leaving a child unsupervised would obviously infringe the rule. Living in the direct provision environment cannot realistically be contrasted with a situation whereby a neighbour or passerby would seek to intervene by way of reporting a parent to the authorities because they considered a parent was not looking after their child properly. In the direct provision environment, the monitoring of how you care for your child is a constant and daily feature and whilst the level of rule enforcement in different centres and at different times may vary in terms of strictness (and any variation is itself dependent on staff and management in a particular centre which may be subject to change), the situation remains that parents in the care of their children are subject to monitoring and potential reporting to the authorities in a way that does not apply outside of direct provision centres. It is also important to note that the rule in question is not part of the rules relating to child protection policy concerning neglect, emotional, physical or sexual abuse of children. It is a separate rule outside of that policy which is stated in the rules to be relevant to the care and safety of children.

> 19. The sense of being watched and monitored is a constant feature of the direct provision environment across a range of areas. It is not just that you have a sense of being monitored in relation to the care of your child, the sense of being monitored and watched is compounded because of the room inspection regime where somebody has a key to your room and has free access, with respect to the registration arrangements, the general monitoring of your whereabouts and the presence of CCTV cameras in the common areas of the centre such as the reception, on each floor of the corridors where the rooms are located, the laundry room, the common (coffee) room and the dining room. When you add to this in terms of restriction on privacy, the fact that you are not allowed to have visitors or any other person who is a non-resident in the bedroom and that visitors are completely confined to the common room / church room (and must also register their details), it means that there is no single place in the centre where I can be with a non resident no matter who they are, where I can have privacy or an intimate or private conversation or interaction. In addition of course there is the near complete lack of control over food provision. Over a lengthy period, the monitoring and restrictions, severe lack of privacy and sense of being watched have a very restrictive effect and it serves to prevent you having a normal, personal, private and family life and restricts you behaving in a natural way and being who you are as a person."

The Respondents' Evidence

3.12. Mr. Patrick McGovern is the manager of the Eglinton Accommodation Centre and has sworn an affidavit for the purposes of verifying the Statement of Opposition in these proceedings. Having considered the affidavits of the applicant and of her solicitor, he has sought to describe the Eglinton Accommodation Centre. He commences his reply to the applicant by saying:

> "I say that I am taken aback by the allegations made about Eglinton by the applicants in these proceedings. I take this opportunity to utterly refute these allegations and in particular the allegations that living in Eglinton is a dehumanising experience. The Centre prides itself on its standards and its involvement with the residents living there. The accommodation is considered their home while they are there and the management strive at all times to make their stay as pleasant as possible, liaising with other agencies, community groups, schools etc. in order to assist the residents where possible."

3.13. Mr. McGovern says that the applicant "has been benefiting from Direct Provision since 2010, almost entirely at Eglinton and has never complained formally in respect of the accommodation or any of the services provided to them". He notes that the applicants are accommodated in one *en suite* room. The room is bright and very large, measuring approximately 33.5 ft. x 12 ft. The room comprises a bedroom area furnished with a double bed, single bed and double wardrobe, two bedside lockers and dressing table and chest of drawers. There is also a sitting area with a small dining room table and chairs, a coffee table, large TV stand with a shelving unit. The *en suite* bathroom is fully tiled and has a shower, bath, toilet and vanity unit with sink. As stated above, the room is large and has two occupants and is well in excess of the minimum space requirements set out in the Housing Acts 1996 to 2004. Mr. McGovern denies that Eglinton Accommodation Centre is isolated, being on the seafront in Salthill in Galway within walking distance of the city centre.

3.14. He notes that there is a large living area in the centre which looks out over the promenade and sea, it has a large seating area, a bar area with tea and coffee making facilities, two microwaves, one toaster and four communal fridges which are open 24

hours a day. There is a television in each of the bedrooms with 13 channels. In addition, there is a large communal room which is used for children's parties, knitting classes etc. He describes a library in the area of the communal room and a computer room with eight computers. The ground floor has Wi-Fi. A children's computer class is held each Friday evening and Saturday morning.

3.15. There is a laundry facility. There is a preschool on site and an open air area for outdoor play. Four staff members work in the preschool. The second named applicant attends the preschool and there is a playground known as the Toft Park Playground adjacent to the accommodation centre. Children of school-going age have the right to attend local primary and post-primary education, with 43 children attending nine different primary schools and six children attending four different secondary schools. Children are entitled to free travel to and from school and homework facilities are available for children. Having described accommodation and services available at Eglinton Accommodation Centre, Mr. McGovern says:

> "I say that the allegations made by the applicants concerning the standard of services provided to them by Eglinton are utterly rejected. Each of the allegations is dealt with further below. The allegation that Eglinton is a dehumanising experience is utterly rejected. On the contrary, Eglinton strives to run the accommodation centre in a streamlined and pleasant manner and in a manner that ensures its residents have an opportunity to avail of all the facilities available and to enjoy the place as their home."

3.16. The particular denials of allegations made by the applicants expressed by Mr. McGovern are as follows:

> "1. The accommodation is not small or inadequate.
>
> 2. The applicants have not suffered unnecessary disruption or upheaval with their accommodation. Any of the moves made by the applicants are made for good reason and for the benefit and sometimes at the request of the applicant. The applicants' privacy is respected and the rules and restrictions in place do not impede normal life. Management try to respect privacy of residents as much as possible. When inspections of the rooms happen, two members of staff are present. The accommodation is well maintained. Standard of food is good and there is extensive choice.
>
> . . .
>
> The picture which the first named applicant seeks to paint is that of an anonymous, isolated and degrading accommodation system and this is absolutely rejected."

3.17. Mr. McGovern, having described the positive aspects of the facilities, says as follows:

> "Accordingly, the allegations being made by the applicants herein are most surprising - in particular, the allegation that the experience of living in Eglinton Accommodation Centre is a dehumanising experience which breaches their human rights. The management do not place any unnecessary restrictions on the residents but must be mindful of the safety and quiet enjoyment of the complex for all. To that end, the management apply the House Rules referred to above in a reasonable and flexible manner.
>
> It is not accepted that the applicants are isolated and segregated from society or that they have no control over their lives. Transport is available and the accommodation centre is centrally located in Galway city. The children are integrated into the local school. The parents are free to meet

and socialise with other parents as they wish, or with persons they meet in the locality or through religious organisations.

. . .

I say and believe that the allegations made by the applicants concerning the standards of accommodation provided to them are untrue. The applicants have been provided with a reasonable standard of accommodation and services which include educational and leisure facilities. While it is accepted that the applicant might personally prefer different options on occasion, it is not possible for the management of Eglinton or RIA to have regard to such personal preferences."

3.18. Mr. Noel Dowling is a Principal Officer working in the Reception and Integration Agency of the Department of Justice and he has also sworn an affidavit in these proceedings. He describes 'direct provision' in the following terms:

"The Direct Provision system, managed by the Reception and Integration Agency (hereinafter referred to as 'RIA'), a unit within the Department of Justice and Equality, is the means by which Ireland discharges its obligations to provide for the basic requirements of persons seeking refugee status and protection status (hereinafter referred to as protection seekers). It is a largely cashless system with the State assuming responsibility for providing suitable accommodation on a full board basis. The cost of all of the residents' meals, heat, light, laundry, television, household maintenance, etc. is paid directly by the State. Protection seekers can also access health and education services together with extensive other facilities and services designed to ensure their needs are met while seeking the protection of the State.

. . .

I say and believe that it is clear from the evidence provided by way of this affidavit, together with the accompanying exhibits that the allegations made by the applicants concerning their accommodation and the services provided for them are simply not true. The applicants have been provided with accommodation suitable for their needs as a single parent family unit. In addition, the applicants are provided with a generous and nutritious selection of food and provisions for snacks, breakfasts and school lunches. The facilities afforded to the applicant family at no cost to them whatsoever are considerable and include a preschool, outdoor children's play area, recreational rooms, computer facilities, laundry facilities, educational facilities, library, seasonal outings and social activities. Applicants have no bills to pay in respect of their accommodation and services, and unlike most residents in the country, do not have to concern themselves about the cost of basic necessities such as the weekly shopping bill, electricity, heating, laundry and household maintenance bills."

3.19. Mr. Dowling describes the 'direct provision' scheme as one where accommodation is provided on a full board basis and that a weekly 'Direct Provision Allowance' is paid. In addition, the Department of Social Protection may make once-off exceptional needs payments to cover things such as baby equipment, payments towards clothing, extracurricular activities for children, activities for families and adults and transport for certain appointments.

3.20. Mr. Dowling, in response to the complaint as to the standards at Eglinton, says:

"The applicants have made numerous allegations in respect of the facilities

and services afforded to them in Eglinton Hotel where they reside in these proceedings. They contend that the services afforded to them are of a poor standard, causing the first named applicant to struggle to provide food for her child or meet their basic needs and that the experience is a degrading and dehumanising one. These allegations are entirely refuted. However, as set out in the affidavit of Patrick McGovern, manager of the Eglinton Hotel, to which I beg to refer when produced, the reality is that the applicants have been and continue to be provided with a high level of services and facilities.

. . .

Allegations being made by the applicants herein are most surprising, and in particular, the allegation that the experience is a degrading dehumanising one. The management do not place any unnecessary restrictions on the residents. However, the management must be mindful of the safety and quiet enjoyment of the complex for all residents. To that end, the management apply the House Rules as previously exhibited by Mr. McGovern, manager of the Eglinton Hotel.

. . .

Having considered these facilities, it is of interest that the applicants are in a preferable position to many low income families in the State, whether in receipt of social welfare payments or not. They are housed in a very large en suite room measuring 33.5 ft. x 12 ft. They have no bills to concern themselves with whatsoever, they are not concerned about heating the premises, lighting, electricity, laundry costs or household maintenance. They do not have to concern themselves in paying for food and domestic goods. An extensive menu is provided for them from which to choose breakfast and a three-course lunch and dinner each day, with a selection of nutritious hot and cold food.

Outside the mealtimes of breakfast, lunch and dinner, there is provision made for snacks, tea and coffee. They are provided with television, computer facilities, laundry facilities, recreational facilities including access to the promenade, education courses, access to free medical and nursing care, can apply for additional payments for clothing and other options.

. . .

I say and believe, therefore, that the applicants are quite incorrect in the allegations they make. The allegations that living in this environment is a degrading or dehumanising experience is rejected and demonstrates a startling lack of appreciation for the daily realities of many other non-protection seekers, particularly given the difficult economic circumstances unemployed individuals and low income families currently face. While the applicants complain that their lifestyle is monotonous and routine, it is submitted that the facilities are designed to be suitable for a genuine protection seeker. It is submitted that were a person genuinely fleeing persecution in their home country, such a person would welcome the quiet and peaceful enjoyment of the Eglinton Hotel on the seafront in Salthill, Galway.

. . .

It is the respondent’s position that the current accommodation the

applicants have in Eglinton Hotel more than fulfils the State's obligation under national and international law, and the applicants herein have not adduced any truthful evidence to the court to the contrary. The applicants basic needs are more then met by the State in the facilities and services it affords to them. They have no financial concerns in relation to how to pay for their basic needs, such as accommodation, heating, lighting, food, healthcare education.

. . .

It is not accepted that the applicants are isolated and segregated from society, that they have no control over their lives.

. . .

I say and believe that the allegations made by the applicants concerning the standards of the accommodation provided to them are untrue. The applicants have been provided with a reasonable standard of accommodation and services, including food, educational and leisure facilities."

Affidavit of Una O'Brien of the 14th April 2014:

3.21. The applicants' main reply to the respondents' denials of illegality is dated the 22nd April, 2014, as set out in an affidavit of their solicitor, Una O'Brien. Ms. O'Brien says that the following features of the applicants' circumstances are of particular concern and are at the core of what is at issue in these proceedings (the affidavit was sworn before it was known that some of the complaints were adjourned or do not now require determination):

? Blanket denial of access to employment or capacity to seek work.

? Denial of access to any mainstream social welfare benefits and allowances (save insofar as the applicants may qualify for exceptional needs payments).

? The requirement that a person such as Ms. A must live in the 'direct provision' system as a result of the above restrictions.

? The manner in which the 'direct provision' system interferes with and breaches constitutional rights and interferes with and undermines private and family life and the rearing, parenting and development of children.

? The marginalisation and exclusion of those living in 'direct provision' from wider society and community.

3.22. Ms. O'Brien summarises the denials made by respondent (accurately, in my view) as follows:

(a) Direct provision does not restrict freedom of movement.

(b) The experience of living in direct provision is not degrading or dehumanising.

(c) Management do not place unnecessary restrictions on residents.

(d) Direct provision living does not create isolation or segregation from society.

(e) Direct provision does not take away control from residents with their own lives.

3.23. Mr. Dowling is said to assert that the State is acting in a reasonable manner in respect of the accommodation arrangements for the applicants with full regard to their family rights and providing for them as a single parent family.

3.24. The respondent's denials are answered as follows:-

> "I say these contentions are not sustainable having regard to the nature and content of the direct provision system and environment, the RIA rules and procedures and arrangements on the grounds in centres in terms of day to day control and management of the lives of residents including the applicants herein and the manner in which the direct provision system serves to radically undermine and transgress the human dignity and fundamental rights of residents."

3.25. Ms. O'Brien analyses a sample RIA contract with accommodation providers and the RIA house rules and says:

> "…that a careful examination of these two documents serves to demonstrate the intense and detailed extent to which the lives of protection applicants living in the direct provision system and environment is controlled and subject to management by RIA and private contractors and also serves to demonstrate the very significant frailties and deficiencies in the internal complaints system which is referred to therein."

3.26. The applicants submit that these documents reveal that accommodation providers are required to maximise "hostel accommodation centre occupancy rates" with the result that residents may be moved from one centre to another to ensure that all centres are full and eventually that under-utilised centres can be closed down. The complaint made here is that residents can be moved at will without consent for reasons of economy and without the authorities having regard to their interests or wishes.

3.27. The following allegations in respect of the sample contract are also made:

> ? Clause 1.2 of the sample contract requires the contractor to ensure maximisation of capacity thereby necessitating or requiring the transfer of residents to alternative bedrooms within the centre to achieve maximisation;
>
> ? Clause 1.3 requires the contractor to record personal details of the residents in a register on a daily basis and to forward the details to RIA once a week. This results in careful monitoring by RIA of all the residents in direct provision in the State. It is noted that the respondents justify this by reference to safety considerations whereas the applicants contend that the true reason is financial as the directors are required to maximise room and centre occupancy.
>
> ? Clause 3.2 of the contract requires the contractor to carry out checks on all accommodation units at least once a week and requires restrictions on visiting hours for guests and requires that visitors be signed in by a resident before gaining admission to the centre as provided for in clause 3.12.

3.28. Ms. A makes complaints about very many aspects of her circumstances. Some of the complaints are general, some are highly specific. Each complaint is denied by deponents on behalf of the respondents. Ultimately Ms. A seeks to express her complaint and sense of grievance in an affidavit sworn on the 17th April, 2014, in the following terms:-

> "53. I refer to paragraph 151 of Mr. McGovern's affidavit and paragraph 85

of Mr. Dowling's affidavit where they take issue with my use of the phrases 'dehumanising' and 'degrading' to describe my existence and circumstances in the direct provision setting, system and environment...Living in and under the direct provision system and environment (especially when as I have emphasised herein, you are not permitted to work/seek work and have no access to social welfare benefits and allowances) is a dehumanising experience which eats away at my personal dignity and creates a sense of lack of self worth and hopelessness for me. It deprives me (and T too) of positive and a normal life experiences and the opportunity to make something of my life and makes me feel inferior but yet my situation of being constrained to live in direct provision along with the enforced ban on being able to seek work or have access to social welfare benefits is not of my own choosing.

54. At the root of all of this in terms of direct provision being a dehumanising and degrading experience, is the lack of capacity and control I have over my life and destiny (and that of T) and the sense of utter dependency which is integral to the direct provision system. The particular features of the direct provision living environment which I have highlighted in this affidavit as significantly attributing to my complaint about the system and the breaches of fundamental rights involved all contribute to the lack of dignity involved in living in direct provision. I refer in particular to the interference with private life, privacy, family life, autonomy, freedom of movement and choice and the undermining and interference with my parenting role and the adverse affect on a young child of a prolonged stay in direct provision. When you add in on top of that system, not being allowed to work/seek work, not having access to social welfare benefits and allowances and the very meagre direct provision allowance, it results in a dehumanising and degrading experience, especially over such a protracted period.

55. Whilst Mr. Dowling, at paragraph 10 of his affidavit, has referred to protection seekers being free to opt not to live in direct provision and the system being optional, I say that this is a wholly unrealistic view to take. When I have no permission to work/seek work, no access to social welfare benefits or allowances and only receive the direct provision allowance for me and T it is simply not possible, tenable or feasible for us to live outside of direct provision and therefore I am constrained to live in that system and I do not have any option. The situation would be similar for the majority of those living in direct provision."

4. Hearsay

4.1. The applicants have sought to rely upon numerous reports by a variety of governmental organisations, non-governmental organisations, international organisations and institutions to support their case that 'direct provision' is unlawful. In addition, particular assertions as to facts or statements of fact contained in a number of these documents are sought to be introduced as evidence in support of the applicants' case. Statements in the documents are said to corroborate the applicants' case that 'direct provision' has serious adverse effects and to support the proposition that 'direct provision' constitutes inhuman and degrading treatment.

4.2. The various reports and the statements therein to which Ms. A refers are as follows:

a) United Nations International Covenant on Civil and Political Rights, "List of issues in relation to the fourth periodic report of Ireland" (Human Rights Committee, 22nd November 2013) and "Replies of Ireland to the list of

issues" (Advance Unedited Version, 27th February 2014);

b) Irish Human Rights Commission, "Submission to the UN CERD Committee on the Examination of Ireland's Combined Third and Fourth Periodic Reports" (November 2010);

c) "Fifth Report of the Special Rapporteur on Child Protection, A Report Submitted to the Oireachtas" (Geoffrey Shannon, 2011 Report);

d) Joint Committee on Justice, Defence and Women's Rights Debate, "Asylum Policy and Practice and Gender Issues: Discussion" (Houses of the Oireachtas Committee Debates, Wednesday 7th July 2010);

e) European Commission against Racism and Intolerance "ECRI Report on Ireland" (Council of Europe, published 19th February 2013);

f) Council of Europe, Parliamentary Assembly "Refugees and the right to work report of rapporteur Mr. Christopher Chope" (Committee on Migration, Refugees and Displaced Persons) including a "Resolution 1994 of the Parliamentary Assembly on Refugees and the right to work" (2014, Parliamentary Assembly of Council of Europe);

g) UN General Assembly, "Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona" dated 17th May 2011 (Human Rights Council, Seventeenth session);

h) FLAC "One size doesn't fit all - A legal analysis of the direct provision and dispersal system in Ireland, 10 years on." (November 2009);

i) ESRI "The Organisation of Reception Facilities for Asylum Seekers in Ireland" (Corona Joyce, Emma Quinn, European Migration Network, February 2014).

4.3. The respondents argue strenuously that the statements in these documents are hearsay and must be excluded. They are, it is said, relied upon by Ms. A for the truth of the matters asserted. The applicants do not deny this is one of the purposes of referring to the reports and statements. The respondents point out that they have no opportunity to cross-examine the persons who made the statements. The reports are exhibited to the applicants' solicitor's affidavit, and though the respondent argues that this does not prove the reports, no objection is taken to the reports on this technical basis. I agree that the reports are not proved by being exhibited to the solicitor's affidavit. I agree that statements in these exhibited documents sought to be relied upon as evidence as to fact should be excluded as inadmissible hearsay. Counsel for the applicant did not accept that the statements were hearsay and therefore made no effort to assert any exception to the rule against hearsay which would permit the court to admit the controversial evidence.

4.4. Grave exception appeared to be taken by the applicants to the idea that the rule against hearsay might be used to exclude material which is said to be of central importance. However, if the respondent had sought to rely on some external report or study to say that 'direct provision' in Ireland causes no ill-effects that would undoubtedly have been resisted tooth and nail by the applicants as inadmissible hearsay.

4.5. The applicants' counsel has energetically urged the Court to have regard to the content of all of these reports in relation to allegations concerning circumstances in which the applicants live and as to the negative consequences of those circumstances. In other words, all of the shortcomings of 'direct provision' identified in these reports should be

used by the Court to assist with its decision in this case, having regard to the identity of the persons who made the statements and the volume of the criticisms seemingly made.

4.6. Counsel for the respondent has argued that this proposed approach is seeking to avoid the hearsay rule and submits that the relevant material either constitutes admissible evidence or it does not. She argues that if the evidence is hearsay it is not admissible as to any matters of fact and that describing the reports submitted as 'material' rather than as 'evidence' does not dis-apply the rule. I agree with the respondent. The rules of evidence are not disapplied in judicial review proceedings.

4.7. Counsel for Ms. A argues that the regime as to evidence and extraneous documentation which applies in the European Court of Human Rights should be used in these domestic proceedings. He referred to numerous authorities (*ALJ and A, B and C's Application for Judicial Review* [2013] NIQB 88, *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, *M.S.S. v. Belgium and Greece (*Application no. 30696/09, 21st January 2011), *Wilson v. First County Trust Ltd (No. 2)* [2003] UKHL 40, *A v. Secretary of State for the Home Department* [2004] UKHL 56, *R. v. Halpin* [1975] 1 Q.B. 907 and *Eastern Health Board v. M.K* [1999] 2 I.R. 99) which, he said, supported the suggestion that the Court should have regard to all of these reports.

4.8. Counsel for the respondent submits that it is not appropriate to say that the approach taken by the European Court of Human Rights should be taken by the Irish High Court, as that court is a *sui generis* body operating in a particular international context which does not hear cases or hold trials where the parties give first hand evidence. In contrast, it is submitted that the High Court has full original jurisdiction and can hear evidence, which the European Court of Human Rights does not do. On a careful reading of the authorities submitted by counsel I can find no support for his argument that that the ordinary rules of evidence may be dis-applied in these proceedings and that instead the approach as to evidence and use of extraneous material followed by the Strasbourg Court should apply. (Section 7 of this judgment contains a discussion on the approach of the ECtHR to disputes as to facts and the use of third party reports.)

4.9. I have not found it necessary to rely on anything in the multiple reports submitted to the Court to assist me in understanding the circumstances of the applicants. I accept her evidence as to the basic facts.

4.10. With respect to the second use I should make of these reports i.e. that the reports should assist me in assessing the overall circumstances of 'direct provision' including the legality and the proportionality of the scheme, my view is that it is inappropriate for the Court to have regard to such material to assist with analysing and answering the central legal questions posed by these proceedings. This Court is not concerned with what persons who are not parties or witnesses in these proceedings might think about the legality, proportionality or quality of 'direct provision'. Their views might have been of considerable assistance to the applicants (and to the court) had viva voce evidence been given but this did not happen. Therefore, though I have read the documents which have been exhibited by the applicants, I have decided that I cannot have regard to the views expressed therein in determining any question before this Court. The authors of the reports have not heard the argument in this case. Nor have they seen or heard the evidence of the applicant. They have not been exposed to the evidence and the views of the respondents. This case can only be decided on the pleadings, the evidence and the arguments of the parties.

5. Findings of Fact

5.1. Ms. A has given clear evidence as to the circumstances in which she lives. This evidence is not denied by the respondent. It is accepted by the court. The applicant has discharged the burden proof with respect to basic and important facts such as where she lives, her diet, her daily routine, her son's educational environment, all the physical

characteristics of her accommodation, the content of RIA rules etc. She has also given clear evidence as to how she feels about her circumstances. The Court has no hesitation in accepting that she has very negative feelings about her circumstances.

5.2. Ms. A gives her own evidence of the negative effects she suffers from 'direct provision'. The respondents have trenchantly denied the existence of these negative effects.

5.3. Whether 'direct provision' creates negative effects is a question of fact and the competing averments of the parties on the topic create a significant dispute as to fact. The court was not offered the means to resolve this dispute. The dispute is at the core of the case and its resolution is necessary for the applicants to succeed on this aspect of the case. The applicants could have sought a plenary hearing of this action but did not. They could have requested cross examination of the respondents on their affidavits but did not. They could have filed affidavits by suitably qualified persons as to the effects of 'direct provision' but they did not. The applicants thereby failed to discharge the burden of proof to establish that 'direct provision' has the negative effects alleged. So much of the applicants' case as relies on allegations of adverse effects arising from 'direct provision' falls to be assessed in this context.

6. Issues for Decision

6.1. Against that background and having regard to the pleadings, the written submissions, the manner in which the case was argued, the points which no longer require determination and the points which stand adjourned, the issues which arise for determination are as follows:

> a. Does 'direct provision', either in part or because of cumulative effect, breach the applicants' fundamental human rights?
>
> b. Is Article 15.2 of the Constitution breached because 'direct provision' is an administrative scheme without legislative basis (apart from the prohibitions on work and social welfare)?
>
> c. Is the weekly cash payment (adults €19.10 and children €9.50) known as the Direct Provision Allowance *ultra vires* the Social Welfare Consolidation Act 2005 or otherwise unlawful?

6.2. Only declaratory relief is sought by the applicants with respect to matters now requiring determination. No damages were sought in respect of the alleged breaches of human rights. Towards was the end of the hearing (on 25th July 2014, day 19 of 22), this Court ruled that the only remedy in Irish law for a breach of the ECHR was damages or a declaration of incompatibility of law in accordance with the European Convention on Human Rights Act 2003. No such relief was sought though detailed submissions concerning the breach of the applicants' Convention rights were made. The applicants moved to amend the pleadings to include statutory damages under the 2003 Act though, oddly, only nominal damages are sought. This is odd because I can see no reason in law or logic why a breach of ECHR rights should sound in nominal damages only, especially for applicants who say they are impoverished. I reserved my decision on this late application to amend the pleadings. Such an amendment will only be required if the court finds that a breach of the applicants' Convention rights has occurred.

6.3. Human Rights Issues

6.4. I shall now deal with the first of the three issues identified at paragraph 6.1 for determination. viz., 'Does 'direct provision', either in part or because of cumulative effect, breach the applicants' fundamental human rights?

6.5. The applicants have sought a declaration that:

> "The Direct Provision Scheme . . . is in breach of and violates and/or fails to respect and vindicate the rights of the applicants pursuant to 40.3, 41 and 42.1 of the Constitution and Articles 3, 8 and 14 of the ECHR and Article 2 of the Fourth Protocol of the ECHR and/or the said scheme amounts to unjustifiable, unequal treatment for the applicant family within the terms and meaning of Article 40.1 of the Constitution."

6.6. The grounds for the declaration in respect of which leave was granted are set out at ground (IX)(a) to (j) in the Statement Grounding the Application for Judicial Review and are preceded by the following remarks which appear to set the theme:

> "The culmination, effect and impact of the Direct Provision Scheme and living conditions on the Applicants over a prolonged and protracted period considering, in particular, the severe financial constraints and pressures the first named Applicant faces, the unsuitable and inadequate living/accommodation arrangements, the lack of autonomy and control over the everyday functioning of the family including with respect to their diet and food arrangements and requirements, as well as regards the appropriate upbringing and nurturing of the minor Applicant, the restrictions and rules they face with respect to their place of residence and movement, together with the denial of the first named Applicant of the right and ability to provide for and support her child by way of employment (and the denial of access to social welfare benefits and allowances), is in violation of the Applicants' rights as protected by the Constitution, the ECHR, the Charter of Fundamental Rights of the European Union, as well as directly relevant international human rights protection instruments to which this State has acceded. Specifically, being subjected to the Direct Provision System gives rise to the following breaches of the Applicants' rights."

6.7. This formal pleading reflects the oral submissions which placed emphasis on the idea that the alleged harm suffered by the applicants is caused, in significant part, by the length of time the applicants are exposed to 'direct provision'.

6.8. The illegalities associated with 'direct provision' are set out paragraph (IX) (a) to (j) in the pleadings and may be summarised as follows:

> ? Direct Provision amounts to inhuman and degrading treatment in breach of Article 40.3.1 of the Constitution and Article 3 of the Convention.
>
> ? Direct Provision is a disproportionate interference with the private life of the applicants.
>
> ? Direct Provision, especially when endured over a prolonged period, interferes with the right to respect for family life under the Irish Constitution and Article 8 of the Convention (and Article 3 of the UN Convention on the Rights of the Child).
>
> ? Direct Provision impairs parenting in breach of Article 42 of the Constitution.
>
> ? Direct Provision breaches the Applicants' rights and the State's obligations arising under the Charter of Fundamental Rights of the European Union.
>
> ? Direct Provision with its controls and restrictions on choice of residence, freedom of movement and liberty is a disproportionate interference with privacy rights under Article 8 of the Convention.
>
> ? Direct Provision constitutes discrimination and breach of Article 40.1 of

the Constitution.

6.9. The Court struggled somewhat with the applicants' human rights claim. It appeared to involve a mix of highly specific claims and very general claims. A lack of specificity in pleading was rendered all the more problematic by the failure of the applicants to define what was meant by 'direct provision'. It was difficult to discern whether the applicants' rights were said to have been breached because of the cumulative negative effects of 'direct provision' or because of cumulative negative effects endured over time or because particular aspects of 'direct provision' breached certain rights, with or without a temporal element. Ultimately I have interpreted the applicants' human rights claims as presenting the following issues for determination:

a. Is 'direct provision' a form of inhuman and degrading treatment?

b. Are there particular aspects of 'direct provision' which breach particular human rights?

c. Does 'direct provision', because of cumulative effects, violate the applicants' right to respect for family life and private life?

d. Does 'direct provision' breach rights due to the length of exposure to the regime?

e. Is the EU Charter of Fundamental Rights applicable?

6.10. The applicants' written submissions introduces the human rights claims as follows:

"62. It is submitted that the Direct Provision system and the arrangements and the operation of that system (and/or the operation of that system in combination with the denial of right to work and the denial of mainstream social welfare payments), violates and/or fails to respect and vindicate the applicants' rights as protected by the Constitution, the European Convention on Human Rights (hereafter the ECHR) and the Charter of Fundamental Rights of the European Union (hereafter the Charter), as well as directly relevant international human rights protection Instruments to which this State has acceded. The interference with and the breach of the applicants' fundamental rights can be broadly characterised as interference in respect of:

a. family life;

b. the right of parental control and autonomy;

c. the rights of the child;

d. private life and privacy;

e. personal autonomy and choice;

f. freedom of movement and residence;

g. the right to work/right to earn a living, addressed in detail in section 6 below and procedural rights and safeguards."

6.11. In this submission the applicants suggest that 'direct provision', in all its manifestations, breaches each of the identified rights. This is patently wrong. Payment of the 'direct provision' allowance could not breach freedom of movement or the right to work. The alleged lack of control and choice in relation to food (an intrinsic part of 'direct

provision', according to the applicants) could not be said to be a breach of freedom of movement and residence. In other words, it is not possible for the applicants to sustain a plea that 'direct provision' cumulatively violates all of the rights identified in the pleadings and in the written submissions. The proposition is all the more stark bearing in mind that 'direct provision' is not a term of art and no definition has been pleaded.

I turn now to address the first of the questions identified at paragraph 6.9.

7. Is 'direct provision' a form of Inhuman and Degrading Treatment?

7.1. The rule against inhuman and degrading treatment is to be found in Article 3 of the European Convention on Human Rights ('ECHR') which provides:

> " Prohibition of torture
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

7.2. The applicants argue that Article 40.3 of the Constitution expresses a similar prohibition and this was not contested by the respondents. Indeed, Gilligan J. in *O.O. v. Minister for Justice* [2004] IEHC 426 stated:

> "A decision taken in accordance with the requirements of constitutional justice which potentially affects the right to life should only be taken after a thorough examination of the evidence with respect to the obligation on the State to protect the right to life if the decision is to be taken compatibly with the requirements of constitutional justice.
>
> The Constitution prohibits acts or omissions which expose a person to a real and substantial risk to their right to life or to a breach of their human rights (including their right to freedom from torture, inhuman and degrading treatment). The risks to life include the real and substantial risk that a person may commit suicide, as established in *Attorney General v. X.* [1992] 1 IR 1."

7.3. Arguments were based on the rule as formulated in the ECHR and interpreted by the European Court of Human Rights ('ECtHR'). The most relevant authority in relation to this allegation is *M.S.S v. Belgium and Greece* (Application no. 30696/09, 21st January 2011), relied on by the applicants and the respondents. The facts of the case are as follows.

7.4. The applicant, M.S.S., an Afghan national, left Kabul early in 2008 and entered the European Union through Greece. On 10th February 2009, he arrived in Belgium, where he applied for asylum. By virtue of the "Dublin II" Regulation, the Belgian Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. The applicant was transferred to Greece on 15th June 2009. On arriving at Athens airport he was placed in detention in an adjacent building where he was locked up in a small space with 20 other detainees; access to the toilets was restricted; detainees were not allowed out into the open air; detainees were given very little to eat and had to sleep on dirty mattresses or on the bare floor. Following his release and issuance of an asylum seeker's card on 18th June 2009 he lived on the street with no means of subsistence. He attempted to leave Greece with a false identity card but was arrested and placed in the detention facility next to the airport for one week where he alleges he was beaten by the police. After his release he continued to live in the street occasionally receiving aid from local residents and the church. On renewal of his asylum seeker's card in December 2009 steps were taken to find him accommodation but no housing was ever offered to him. The applicant alleged that the conditions of his detention and his living conditions in Greece amounted to inhuman and degrading treatment in violation of Article 3.

7.5. The Grand Chamber described the approach to Article 3 cases as follows:

> "218. The States must have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct (see, among other authorities, *Labita v. Italy* [reference])
>
> 219. The Court has held on numerous occasions that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see, for example, *Kud³a v. Poland*)
>
> 220. The Court considers treatment to be "inhuman" when it was "premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering". Treatment is considered to be "degrading" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance (*Pretty v. the United Kingdom*, 52, ECHR 2002-III). It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, s. 32, Series A no. 26). Lastly, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Peers v. Greece*, 74, ECHR 2001-III).

7.6. The applicant in *M.S.S.* presented distinct Article 3 complaints in respect of the conditions of his detention, on the one hand, and his general extreme poverty, on the other. Both sets of circumstances, he alleged, separately constituted inhuman and degrading treatment in breach of Article 3.

7.7. The Greek Government disputed that the applicant's rights under Article 3 had been violated during his detention and claimed that he had adduced no evidence that he had suffered inhuman or degrading treatment. As to this evidential matter, the Court noted:

> "208. In contrast with the description given by the applicant, the Government described the holding centre as a suitably equipped short stay accommodation centre specially designed for asylum seekers, where they were adequately fed.
>
> 209. In their observations in reply to the questions posed by the Court during the hearing before the Grand Chamber, the Government gave more detailed information about the layout and facilities of the Centre. It had a section reserved for asylum seekers, comprising three rooms, ten beds and two toilets, the asylum seekers shared a common room with people awaiting expulsion, where there was a public telephone and a water fountain. The applicant had been held there in June 2009 pending receipt of his 'pink card'."

7.8. The comparison with the present case is interesting. As can be seen from the description of the parties' evidence in suit, the applicants make detailed complaints concerning the negative effects of 'direct provision' and claim that these effects constitute inhuman and degrading treatment. The respondent denies that the living conditions cause

the alleged negative effects. In support of the applicants' allegations, multiple reports and commentaries were exhibited, but I have decided that this is inadmissible hearsay evidence. Contrastingly, the European Court of Human Rights expressly relied on external material to resolve the dispute as to facts regarding Greek detention conditions. At para. 226, the Court said:

> "The Court notes that according to various reports by international bodies and non-governmental organisations (see paragraph 160 above), the systematic placement of asylum seekers in detention without informing them of the reasons for their detention is a widespread practice of the Greek authorities.
>
> 227. The Court also takes into consideration the applicant's allegations that he was subjected to brutality and insults by the police during his second period of detention. It observes that these allegations are not supported by any documentation, such as a Medical Certificate, and that it is not possible to establish with certainty exactly what happened to the applicant. However, the Court is once again obliged to note that the applicant's allegations are consistent with numerous accounts collected from witnesses by international organisations (see paragraph 160 above). It notes, in particular, that following its visit to the holding centre next to Athens International Airport in 2007, the European Committee for the Prevention of Torture reported cases of ill-treatment at the hands of police officers (see paragraph 163 above)…
>
> 229. It is important to note that the applicant's allegations concerning living conditions in the holding centre are supported by similar findings by the CPT (see. Para. 163 above), the UNHCR (see paras. 2 and 3 above), Amnesty International and *Médicins sans Frontiéres - Greece* (paragraphs 165 and 166 above) and are not explicitly disputed by the Government."

7.9. At para. 230, the Court made reference to findings made by organisations that visited the holding centre next to the airport which said that:

> "…the sector for asylum seekers was rarely unlocked and the detainees had no access to the water fountain outside and were obliged to drink water from the toilets. In the sector for arrested persons, there were 145 detainees in a 110 sq. metre space. In a number of cells, there was only 1 bed for 14 to 17 people. There were not enough mattresses and a number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot. Detainees' access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed in all sectors that there was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and that the detainees were deprived of outdoor exercise."

7.10. Then the Court said:

> "The Court reiterates that it has already considered that such conditions, which are found in other detention centres in Greece, amounted to degrading treatment within the meaning of Article 3 of the Convention (see paragraph 222 above). In reaching that conclusion, it took into account the fact that the applicants were asylum seekers."

7.11. The court summarised its own jurisprudence on Article 3 and detention conditions as follows:

> "221. Article 3 of the Convention requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the

detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (see, for example, *Kud³a*, cited above, s. 94).

222. The Court has held that confining an asylum seeker to a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products, amounted to degrading treatment within the meaning of Article 3 of the Convention (see *S.D. v. Greece*, ss. 49 to 54, 11 June 2009). Similarly, a period of detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet is unacceptable with respect to Article 3 (ibid., s. 51). The detention of an asylum seeker for three months on police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals has also been considered as degrading treatment (see *Tabesh v. Greece*, ss. 38 to 44, 26 November 2009). Lastly, the Court has found that the detention of an applicant, who was also an asylum seeker, for three months in an overcrowded place in appalling conditions of hygiene and cleanliness, with no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions amounted to degrading treatment prohibited by Article 3 (see *A.A. v. Greece*, ss. 57 to 65, 22 July 2010)."

7.12. My understanding of the manner in which the European Court of Human Rights resolved the dispute as to facts with respect to detention conditions was to have regard to its own previous findings with respect to detention conditions for asylum seekers in other Greek detention centres, to have regard to the reports of governmental and non-governmental bodies who had inspected the centre at issue and to have regard to the fact that the Greek Government did not appear to explicitly reject some of the factual allegations made by the applicant. The Court's conclusion is expressed as follows:

"233. . . In the light of the available information on the conditions at the holding centre near Athens International Airport, the Court considers that the conditions of detention experienced by the applicant were unacceptable. It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and the anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker.

234. There has therefore been a violation of Article 3 of the Convention."

7.13. Once the Strasbourg Court resolved the dispute as to facts and accepted the description of detention conditions advanced by the applicant, it found that inhuman and degrading treatment was established as a matter of law. This approach suggests that a violation of Article 3 will follow once compelling facts which demonstrate a minimum level of severity are proved. In other words, if the facts are of an alarming nature, as was the case in *M.S.S.*, no additional evidence proving the negative effects of those facts is required in order to answer the legal question as to whether those facts amount to inhuman and degrading treatment.

7.14. This is not a surprising proposition. No great leap was required in the Greek case, given the appalling circumstances of detention, for the Court to move from the accepted facts ("the Court considers that the conditions of detention experienced by the applicant were unacceptable", at para.222 of the decision) to a finding that such conditions

constituted inhuman and degrading treatment as a matter of law.

7.15. This approach is not possible if there is a dispute as to material facts which the court cannot resolve because the dispute arises on affidavit with no cross examination or oral evidence; this approach will not be not possible where the facts, even if proved, are not so startling as to permit an immediate finding of inhuman and degrading treatment; In other words, the approach to the allegation of breach of Article 3 in M.S.S. is not possible in this case.

7.16. A court cannot leap from an allegation of negative injurious effects caused by 'direct provision', (which are robustly denied) to a legal conclusion that 'direct provision' constitutes prohibited inhuman and degrading treatment. If a defendant does not deny negative injurious effects in an Article 3 claim, the court is left only with the question of whether such accepted effects may be said to constitute inhuman and degrading treatment as a matter of law. If the defendant denies the effects, a plaintiff could nonetheless persuade a court that the negative effects have been suffered if adequate evidence is adduced - for example, by persuasive oral evidence offered by the complainant or by independent professional evidence. In such circumstances a court, having resolved the dispute in favour of the complainant, could then proceed to determine whether such proved negative effects constitute inhuman and degrading treatment. Here, the court has not been able to resolve a dispute as to facts central to the applicants' Article 3 claim.

7.17. The second Article 3 claim in the Greek case related to the applicant's extreme poverty. The applicant submitted that he lived in a park in Athens for many months, that he spent his days looking for food, that he had no access to any sanitary facilities and that at night he lived in permanent fear of being attacked and robbed. The Greek Government did not deny these circumstances, but instead suggested that he was to blame for failing to avail of certain State services. The Government also submitted that the European Convention on Human Rights did not guarantee a right to accommodation or to political asylum. The Government relied on *Chapman v. The United Kingdom* ([GC], No. 27238/95, para. 99, ECHR 2001-I), which held that there was no Convention right to be provided with a home by the Contracting States. The Court decided as follows:

> "The Court has already reiterated the general principles found in the case-law on Article 3 of the Convention and applicable in the instant case . . . It also considers it necessary to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home (see *Chapman*, cited above, s. 99). Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living (see *Muslim v. Turkey*, No. 53566/99, para. 85, 26 April 2005)."

7.18. The Court noted the obligation on the Greek Government arising from the EU Directive on Reception Conditions for Asylum Seekers (Directive 2003/9/EC) and said:

> "251. The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection group in need of special protection . . . It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and activities of the UNHCR and the standards set out in the European Union Reception Directive.
>
> 252. That said, the Court must determine whether a situation of extreme poverty can raise an issue under Article 3.
>
> 253. The Court reiterates that it has not excluded the possibility 'that State

responsibility [under Article 3] could arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity'. (See *Budina v. Russia*, DEC, No. 45603/05, ECHR 2009).

254. It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of the situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.

255. The Court notes in the observations of the Council of Europe Commissioner for Human Rights and the UNHCR as well as the reports of non-governmental organisations (see para. 160 above) that the situation described by the applicant exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile as that of the applicant. For this reason, the Court sees no reason to question the truth of the applicant's allegations."

7.19. It is worth pausing to consider that this is another example of the European Court of Human Rights relying on external material to support findings of fact, but in this instance, the applicant's allegations were not denied by the Greek Government and possibly did not need external corroboration. At para. 258, the Court continued:

"In any event, the Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece. The Government themselves acknowledge that there are fewer than 1,000 places in Reception Centres to accommodate tens of thousands of asylum seekers. The Court also notes that, according to the UNHCR, it is a well known fact that at the present time an adult male asylum seeker has virtually no chance of getting a place in a Reception Centre, and that according to a survey carried out from February to April 2010, all the Dublin asylum seekers questioned by the UNHCR were homeless. Like the applicant, a large number of them live in parks or disused buildings . . .

259. Although the Court cannot verify the accuracy of the applicant's claim that he informed the Greek authorities of his homelessness several times prior to December 2009, the above data concerning the capacity of Greece's Reception Centres considerably reduce the weight of the Government's argument that the applicant's inaction was the cause of his situation. In any event, given the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece, the Court considers that the Greek authorities should not simply have waited for the applicant to take the initiative of turning to the police headquarters to provide for his essential needs.

…

262. Lastly, the Court notes that the situation the applicant complains of has lasted since his transfer to Greece in June 2009. It is linked to his status as an asylum seeker and to the fact that his asylum application has not yet been examined by the Greek authorities. In other words, the Court is of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his

suffering.

263. In the light of the above and in view of the obligations incumbent on the Greek authorities under the European Reception Directive (see para. 84 above), the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction for the situation in which he had found himself for several months, living in the street with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.

264. It follows that, through the fault of the authorities, the applicant has found himself in a situation incompatible with Article 3 of the Convention. Accordingly, there has been a violation of that provision."

7.20. The approach of the European Court of Human Rights to this second Article 3 claim is indistinguishable from the approach adopted to the first claim. Once it was satisfied as to the existence of the facts this led inexorably to a conclusion that a breach of Article 3 had occurred. The Court did not have to grapple with an evidential problem as to whether there were negative effects arising from given conditions and circumstances.

7.21. In that sense, the M.S.S. case is in sharp contrast to the facts of the present case. The circumstances which are said by the applicants to constitute inhuman and degrading treatment here are not startling or alarming examples of physical or mental abuse. The applicants complain that negative and injurious effects are caused by the cumulative effects of 'direct provision' principally because of the length of time they have spent in these circumstances, bearing in mind that it is effectively conceded that the cumulative effects of 'direct provision' would not cause actionable harm in the short term. As the court has already indicated, the applicants have failed to prove the negative effects alleged and thus it is not possible for them to sustain a claim that 'direct provision' is a form of inhuman and degrading treatment because of its negative effects contrary to the ECHR or any provision of Irish law.

7.22. It is appropriate to consider the failure of the applicants to discharge the burden of proof as to negative effects of 'direct provision' bearing in mind the passage from *M.S.S. v. Greece and Belgium* quoted above (see para. 7.5) Adopting the approach of the ECtHR, my view is that the applicants in this case, in connection with their Article 3 claim, must establish the existence of ill-treatment which has reached a minimum level of severity having regard to all the circumstances, including the duration of the treatment, where 'minimum level of severity' is assessed having regard to the physical or mental effects of that ill-treatment.

7.23. In order for an applicant to succeed in a claim that treatment is inhuman, the treatment must be proved to have been "premeditated, applied for hours at a stretch and caused either actual bodily injury or intense mental suffering". The applicants do not allege that the treatment is premeditated, do not allege that it was "applied for hours at a stretch" (which appears to refer to the practice of torture) and do not allege that the treatment caused actual bodily injury or intense physical suffering. Therefore, the inhuman treatment at issue in this case can only be that which "caused intense mental suffering". The applicant bears the burden of proving that 'direct provision' constitutes ill-

treatment which has caused intense mental suffering. No such case was advanced and no evidence was adduced which might support such a finding. In other words insofar as the applicants say that 'direct provision' is inhuman treatment, this claim must fail.

7.24. With respect to the "degrading" element of the prohibition, the European Court of Human Rights in *Pretty v. the United Kingdom* (No. 2346/02, s. 52, ECHR 2002-III) has said that treatment can be thus described:

> "when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance"

7.25. The applicants bear the burden of proving that 'direct provision' either humiliates or debases them in a manner which shows a lack of respect for human dignity, or that 'direct provision' "arouses feelings of anguish or inferiority capable of breaking [their] moral and physical resistance". With respect to the first part of this principle, the applicants have not pleaded that 'direct provision' humiliates or debases them in a manner which shows a lack of respect for human dignity nor has any evidence to this effect been adduced. Insofar as the general tenor of Ms. A's evidence suggests that 'direct provision' humiliates or debases her in a manner which shows a lack of respect for her human dignity, this is met by the general denials of the respondents. Given the state of the evidence, the claim, if it was ever made, that 'direct provision' humiliates or debases in a manner which shows a lack of respect for human dignity, must fail.

7.26. As to second part of the definition of what constitutes degrading treatment, the applicant has never attempted to establish that 'direct provision' arouses feelings of anguish or inferiority capable of breaking her moral and physical resistance. If this is the claim it too must fail for want of evidence.

7.27. I reject the applicants' case that 'direct provision', in any of the meanings attributed to the phrase, is a form of inhuman and degrading treatment. Though I have assessed the claim by reference to the ECHR and the jurisprudence of the ECtHR, the conclusion would be the same if the claim were analysed as a breach of a constitutional right not to be exposed to inhuman and degrading treatment.

8. The second of the questions identified at paragraph 6.9 is 'Are there particular aspects of 'direct provision' which breach particular human rights?'

8.1. This question derives from national and international rules in relation to private and family life and in particular Article 8 of the ECHR which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being 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."

8.2. In contrast to Article 3 which is absolute, Article 8 indicates the circumstances in which the State may interfere with the right to respect for family and private life and the parties agree that whatever the source of the rule (the Constitution or the Convention), rights in this area are not absolute and may be interfered with by the State in accordance with law.

8.3. The affidavits of the applicants reveal Article 8 and equivalent complaints relating to the RIA rules and in particular:

? The daily registration requirement.

? The requirement to notify proposed absence.

? Unannounced searches of bedrooms with or without permission.

? The rule against having guests in the bedroom.

? Inadequate complaints procedure (this is not an Article 8 complaint but is addressed here for convenience)

8.4. The applicants argue that these rules fail to respect family and private life as required by Article 8(1) and offend the proportionality requirement in Article 8(2). The complaint is based on alleged interference with private life. Ms. A objects to being monitored in what is meant to be her home.

8.5. By way of general response to these complaints the respondents argue that they enjoy a 'margin of appreciation' to permit them to treat the applicants in a particular way. They argue that the rules are reasonable restrictions necessary to regulate communal living. The respondents say that there are justifications for each of the rules. The respondent concedes that "….the applicants are entitled to privacy and that the first named applicant in particular is entitled to a degree of autonomy as regards the decisions and choices she makes for herself and her son".

8.6. No significant dispute arose between the parties with respect to the legal principles which govern privacy. The protection afforded to privacy in Irish law and international law is not materially different. The parties agree that the right to privacy/respect for private life is not absolute. The real issue in the case is whether or not the restrictions on privacy, which are not seriously denied, can be justified. The case law referred to by the respondent is *Norris v. Attorney General* [1984] I.R. 36; *Kennedy v. Ireland* [1987] I.R. 587*; M. v. Drury* [1984] 2 I.R. 8 at 8; *Kane v. Governor of Mountjoy Prison* [1988] 1 I.R. 757; *DPP v. Kenny* [1992] 2 I.R. 141; *Haughey v. Moriarty* [1999] 3 I.R. 1; and *Re: Ansbacher Cayman Limited* [2002] 2 I.L.R.M. 491.

I will now deal with each of the particular privacy complaints in turn:

Room Inspections

8.7. The respondent justifies the room inspections regime as follows:

> "RIA has an obligation to ensure that the premises is safe and free from hazards for all of the persons living there, including the first named applicant and her child. There are safety issues to be considered, including fire safety, maintenance and general safety. For example, the rooms contain window restrictors. The management of Eglinton is aware that many young children live on the premises and must therefore ensure that these window restrictors are in place on the windows and that these are maintained in place on a continual basis. This is a child safety issue, as if the restrictors are interfered with in order to open the window fully, there is a danger that a child can fall out of these windows."

8.8. I have no doubt that the respondents' agent is entitled to carry out room inspections. What that quoted submission singularly fails to establish is the necessity for unannounced inspections conducted without the consent of the inhabitant and in circumstances where

they might be absent. The principle of proportionality requires as little interference with a right as possible (per Denham J in *Meadows v. Minister for Justice* [2009] IESC 3 "the rights of the person must be impaired as little as possible"). The inspections regime permitted by the RIA rules is well beyond what is necessary to reduce risks to persons living in the communal environment and breaches constitutional and ECHR rights to privacy and to respect for private life.

8.9. My view is that the space occupied by the applicants in Eglinton is their home and this is expressly acknowledged by RIA who announce in written material given to residents on their arrival that "this is your home". Though the matter was not argued (in spite of a query from the court addressed to the applicants on the topic) it seems to me that Article 40.5 of the Constitution which provides "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law" may condemn the rooms inspections regime. (The fact that the applicants are not citizens seems to be irrelevant as Hogan J. remarked in *Omar v. Governor of Cloverhill Prison* [2013] IEHC 579, "11. It is important to stress at the outset that this provision [Article 40.5] applies to every home in the State, irrespective of the nationality or status of the occupants of the dwelling. The Supreme Court has made it clear that the fundamental rights provisions of the Constitution apply without distinction to all persons within the State: see *Re Article 26 and Electoral (Amendment) Bill* [1984] I.R. 268.")

Monitoring of presence:
8.10. The justification for the daily sign-in rule is the desire of management to know the level of occupancy of the centre and thereby to ensure that it is used to its proper capacity. That objective is lawful. Ms. A says she feels she is being watched in her home and the regime adds to the feeling of being institutionalised. In my view, the respondent's objective could easily be achieved in a way which did not require daily signing-in. I accept that the rule which requires the applicant to sign-in on a daily basis in *her home* is an interference with private life. It is not justified by the desire of the respondents to ensure that full use is made of the facility. Neither is it excused by the fact that the applicant, in fact, avoids the rule (by refusing to sign in) though her presence is noted by staff. The fact that the staff can note her presence without requiring her to sign in every day indicates that there is a less intrusive way for the staff to monitor occupancy levels. The rule is disproportionate to its objective.

The requirement to notify intended absence
8.11. The justification for this rule is the need to ensure proper use of the facilities - similar to the justification for the daily signing-in rule. I have no doubt that this too is an invasion of privacy and for reasons stated in respect of the signing-in rule, this too is unjustified and disproportionate.

No guests
8.12. The rules which prohibit guests in the private quarters is sought to be justified by a combination of objectives to ensure that the centre is only used by those entitled to live there and the desire to monitor safety issues. The outright ban on guests in private rooms whether during the day or at night seems to me to be unjustified and disproportionate. It must be recalled that the room allocated to applicants is their home and the complete ban on guests goes much further than what is required to meet the stated aims of the rule. A simple signing-in rule for guests would achieve precisely the same purpose and invade the applicants' right to privacy much less. The rule is disproportionate to its objective.

8.13. Arguing in favour of the State's right to use appropriate rules to govern 'direct provision', the respondents have cited the decision of the European Court of Human Rights in *Leyla Sahin v. Turkey* (Application no. 44774/98, 10th November 2005) which involved an examination of the Turkish prohibition on wearing headscarves in educational establishments. The Court gave a detailed judgment on the concept of the balancing of rights by States and the margin of appreciation granted to States in striking the correct

balance between conflicting rights. The respondents also referred to the doctrine of margin of appreciation in an Article 8 context, in particular referring to the decision in *Hristozov v. Bulgaria* (Applications nos. 47039/11 and 358/12, 29th April 2014) dealing with rights of persons seeking to access experimental cancer medication under Article 8. The Court, noting the boundary between the positive and negative obligations of States under Article 8, said that regard must be had to the fair balance between the interests of the individual and the community. At para. 118, the Court said:

> "118. In its recent judgment in *S.H. and Others v. Austria* (cited above, s. 94), the Court summarised the principles for determining the breadth of the State's margin of appreciation under Article 8 as follows. A number of factors must be taken into account. Where a particularly important facet of an individual's existence or identity is at stake, the margin will normally be restricted. Where, however, there is no consensus within the Contracting States, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. There will usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights.

8.14. Insofar as the respondents argue that this jurisprudence establishes that a wide margin of appreciation is permitted to regulate people in asylum centres, I am not persuaded that the principles in that case law are applicable in this particular context. How best to secure maximum use of the accommodation centres or how to monitor for safety and order are not sensitive or difficult problems which balance deeply held rights and views of different parts of the community such as would justify a wide margin of appreciation for the State.

Complaints Handing Procedures

8.15. The applicants allege that the complaints procedure for matters connected with the accommodation centres lacks independence. (The complaint is not based on a breach of human rights but it is appropriate to address the matters here as it arises under the RIA Rules.)

8.16. RIA have contractual relations with the owners of the accommodation centres and acts as the final arbiter of disputes between residents and the centres. RIA is also the author of the House Rules. It is understandable that residents sense a lack of independence in complaints handling where the final arbiter is in a commercial relationship with the body about which complaint is made. RIA is the author of the House Rules, breach of which may give rise to the complaint and it is not appropriate that RIA having written the rules and appointed persons as operators of the centres should then ultimately decide on disputes between operators and residents about the rules. This seems to me to be a breach of the concept of *nemo iudex in causa sua*. In my view, there is no compelling reason why RIA must be the final complaints handling body for residents. I reject the respondents' contention that this is a theoretical issue as Ms. A has never appealed a decision on a matter to RIA. Ms. A is entitled to an independent complaints handling procedure and this is not dependent on whether she has ever invoked the current deficient system.

9. Cumulative effect of 'direct provision' on Privacy and Family Life:

9.1. The third issue identified by the court in this module is: 'Does 'direct provision', because of cumulative effects, violate the applicants' right to respect for family life and private life?

9.2. Apart from the specific complaints about the RIA House Rules addressed in section 8, the applicants maintain that 'direct provision' cumulatively and in all its manifestations violates their rights to privacy/private life and family life.

9.3. Insofar as the applicants have argued that their private life rights/rights to privacy require the State to provide an accommodation regime of a certain standard, this is rejected by the Court.

9.4. Nobody has a primary right under Irish or international law to be provided with accommodation. As against this, the State accepts that it has a legal and moral responsibility to shelter and give material support to destitute protection applicants. Though a source of this legal obligation was not identified by the respondents, it seems that the legal obligation derives from the State's primary legal obligation to facilitate applications for asylum and subsidiary protection. The duty to provide food and shelter to destitute protection applicants arises in connection with the obligation to receive and determine applications for international protection. To refuse applicants shelter and food would prevent applications for protection from being made and this would violate Ireland's international legal obligations.

9.5. The receipt of accommodation and food by protection applicants may also be observed as a derivative right connected with the right to make an application for protection. It is not a free standing right. It is co-extensive with the right to apply for international protection in Ireland.

9.6. Having made these general remarks, the complaints of the applicants that 'direct provision' has cumulative effects which interfere with private and family life are now assessed.

9.7. Nothing advanced on behalf of the applicants comes close to suggesting that when the State discharges its legal and moral obligation to provide food and shelter that it may not do so on a communal basis. Communal living inevitably reduces privacy. Persons living in retirement homes, in homeless shelters, in hospitals, in nursing homes, in prisons, even persons inhabiting privately owned apartments, all experience less privacy than persons who, for example, reside in a detached home surrounded by gardens.

9.8. The detailed complaints addressed by the applicants about a breach of privacy rights which focused on communal eating and the prohibition on private cooking fall to be considered in this general context. My view is that the State has properly justified the prohibition on cooking in private rooms. The prohibition is central to communal accommodation arrangements which encompass communal dining. Without communal dining very significant changes in the type of accommodation supplied would be required. Kitchen facilities complying with building control and fire regulations would be needed. Significantly larger units would be inevitable. Much greater cost would be associated with the provision of food and cooking facilities of this sort. Communal dining is central to communal living which is at the heart of 'direct provision'. Communal living is not said by the applicants to be unlawful. Communal dining is thus justified and lawful.

9.9. There are many obvious disadvantages, discomforts and interferences which inevitably flow from communal living. With the exception of the matters that I have addressed at section 8 above, my view is that the State is entitled to provide food and shelter in the manner chosen, notwithstanding the interferences with private and family lives thereby entailed. All of these disadvantages flow inevitably from communal living. Their inevitability is their justification and so long as they do not cause injury, they are lawful.

9.10. The only way in which the dining related disadvantages can be assuaged is to alter the model of 'direct provision' by permitting private cooking in the residential units. This would not only require very significant physical alterations to the private rooms but would require the State to supply food for protection applicants to prepare or money so that applicants could purchase their own food for preparation. In other words, the only way the interference with family life and privacy can be avoided is to abandon central aspects of

the 'direct provision' model chosen by the State. The applicants accept that 'direct provision' is not *per se* unlawful. The general interferences it causes (as opposed to the particular matters addressed at section 8 above) are unavoidable and are thus justified and proportionate.

9.11. Where unavoidable interference is found, no breach of rights occurs where the interference does not cause actionable harm and the court has found, in the context of the Article 3 claim, that the applicants have failed to prove injurious negative effects arising from 'direct provision'. The corollary is that an unavoidable interference with Article 8 rights which causes injury might not survive a proportionality assessment, depending on the degree of harm suffered. Thus if there were evidence that 'direct provision' caused psychological or physical injury of the minimum level of severity to attract the protection of Article 3, it is difficult to see how such a system would not be a breach of Article 8.

Family Life

9.12. The alleged negative effects on family life caused by 'direct provision' is expressed at follows by the applicants in written submissions:

> "The conditions and restrictions inherent in Direct Provision living in combination with the intense financial pressure experienced by families served to grossly impair the establishment and enjoyment of normal family life and distort the role and parenting function of residents such as the first named applicant herein. Abnormal and unhealthy living circumstances are normalised in the Direct Provision system and for many children, including the second named applicant, who have spent all or a significant portion of their life in Direct Provision, this is the only way of life familiar to them."

9.13. Later it was submitted that:

> "The Direct Provision System limits the autonomy of asylum seekers and impedes their family lives, as most accommodation centres have not been designed for long-term reception of asylum seekers and are not conducive to family life. Indeed, the Direct Provision System was intended to be a temporary administrative measure and views were expressed from the outset that a person should not remain living in Direct Provision for longer than six months."

9.14. Further, the applicants submit that:

> "The manner in which the Direct Provision System limits and undermines family life does not respect the protections contained in Articles 41 and 42 of the Constitution. It is said that (see para. 75) Direct Provision undermines the 'autonomy of parents in the care and upbringing of their children and fails to respect a parent's responsibility, duty and role as the primary and natural educator of the child'."

9.15. The applicants referred to the decision of the Supreme Court in *McGee v. Attorney General* [1974] I.R. 284 at 311, where Walsh J., apropos of Article 41 of the Constitution, said:

> "In this Article the State, while recognising the family as the natural primary and fundamental unit group of society and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law, guarantees to protect the family in its constitution and authority as the necessary basis of social order and as indispensable to the welfare of the nation and the State . . . By this and the following Article, the State recognises the parents as the natural guardians of the children of the family and as those in whom the authority of the family is vested and those who shall have the right to determine how the family life shall be conducted, having due regard to the rights of the children not merely as members of that family but as individuals."

9.16. The respondents point out that an unmarried mother's rights do not derive from the family rights under Article 41, but instead derive from Article 40.3 of the Constitution. In

The State (Nicolaou) v. An Bord Uchtála [1966] I.R. 567, it was held that the mother's natural right to the custody and care of her child was protected by Article 40.3. However, the State concedes that the limitation (if that is what it is) in an Irish constitutional context, does not apply under the Convention and the unmarried mother and her child are recognised as a family unit for those purposes.

9.17. Numerous authorities have been cited in support of the proposition that family rights are not absolute and sometimes must give way to the interests of the common good *(Pok Sun Shun v. Ireland* [1986] ILRM 593, *Osheku v. Ireland* [1986] I.R. 773, and *Lobe & Osayande v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1). In the latter case, the Supreme Court held that although an Irish-born child had rights under Articles 41 and 42 of the Constitution to the company of the child's parents, those rights did not create rights for each member of the child's family to reside in the State. The respondents say that elaborate provision is made to respect the family unit which is comprised by the first and second named applicants in these proceedings. They are housed together and there is no question of enforced separation in this case.

9.18. Having considered the applicants' averments and the written and oral submissions of Counsel, it seems that the high point of the family rights argument in this case is that the alleged abnormality in which this family reside is a breach of their Article 8 and Constitutional rights. This submission, like many others in this case, is to be considered against a concession that 'direct provision' is not per se unlawful, and that 'direct provision', when endured for between six to twelve months, is unlikely to give rise to actionable harm. Communal living will undoubtedly impair the enjoyment of family life. The legal question, however, is whether such interferences are proportionate. No complaint advanced by the applicants in respect of the manner in which their enjoyment of family life is impaired has been demonstrated to be so unrelated to the objective of 'direct provision' as to be unjustified or thereby disproportionate. No professional evidence was sought to be adduced which would suggest an injury to family life occasioned by 'direct provision'. In my view, the applicants have failed to establish that 'direct provision', as experienced by them, unlawfully interferes with family life.

9.19. Though the Court has heard submissions in respect of the abnormal circumstances in which the minor applicant has been reared, it seems to me that much more should have been done to persuade the Court as to the negative psychological effects of such an environment. It places the Court in an impossible position to invite it to conclude that there is some serious deficiency in the environment in Eglinton when I have no evidence other than the mere assertion of Ms. A and the submission of lawyers that this is so. Though my instinct tells me that 'direct provision' is not an ideal environment for rearing children, I cannot assume the skill and knowledge of a psychologist to make conclusions about the suitability of 'direct provision' for children. Therefore, again, because of a failure of proof, the contention that the respondents are responsible for creating a negative atmosphere in which the second named applicant is being reared, in breach of relevant ECHR and Constitutional rights must fail.

9.20. In *Costello-Roberts v. United Kingdom* (Application no. 13134/87, 25 March 1993), the ECtHR held that the treatment of a complainant must "…entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8". Similarly, in this case it was incumbent on the applicants to provide sufficient evidence of the 'adverse effects' caused by 'direct provision' to sustain a plea of breach of their right to respect for a private life and / or family rights. The applicants have not reached this threshold due to the absence of evidence of such adverse effects.

10. Duration Issue

10.1. The fourth issue identified by the court for determination in this module is 'Does

'direct provision' breach rights due to length of exposure to the regime?

The applicants generally accept that neither a system of cashless support for protection applicants nor communal living is per se unlawful. The applicants refrain is that it is the length of time 'direct provision' has been endured which causes injury/rights violations. This raises the question as to when, if ever, does 'direct provision' which is lawful and acceptable in the short term give rise to actionable harm. The obvious answer is that illegality commences when injury is caused and the applicants must provide proof of actual harm in connection with the claim that their rights have been violated by the length of them they have lived in 'direct provision'.

10.2. The court has found this part of the applicants' case to be somewhat evanescent. Is 'direct provision' endured for long periods a breach of Article 3 of the ECHR or its Irish Constitutional equivalent? Or is it a breach of Article 8 of the ECHR and its Irish equivalents? Or is it a breach of both Article 3 and Article 8? The absence of clear pleading left the court struggling to put shape on what seemed to be imprecise complaints.

10.3. Ms. A has been living in 'direct provision' since April 2010 and her time spent there can be divided in two parts. The first part is connected with her application for asylum which was made in April 2010. This was refused at first instance in June 2010 and appealed to the Refugee Appeals Tribunal. An oral hearing was set for 30th November 2010 but was adjourned at Ms. A's request because of her pregnancy. After the birth of her son her solicitors wrote to the Tribunal to say she was available to attend for an oral hearing. Within two months it had taken place and a negative decision issued in October 2011. Thus the asylum related period of living in 'direct provision' was approximately 18 months and of this 3\4 months is attributed to the request for the hearing to be adjourned (November 2010 to March 2011). Her son's oral hearing took place in September 2011 and a final negative decision issued on 27th October 2011.

10.4. Following the refusal of her appeal, Ms. A and her son sought subsidiary protection in November 2011. This is the beginning of the second part of her time in 'direct provision'.

10.5. Arising from the decision of the Court of Justice of the European Union in *M.M. v. Ireland*, delivered in November 2012, and, the consequential decision of the High Court (Hogan J.) in January 2013, all subsidiary protection applications were put on hold pending the establishment of a new regime for processing these applications.

10.6. The processing the applicants' applications for subsidiary protection commenced in November 2011 and continues to date (of this judgment) - a period of approximately two years to the date of the institution of these proceedings. Some of this period has been explained by the '*M.M.*' issue but the period of one year before the '*M.M.*' issue arose is unexplained. By the time these proceedings issued Ms. A had been living in 'direct provision' for three and a half years. Almost two years of this time results from inefficiencies, to use a neutral description, in the handling of her subsidiary protection application. Had her subsidiary protection claim been assessed with her asylum claim (as happens in every other EU state), her experience of 'direct provision' could have concluded towards the end of 2011 - some two years before these proceedings were commenced. However, the Government (in 2006) decided to separate asylum and subsidiary protection claims. This has prolonged the time these applicants have spent in 'direct provision'.

10.7. It is generally agreed by the applicants that 'direct provision' experienced for 6-12 months would be unlikely to give rise to actionable harm (at least in the way in which cumulative effects might be said to cause such harm). In addition the respondents do not seriously contest that 'direct provision' was originally intended to accommodate protection applicants for between 6 months and one year. In this regard the applicants' exhibit

documents obtained from the respondents where Brian Ó Raghallaigh in the Department of Social Protection said "it is to be expected that people who have been in 'direct provision' for a long period will experience difficulties and we will have to respond to those in a humane manner". Apparently a practice arose in the early years of 'direct provision' of permitting protection applicants who had been living in 'direct provision' for 6 months or longer to apply for supplementary welfare allowance and rent supplement.

10.8. In my view, the interests of justice require the State, which has opted for a system of 'direct provision' and which has opted to separate the asylum application procedure from the subsidiary protection procedure, to provide relief from the harmful effects of 'direct provision' if harm is proved. Unduly lengthy exposure to 'direct provision' may well be injurious and thus unlawful.

10.9. I have described the failure of the applicants to discharge the burden of proof with respect to the Article 3 claim. This 'duration of exposure' point is equally dependent on proof of harm or negative effects. The evidential deficit which caused the failure of the Article 3 claim is equally fatal to this 'duration claim'.

11. EU Charter of Fundamental Rights

11.1. The next issue I have identified for determination is: 'Is the EU Charter of Fundamental Rights applicable?"

11.2. The applicants have sought to argue that the EU Charter of Fundamental Rights governs their circumstances in Ireland. They say the failure of the respondent to deny the applicability of the Charter raises a form of estoppel on the issue. I disagree. The Court raised the matter and gave the parties ample opportunity to address the issues.

11.3. Article 51 of the Charter provides that it has application only when Member States are implementing Union law. Article 51 states:

> "1. The provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.
>
> 2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution."

11.4. The applicants argue that the Charter has broad application and applies whenever a Member State is acting in an area governed by or within the scope of EU law. It is submitted that as the applicants seek the protection of the State pursuant to Council Directive 2004/83/EC (the Qualification Directive), they are in the State for the purposes of pursuing EU law rights and they are consequently entitled to all of the protections of European Union law, including the provisions of the Charter. It is argued that the treatment of protection applicants in Ireland during their application procedures is linked to the Common European Asylum System established by Union law. In this sense, according to the applicants, the treatment of protection applicants constitutes the State 'implementing Union law.'

11.5. The Court raised the issue because Protocol No. 21 'On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice' excuses Ireland and the UK from participation in Title V of Part III of the Treaty on the Functioning of the European Union ('TFEU') - under which chapter the rules on the Common European

Asylum System are made. Articles 3 and 4 of Protocol No. 21 permit Ireland to opt to participate in any particular measure adopted by the Council pursuant to Title V of TFEU. Ireland used the opt-in mechanism to participate in the Qualification Directive, (Directive 2004/83/EC), the Procedures Directive (Directive 2005/85/EC), the Dublin II Regulation (Council Regulation (EC) No. 343 (2003) of 18th February 2003) and the Eurodac Regulation (Council Regulation (EC) No. 2725/2000 of 11th December 2000) - all connected with the Common European Asylum System. The only measure in respect of which Ireland did not use the opt-in mechanism of Protocol 21 was the Reception Conditions Directive (Council Directive 2003/9/EC).

11.6. The applicants, citing authorities such as Case C390/12 *Robert Pfleger* (Austria, 30th April 2014) submitted that Member States are bound by the provisions of the Charter even when they are derogating from EU law provisions. The applicants referred to Case-36/*02 Omega Spielhallen*, and in particular, para. 30 of the decision of the Court of Justice of the European Union as follows:

> "However, the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation . . ."

11.7. In the *Pfleger* case, the Court of Justice noted that rules at national level exercising lawful derogation from EU norms would, nonetheless, be required to be compatible with fundamental rights "the observance of which is ensured by the Court". The applicant argues that Ireland has derogated from the Reception Conditions Directive and in that derogation it is bound by EU law, and in particular, by the Charter.

11.8. The rights arising under the Charter are well established and available to the applicants under the Irish Constitution and the European Convention on Human Rights. One additional right available under the Charter which does not appear to be expressly a matter of Irish constitutional rights or of Convention rights, is the 'Right to good administration' (Article 41), but I do not understand that right to be called in aid by the applicants in this case, save with respect to the deficiencies in the complaints handling procedures. The applicants have succeeded in their claim about complaints handling without recourse to Article 41. Principles of domestic public law were enough. In any event, my view is that Protocol No. 21 does not facilitate derogation from any provision of Union law. It is the opposite of derogation. It is a provision which disapplies the relevant Chapter of the Treaty unless a positive decision is taken to opt-in to measures adopted thereunder. Ireland has not decided to participate in the Reception Conditions Directive and therefore it has no application in the State. Ireland has not derogated from the Reception Conditions Directive.

11.9. To uphold the applicants' position on the applicability of the Charter would be to create an EU law obligation for Ireland in respect of the manner in which it provides for protection applicants in the teeth of Protocol No. 21 which says that a Directive such as the Reception Directive has no application in Ireland unless a positive decision is taken by the State to be governed by such a measure. The manner in which Ireland provides material support to protection applicants is not any form of implementation of Union law and therefore, in accordance with Article 51 of the Charter, that Charter does not govern Ireland's actions in this area. The manner in which material support is provided is well within the sphere of national autonomy. Though the obligation to provide support for destitute protection applicants is related to the EU obligation that such persons be allowed to seek protection (as stated in para 9.4 above), this does not mean that the provision of material support to protection applicants implements EU law. The provision of the support certainly facilitates Ireland's implementation of the Qualifications Directive in that it allows persons to stay in Ireland until their request for protection is determined but the provision of support is not thereby the implementation of EU law.

11.10. The combined effect of Protocol 21 TFEU and Article 51 of the Charter is that

protection applicants in Ireland do not have Charter rights in relation to their reception conditions.

12. Socio-economic Rights Argument:

12.1. The respondents claim that the essence of the applicants' case is that they seek to improve their material circumstances to accord with the choices they would make as to where they live, what food they eat, where to cook it, etc. The respondent interprets the applicants' case as a plea that they be given independent accommodation and sufficient resources to make their own choices on a daily basis. In other words the respondents view these proceedings as an action to enforce economic rights.

12.2. The respondents rely on a line of authority beginning with *O'Reilly v. Limerick Corporation* [1989] ILRM 181, up to *North Western Health Board v. H.W.* [2001] 3 I.R. 622, for the proposition that socio-economic rights are non-justiciable and that the manner in which public monies are spent is a matter for the Oireachtas and the courts should not trespass upon this domain. Reference is made to endorsement by Murphy J. in *T.D. v. Minister for Education* [2001] 4 I.R. 259, of Costello P.'s dicta in *O'Reilly*:

> "It is, of course, entirely understandable, and desirable politically and morally, that a society should, through its laws, devise appropriate schemes and by means of taxation raise the necessary finance to fund such schemes as will enable the sick, the poor and the underprivileged in our society to make the best use of the limited resources nature may have bestowed on them. It is my belief that this entirely desirable goal must be achieved and can only be achieved by legislation and not by any unrealistic extension of the provisions originally incorporated in Bunreacht na hÉireann. I believe that Costello J. (as he then was) was entirely correct when, in *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181, he concluded that the courts were singularly unsuited to the task of assessing the validity of competing claims on national resources and that this was essentially the role of the Oireachtas. It is only fair to add, as I have already pointed out, that those who framed the Constitution seem to have anticipated this problem and provided a solution for it."

12.3. In *North Western Health Board v. H.W.*, Murphy J. noted:

> "There are no provisions of the Constitution cognisable by the courts expressly requiring or permitting the State to provide medical services or social welfare of any kind for any of its citizens."

12.4. Cases somewhat on the other side of the divide in this argument are also referenced by the respondent, including In *Re Article 24 and the Health (Amendment) No. 2 Bill* [2004] [2005] 1 I.R. where the Court was prepared to assume that a person of limited means might enjoy a constitutional right to care and maintenance by the State in its protection of the elderly. In *O'Donnell v. South Dublin County Council* [2007 IEHC 204, sibling plaintiffs suffering from severe disabilities, resided in an overcrowded mobile home unsuited to the needs of the disabled. Laffoy J. stated:

> "[76.] This case is very unusual, if not unique. It is difficult to comprehend the level of disability, hardship and deprivation which the plaintiffs endure between them. That Mrs. O'Donnell desires, and intends, to care for them with the assistance of other members of her family in the home setting must be in their best interests and it must be in the interest of the State and its organs to facilitate her in so doing.
>
> [77.] This is not a case which is based on an assertion that the State or any of its organs has a positive obligation to make certain provision for every traveller family, for instance, that the State should legislate or have an administrative scheme to provide two de luxe mobile homes for every traveller family. This case is about the particular circumstances of one

family, which has three severely disabled members . . .”

12.5. In line with the latter cases, counsel for the respondent conceded that if a person in state care had insufficient food to sustain life, an actionable wrong would thereby be committed by the State. To remedy such illegality a court could order the State to increase daily food provision even though the effect of such an order would be to require the State to spend more money on food for the person concerned.

12.6. It seems to me that the high point of the jurisprudence in the area confirms that courts should not trespass on the role of the executive or the legislature when deciding how a particular problem might be addressed. How public money is used is a matter exclusively for the Oireachtas working in co-operation with the executive. Nonetheless, where State action results in a breach of human rights and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of the order. If all of that is correct, then the respondent’s argument that the applicants in this case are suing for socio-economic rights in a manner prohibited by the Constitution and by a number of High Court and Supreme Court judgments, must be wrong. In my view in a situation where an applicant claims that ‘direct provision’ is having such adverse effects on her life as to cause harm and where such circumstances are backed up by appropriate medical and other independent evidence, a Court would be entitled to grant appropriate relief, even if the only remedy for the wrong involved the expenditure of additional resources by the State.

13. Direct Provision Allowance - An Unlawful Social Welfare Payment

13.1. The applicants seek: “A Declaration that…the payment of the weekly direct provision allowance … is ultra vires the Social Welfare Consolidation Act 2005 (as amended) and unlawful by reason of the lack of any statutory basis for said payments.”

13.2. The weekly cash payment, known as the direct provision allowance (‘DPA’) is, according to Ms. A, a manipulation of the social welfare code. It is argued that the payments are disguised social welfare payments and thus made in breach of the legislation which prohibits such payments to protection applicants. The applicants, using documents obtained by Freedom of Information (‘FOI’) request, have sought to establish that the direct provision allowance is in fact a social welfare payment. The evidence put before the court by Ms. A is said to “strongly support the position that from the outset the DPA was considered a SWA basic payment considerably reduced in respect of persons residing in ‘direct provision’ accommodation centres and at the same time the same relevant full rate of SWA minus a nominal contribution in respect of those in self catering”. Other documents submitted by Ms. A suggests a concern amongst officials from various departments that the direct provision allowance was *ultra vires* the Social Welfare legislation and in addition the applicants have noted the contents of departmental circulars bearing the title “Supplementary Welfare Allowance Circulars” which refer to the direct provision allowance as a “Basic Payment of Supplementary Welfare Allowance” and a “reduced rate of basic SWA”. In addition, a communication from the Office of the Attorney General advising that the payment ought to be placed on a statutory footing was exhibited.

13.3. The applicants also say that the direct provision allowance has been accounted for in the annual Revised Estimates for Public Services under the heading “Supplementary Welfare Allowance” for the years 2008 to 2011. The applicants point out that in each of the revised estimates for the years in question a footnote says that “supplementary welfare allowances are payable under the Social Welfare Consolidation Act 2005, as amended” [‘SWCA 2005’], or “under Social Welfare (Consolidation) Act 1993, as amended”. The applicants note that for the years 2012 to 2014, no express mention of direct provision allowance was made in the estimates of the Department of Social

Protection.

13.4. The applicants have placed reliance on documents obtained through Freedom of Information requests which detail the views of various government departments with regard to the payments made to applicants for international protection over the last fifteen years to demonstrate that the DPA is *ultra vires* the social welfare code.

13.5. The applicants also submit that the executive cannot be permitted to do that which the legislature has prohibited by simply classifying a payment as an administrative payment. It is contended that the respondents are attempting to disapply the provisions of s. 246(7) of the Social Welfare Consolidation Act 2005 and that to permit such an outcome would be to facilitate the executive in bypassing the plain legislative intention expressed by the Oireachtas.

13.6. Counsel refers to the decisions of *Kennedy v. Law Society of Ireland* [2002] 2 I.R. 458, *MacDonncha v. Minister for Education* [2013] IEHC 226 and *Harvey v. Minister for Social Welfare* [1990] 2 I.R. 232 to support the contention that the respondents have directly contradicted the legislative intention on a wholly administrative basis and without any legal authority and that the 'direct provision' system and payment of the DPA are *ultra vires* and unlawful. It is submitted that other than a superficial attempt to reclassify the payment and represent it as being made pursuant to an administrative scheme, the entire DPA payment remains in identical terms to the system which has been in place since 2000.

13.7. Counsel for the respondents rejects these claims and states that the DPA is not a Supplementary Welfare Allowance or indeed any form of social welfare payment but rather is a paid as part of an administrative scheme of 'direct provision' established by the Government pursuant to its executive power. It is submitted that for technical reasons it is paid using the social welfare payment system. In this regard, it is submitted that the FOI documents indicate no more than an on-going discussion between government departments as regards the status of the DPA and which agency should have responsibility for paying it.

13.8. It is further submitted by the respondents that the DPA cannot be a Supplementary Welfare Allowance payment as it is not means tested. Counsel notes that to qualify for the Supplementary Welfare Allowance an individual must show that his/her means are insufficient to meet his/her needs and those of dependents. The DPA depends on a person's status in the State as an applicant for protection and not their means. Further, it is stated that DPA is paid to meet incidental personal sundries rather than to provide for any assessed need of the recipient.

13.9. Counsel submits that it is significant that if the Court made the declaration sought by the applicants (that the payments are *ultra vires*) it would yield them no benefit, rather it will act to their detriment. Counsel notes that this issue arose in the case of *Mhic Mhathuna v. Attorney General* [1995] 1 I.R. 484 where the court held that the relief sought would remove benefits from certain parents without conferring a benefit on the plaintiffs and was of no benefit to them.

13.10. Finally, the respondents note that since the institution of proceedings the applicants have continued to collect their DPA. It is contended that an issue arises in respect of whether the applicants are entitled to challenge the validity of the DPA in those circumstances and counsel submits that the applicants are estopped from raising the issue. It is asserted that the applicants' position is inherently contradictory and constitutes conduct which should act as a bar to the grant of discretionary relief in the form of the declaration sought.

13.11. The revised estimates for the years 2005-2014 have been exhibited by the

applicants. The applicants claim that a close examination of the way in which DPA is accounted for in these documents reveals a legal flaw which renders the payment *ultra vires* the SWCA 2005.

13.12. The Revised Estimates are presented by the Government to the Dáil annually. The proposed expenditure of each Department of State for the coming year is described. I have randomly selected the estimates for the year 2009 to test the applicants' argument.

13.13. Considering the Revised Estimates for Public Services 2009 (Social and Family Affairs), I note that Section I begins by stating that the document sets out the "Estimate of the amount required in the year ending 31 December 2009 for the salaries of the Office of the Minister for Social and Family Affairs, for certain services *administered* by that Office and for certain grants including a grant-in-aid." [emphasis added] The amount estimated for the year is approximately €10.9bn. Expenditure is divided between 'Administration", estimated at €348m and 'Social Assistance', estimated at €9.3bn. There is no language in the Revised Estimates limiting proposed expenditure to statutory schemes.

13.14. A subheading of 'Social Assistance' is indicated as 'Supplementary Welfare Allowances', one of 24 such subheadings. Fifteen of these subheadings, including 'Supplementary Welfare Allowances' have a footnoted annotation which indicates that the item is "payable under the Social Welfare Consolidation Act, 2005, as amended." The Supplementary Allowances category is further broken down between seven subcategories which are preceded by the words "Provision of supplementary welfare allowances to certain persons whose means are insufficient to meet their needs, including grants to the Health Service Executive". It is also indicated that "Supplementary Welfare Allowances are administered by the Health Service Executive". The seven items or sub-categories are identified as follows:

> "1. Basic supplementary welfare allowances payments.
>
> 2. Direct provision allowance. [i.e. DPA]
>
> 3. Supplements, rent, mortgage, other.
>
> 4. Exceptional needs and urgent needs payments.
>
> 5. Back to school clothing and footwear scheme.
>
> 6. Humanitarian aid.
>
> 7. Administration."

13.15. According to the applicants the revised estimates must be read as meaning that the DPA is presented to the Dáil by the Minister as a payment made under the Social Welfare Consolidation Act 2005 (as amended). This, according to the applicants, either establishes or supports the idea that DPA is paid unlawfully under the Social Welfare Act.

13.16. I reject this argument. No submission was made by the applicants as to the status of either the Estimates or the Revised Estimates. My view is that they do not have legal significance. They are neither 'hard law' nor 'soft law'. They are merely statements made by all of the Ministers as to proposed expenditure in their respective departments. They do not establish the legal basis for any payment. Some of the proposed payments may have no statutory basis though the payment, if made, will be lawful because the Oireachtas, in the annual Finance Act, will have expressly allowed the expenditure.

13.17. In so far as the Revised Estimates purport to say that DPA is a payment made under the Social Welfare Consolidation Act 2005, that is incorrect. The mere fact that it is so asserted in the Revised Estimates does not establish that when the payment is made, it is made pursuant to that Act. The combined effect of Section 192 and s. 246(7)(b) of the SWCA 2005 is that no allowance payable under Chapter 9 of that Act may be paid to persons who have sought subsidiary protection. A statement in the Revised Estimates that DPA is payable under that Act cannot have the effect of amending that legislation. The statement in the Estimates cannot permit that which is prohibited. The Oireachtas must enjoy a presumption that it is aware of its own enactments. The Oireachtas is thus presumed to know that mainstream social welfare is not to be paid to protection applicants, notwithstanding any statement to contrary effect in the Revised Estimates. Thus the erroneous statement in the Revised Estimates concerning DPA is without any legal or factual consequence.

13.18. The applicants have also sought to argue that DPA is a manipulation of the Social Welfare Code and is a form of unlawful parallel welfare scheme. I also reject this argument. As I have just said, the combined effect of section 192 and s. 246(7)(b) of the SWCA 2005 is that no allowance payable under Chapter 9 of that Act may be paid to persons who have sought subsidiary protection.

13.19. Counsel for the applicants suggests that this means that the State is prohibited from giving money to protection applicants. There is no such prohibition. Only allowances under Chapter 9 (with the exception of the sort of single payment or emergency payment allowances of a discretionary nature under ss. 201 and 202 of the 2005 Act) are forbidden.

13.20. Whether a payment made to a person is an allowance under Chapter 9 of the SWCA 2005 is a question of law. It is not a question of fact, as the applicant suggests. The applicants have suggested that the fact the DPA looks like social welfare, that DPA uses the language of social welfare, that the amounts less deductions are identical to certain social welfare payments and that the payments are administered by the same Minister who operates payments under the SWCA 2005 means that these DPA are either unlawful payments under the Act or a manipulation of the Act. None of these factors either alone or together establishes that DPA is a disguised social welfare payment. The State is not prohibited from making cash payments to protection applicants. Neither is State prohibited from using the systems used for social welfare payments to make DPA payments.

13.21. Whatever the merits of the arguments as to the illegality of DPA my view is that the applicants do not have standing to challenge the legality of these payments

13.22. If the applicants wish to maintain a complaint about the illegality of the payment, in my view, they should establish that the illegality causes injury. As Henchy J. remarked in *Cahill v. Sutton* [1980] 1 I.R. 269 on *locus standi*:

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."

13.23. Taking the applicants' case at its highest and assuming they are correct in their assertions that they are in receipt of payments contrary to the 2005 Act, it is clear to the court that the applicants are not injured by the fact that the payment may be made *ultra vires* or otherwise in breach of the social welfare code. My conclusion is that the applicants do not have standing to challenge the legality of the DPA.

13.24. It may be said that the rule as to standing in *Cahill v Sutton* should only be used where the constitutionality of a statute is raised by a litigant. It might also be said that the rule as to standing should not be so tightly drawn as to prevent a court from examining unlawful State action - especially if there is no other likely challenger. Additionally, it might be said that as the applicants are obviously affected by all matters connected with DPA that they have sufficient interest in the subject matter (within the meaning of O. 84 RSC) to raise the question of its illegality. Lest any of these points undermine my decision as to want of standing and even if the applicants are correct about the alleged illegality of DPA I would in the exercise of the discretion available to the court in judicial review, refuse the reliefs sought.

13.25. It is recalled that the applicants seek an order declaring these payments to be unlawful. If the court were to make this order, the immediate effect would be that the payment to Ms. A and her son (and to every other person in 'direct provision') would cease. Ms. A says there is no reality to this and that the Oireachtas would be compelled to make proper provision for cash payments to persons such as her and her son through the enactment of emergency legislation if necessary. This is a rash suggestion. The court should not make an order which would have significant negative consequences for the applicants and for all other persons in receipt of this money in the expectation that the legislature would cure the negative effect of the order of the court.

13.26. The court appreciates that Ms. A is of the understandable view that the basic sum of €19.10 a week should be increased. It is the only support payment, to use a neutral phrase, which has seen no increase since its inception a decade ago. Because of inflation it is worth less now than it was then. For many of the years since the introduction of this payment Ireland experienced a buoyant economy and it is not unreasonable to say that the State has been less generous about the amount of this 'pocket money', but the proper place to make this complaint and to agitate for an increase is in the political arena and not in the High Court.

13.27. In line with the decision in *Mhic Mhathuna* (supra) the order sought would not aid the applicants in any way and I would decline to make the orders on this basis too.

14. Direct Provision Scheme in breach of the Separation of Powers

14.1. The applicants seek a Declaration that 'direct provision' without a legislative basis is invalid having regard to the provisions of Article 15.2.1 of the Constitution

14.2. This ground pleaded in support of that Declaration is as follows:

> "(a) The direct provision scheme and system and its operation is in breach of the principle of the separation of powers and is invalid having regard to Article 15.2.1 of the Constitution. It amounts to the unlawful making of laws by the Executive. The establishment and operation of the Direct Provision scheme and arrangements, the setting and maintaining of direct provision allowance rates, the setting up of a separate body responsible for the operation of the scheme and the contracting out to private companies on a for profit basis of the delivery and provision of the services, the provision of public housing and making of housing arrangements in respect of persons resident in the State (otherwise without means) and the exercising of control and restrictions over significant aspects of the lives of persons confined to the direct provision scheme amounts to the making and maintaining by the first and/or second named Respondent(s) of law by circular and unregulated administrative arrangements, with far reaching impact on fundamental aspects of the Applicants' lives, and is in breach of the principle of the separation of powers and is invalid having regard to Article 15.2.1 of the Constitution.

(b) The operation of the scheme is in breach of Article 15.2.1 due to the lack of any originating legislative basis and the absence of parliamentary scrutiny or modalities for review by the Oireachtas. The first and/or second named Respondents have no legislative authority to determine and control such far-reaching matters of fundamental and integral importance to the family, personal, educational and professional business/career lives of the Applicants and there is no Act or legislative scheme outlining the principles and policies which the Respondents are required to operate within and adhere to in the administration and application of any scheme with regard to the conditions for and social protection of (by way of financial allowances and public housing) protection applicants such as the Applicants herein. In the absence of any relevant primary legislation scheme, there are no applicable or relevant Regulations providing for the Direct Provision scheme."

14.3. The applicants submit that the respondents are operating 'direct provision' in the absence a legislative scheme setting down principles, policies, limitations, criteria or procedural safeguards on the exercise of executive power. The applicants claim that 'direct provision' has fundamental consequences in respect of housing, accommodation arrangements, privacy, food and diet, freedom of movement and choice, monitoring of individuals, social interaction, financial support and personal welfare. Further, it is claimed the system directly impacts on the well-being of children and interferes with parental autonomy.

14.4. It is submitted that the executive is usurping the legislative function in breach of Art. 15.2.1 of the Constitution. This is illustrated, it is said, in the purposeful manipulation of the social welfare code in respect of the DPA and the operation by the executive of a parallel payment system without legislative oversight.

14.5. The applicants contend that for a system such as 'direct provision' to be lawful there must be enabling legislation which would restrict the respondents to implementing principles and policies set down in statute.

14.6. Counsel in arguing that 'direct provision' is in breach of Article 15.2.1 of the Constitution refers the court to the authorities of *City View Press v. An Chomhairle Oiliúna* [1980] I.R. 381; *John Grace Fried Chicken v. The Labour Court* [2011] 3 I.R. 211; *McGowan v. Labour Court* [2013] IESC 21, and *O'Neill v. Minister for Agriculture* [1988] 1 I.R. 539. Counsel submits that the distinction to be drawn between the situations arising in the *O'Neill, McGowan* and *John Grace* cases and 'direct provision' is that the operation of direct provision by the executive is without any overarching legislative scheme.

14.7. Counsel for the respondents submits that the applicants misunderstand the nature of the power being exercised by the Government in respect of 'direct provision'. Direct provision' was established and is operated by executive power conferred by Article 28 of the Constitution. It is contended that despite the applicants asserting that 'direct provision' should be legislated for because it is so far reaching on matters of fundamental rights, no authority has been cited for this proposition. The case law on which the applicants rely relates to the exercise of delegated legislative powers. It is said that the limits on exercise of power described in that case law relate to the exercise of delegated legislative power and not to executive power.

14.8. The respondents note that executive power is vested in the Government by Art. 28.2 of the Constitution. This Article allows the executive power of the State to be exercised "by or on the authority of the Government", which, it is submitted, anticipates the need for administrative action on the part of members of the Government to give effect to Government policy. It is submitted that in the case of 'direct provision', the

executive powers being exercised by the Government includes the formulation and application of general policy in relation to how the needs of protection applicants are to be met, the execution of that policy, the management of State resources and the provision and supervision of certain services. The respondents contend that all of these fall comfortably within the scope of the executive power.

14.9. It is contended that the applicants seek to leap from the proposition that a statute delegating legislative power must contain principles and policies to the contention that the executive power of the State cannot be exercised unless the Oireachtas sets principles and policies to define its scope.

14.10. Counsel for the respondents notes that the Oireachtas has not chosen to enact any legislation to cater for the needs of protection applicants though it has chosen to legislate to preclude protection applicants from mainstream social welfare and from working while awaiting the outcome of their applications.

14.11. It is submitted that the Constitution does not limit the exercise of executive power by reference to subject matter and that case law shows that the courts will only intervene with the exercise of executive power where an action is clearly unconstitutional, or where there is *mala fides* or abuse of power. Counsel submits that the case law in this area stresses the importance of the separation of powers and the limited role of the court in this regard. The court was directed to relevant dicta in *Buckley and others (Sinn Fein) v. Attorney General* [1950] I.R. 67, *Boland v. An Taoiseach* [1974] I.R. 338, *T.D. v. Minister for Education* [2001] 4 I.R. 259, *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10, *Sinnott v. Minister for Education* [2001] 2 I.R. 545, *O'Reilly v. Limerick Corporation* [1989] ILRM 181 and *A.O. and D. L. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1.

14.12. Finally, the respondent notes the use of an administrative scheme to execute government policy, even where fundamental rights are involved is not unusual. In this regard, it is stated that an administrative scheme was used to vindicate a fundamental constitutional right to primary education for some eighty years from the foundation of the State until 1998 before it was underpinned by statute, while a similar system existed as regards the issuing of passports by the Minister for Foreign Affairs prior to the passing of the Passports Act 2008. The respondents also refer to a series of administrative schemes currently in operation which are referred to in the affidavit of Mr. Dowling, Principal Officer in the Reception and Integration Agency. The list he gives is as follows:

? National Fuel Scheme

? Free Travel

? Household Benefits Package

? Back to School Clothing and Footwear Allowance

? Community Employment Scheme

? Rural Social Scheme - RSS

? Tús Community Work Placement Initiative

? Back to Work Enterprise Allowance

? Short Term Enterprise Allowance

? Part-time Job Incentive Scheme

? Work Placement Programme

? Job Bridge, the National Internship Scheme

? Back to Education Allowance

? Training and Development Option

? Part-time Education Option (PTEO)

? Springboard

? Jobs Plus

? The Wage Subsidy Scheme

? The Reasonable Accommodation Fund for the Employment of People with Disabilities

? The Disability Awareness Training Support Scheme

? Job Initiative Scheme

? Gateway

? Technical Assistance and Training Fund

? Technical Employment Support Grant

? Activation and Family Support Programme

? School Meals - Local Project Scheme

14.13. Notwithstanding extensive written submissions and case law cited, the applicants have not produced an authority for the proposition that when State action affects fundamental human rights legislation is required and executive action alone is prohibited.

14.14. The applicants argue that in leaving 'direct provision' to the Government the legislature has abdicated its function in favour of the executive. In this regard, a passage of Denham J. in *Laurentiu v. Minister for Justice* [1994] 4 I.R. 26 is quoted to the effect that:

> "Article 15(2) means that there are limits on the Oireachtas - while it is given the power to legislate, it is the sole body with that power, and as such, has a duty to legislate and is constitutionally prohibited from abdicating its power. In accordance with the Constitution it is for the Court to determine whether the constitutional framework has been breached."

14.15. The decision in *Laurentiu* condemned the active abdication by the legislature of its powers to the executive. No such thing has happened in this case. The Oireachtas has not passed legislation which grants the executive the power to make rules in respect of 'direct provision' in circumstances where the principles and policies surrounding the making of such rules are absent.

14.16. In *O'Neill v. The Minister for Agriculture* [1988] 1 I.R. 539, the Minister established a licensing scheme for persons engaged in artificial insemination of animals, but did not do so on the basis of the powers given to him by the Livestock (Artificial Insemination) Act 1947. The Oireachtas had envisaged a particular type of scheme governed by Regulations and the Minister adopted a scheme not contemplated by the Act and established a scheme on an administrative basis and not by Regulations. The Oireachtas had envisaged the regulation of the scheme by Statutory Instrument over which it would have some control. The administrative scheme adopted was without Oireachtas input. The administrative scheme was condemned by the Supreme Court.

14.17. The contrast with the facts of the instant case are obvious. Here, the Oireachtas has never legislated for reception conditions of protection applicants. It has never established principles and policies governing this area and it has never indicated that the executive may regulate the area by Statutory Instrument. The Oireachtas has been inactive on the question of reception conditions of protection applicants save in so far as it has approved of the expenditure required to operate 'direct provision'.

14.18. The suggestion implicit in the applicants argument is that the executive can only act as mandated by the legislature. This cannot be correct and would lead to a perverse result. It would mean that the Oireachtas could, for example, prevent the State from making any provision for destitute protection applicants by its own legislative inaction.

14.19. Both parties referred to the decision of the Supreme Court in *McGowan v. The Labour Court* [2013] IEHC 21, where a registered Employment Agreement, made pursuant to Part III of the Industrial Relations Act 1946, and registered with the Labour Court, set down the employment conditions of electricians. Once registered, the Agreement constituted contractual terms between employer and employee. The case concerned the legality of the delegation of power to the Labour Court. Once the Labour Court accepted the registration of a registered Employee Agreement between the employer and the employee, it becomes enforceable by criminal prosecution. The Court found that the scheme under the Act was:

> "…an unlimited grant of power in relation to employment terms, made to bodies unidentifiable at the time of the passage of the legislation and without intermediate review. On its surface, therefore, this appears to be a facial breach of Article 15.2.1. 'Law' is undoubtedly being made for the State and by persons other than the Oireachtas. No direct statutory guidance is given for the exercise of the power…Such a far-reaching conferral of law making authority can only be valid if it can be brought within the test outlined in *Cityview Press*…"(para. 25)

14.20. At para. 30 of the judgment, O'Donnell J. said:

> "What appears to be law is being made by persons other than the Oireachtas. But this case does not really raise the troublesome questions of detail and degree that can sometimes arise in this area. There is not here a grant of a limited power to a subordinate body subject to review as there was, for example, in the *Cityview Press* case. Instead, there is a wholesale grant, indeed abdication, of lawmaking power to private persons unidentified and unidentifiable at the time of grant to make law in respect of a broad and important area of human activity and subject only to a limited power of veto by a subordinate body."

14.21. Again, the contrast with the facts of the current proceedings is fairly clear. There has been no attempt by the Oireachtas to delegate its law-making power in this case. The reliance by the applicants on all of the dicta and principles enunciated in *McGowan* and *Cityview Press* and associated authorities is misplaced.

14.22. The Constitution does not require that the legislature must establish principles and

policies in order for the Government to exercise its executive powers. The Government may exercise executive powers independently of the legislature. In exercising its constitutional executive powers, the Government may not trespass upon the exclusive law making function of the legislature. If the Government establishes a scheme in pursuit of a policy which contains rules and conditions, though the rules may be regarded as a form of 'laws', this would not involve the executive usurping the law making function of the legislature within the meaning of Article 15 of the Constitution. For example, if the Government wished to promote the preservation of thatched cottages by paying grants for their restoration, a Minister could ask the Oireachtas to approve a fund for the scheme and rules for this scheme could be established on a purely administrative basis. It could not be said that rules in such a scheme (as to grant amounts, use of certified trades persons etc) would be regarded as a form of laws such that the scheme would trespass on the legislative function and violate the separation of powers.

14.23. The applicants contend that the rules of 'direct provision' and in particular the RIA House Rules are laws within the meaning of Article 15.2 of the Constitution which have been unlawfully made by the Government. The House Rules are not laws as suggested. They are rules governing residential circumstances. They create no general burdens. They are not enforceable by State action. They neither create nor reduce personal rights. They are no different in character to rules governing places such as public hospitals or nursing homes. It could not be seriously contended that restrictions on visiting hours or the like in such public facilities would require a vote in the Oireachtas.

14.24. On the applicants' case, the Government of Ireland would be limited to carrying out instructions of the legislature, passing delegated legislation in accordance with the principles and policies established by the legislature, or pursuing policy provided implementation involved no rules or restrictions of any kind. Such an interpretation of executive power would neutralise the concept of executive power in a manner which is not intended by the Constitution. Such interpretation fails to recognise that the branches of government in Ireland are equal and one is not subservient to any other.

14.25. The mere fact that 'direct provision' could have been placed on a legislative footing does not mean that this must happen. I am satisfied that the Government was entitled to establish and implement a system of 'direct provision' of material support for protection applicants without policy input or legislative input from the Oireachtas (with the exception of approval for expenditure).

14.26. Ms. A has argued that as direct provision touches upon the applicants' fundamental human rights it must be subject to legislative control and may not be a matter administered at the will of the executive. As indicated no authority has been cited for this.

14.27. In my view the respondents' answer to this claim is correct. They point to the fact that for many years the system of national school education was administered without statutory basis although it regulated the constitutional right to free primary education and involved the expenditure of vast sums of money. Though the High Court had occasion to consider legal questions touching upon primary education, it was never suggested by the court or indeed by litigants that the absence of a statutory regulation of primary education breached the separation of powers of the legislature and the executive. See *McCann v. Minister for Education* [1997] 1 I.L.R.M. 1, Costello P. where he stated at p. 15:-

> "In the case of primary and secondary education, hundreds of millions of pounds are administered annually by means of a large number of administrative measures whose existence is known only to a handful of officials and specialists, which are not available to the public and whose effect is uncertain and often ambiguous."

14.28. Similarly, the Criminal Injuries Compensation Tribunal had no statutory basis and yet was judicially interpreted and construed in several cases without complaint in this

respect being made: see the *State (Hayes) v. Criminal Injuries Compensation Tribunals* [1982] I.L.R.M. 210, the *State (Creedon) v. Criminal Injuries Compensation Tribunal* [1989] I.L.R.M. 104.

14.29. Another example of an administrative scheme affecting fundamental rights is found in the decision of the Supreme Court of *Bode v. Minister for Justice* [2008] 3 I.R. 663. In that case the Supreme Court gave detailed consideration to the operation of an administrative scheme, the Irish Born Child '05 ('IBC05') scheme, allowing non-Irish national parents of Irish born citizen children to remain in the State. It was alleged by certain disappointed parents there was no statutory basis for this scheme and that it was unlawful and arbitrary. Denham J. noted:

> "65. The scheme was introduced by the Minister, exercising the executive power of the State, to address in an administrative and generous manner a unique situation which had occurred in relation to a significant number of foreign nationals within the State. However, those who did not succeed on their application under this scheme remained in the same situation as they had been prior to their application. They were still entitled to have the Minister consider the constitutional and convention rights of all relevant persons."

14.30. It is significant that the Supreme Court did not find fault with this scheme on the basis that it was an executive act unsupported by legislation even though the legislature had regulated in the area by passing the Immigration Act 1999. Thus, this is an example of executive action establishing a scheme without legislative input in an area already governed by the legislature and doing so without negative comment from the Supreme Court.

14.31. I reject the argument that the Government has acted unlawfully by operating 'direct provision' without legislative input (other than money votes and prohibitions on social welfare and employment). The Government have lawfully exercised executive power under Article 28.2 and have not trespassed on the exclusive law making functions of the Oireachtas under Article 15.

14.32. The Irish Text of Article 28.3 of the Constitution

14.33. During the course of proceedings, the court raised the issue of the meaning of the Irish version of 'executive power' contained in Art. 28.2. The text reads as follows:

> "2. Faoi chuimsiú forálacha an Bhunreachta seo, is é an Rialtas a oibreos, nó is le húdarás an Rialtais a oibreofar, cumhacht chomhallach an Stáit."

14.34. In English the texts is "The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government."

14.35. I raised the point because I had read in 'Bunreact na hÉireann: A Study of the Irish Text' by Micheál Ó Cearúil (Oifig an tSoláthar, 1999) that a literal translation of the Irish text 'cumhacht chomhallach an Stáit' is 'the implemental power of the State' (see page 403 of that work) i.e. not 'the executive power of the State'. I was concerned that the proper meaning of the phrase 'executive power' in Article 28.2 of the Constitution might be 'implemental power' having regard to Article 25.5 of the Constitution which gives precedence to the Irish text of the Constitution in case of conflict.

14.36. The respondents requested Dr. Micheál Ó Cearúil to offer his opinion on whether there was any difference between the language versions and in particular was there a difference between the Irish word 'comhallach' and the English word 'executive" as used in the provision. In an affidavit full of scholarly insights Dr Ó Cearúil says"

> **"Choice of the Adjective Comhallach**
> 12. The choice of the adjective comhallach corresponding to 'executive' in

> Article 28.2 of the 1937 Constitution is more a product of the exigencies of transition and the state of flux of Irish language terminology when the Irish text of the Constitution was being produced than of consideration of law or statutory interpretation. The original draft of the Irish Constitution was done in English. By mid-October 1936, John J. Hearne had a Draft of Headings ready, containing four basic Declarations and 78 Articles - Mícheál Ó Gríobhtha did not begin the first draft of the Irish text until 19 October, and was not joined by Risteárd Ó Foghludha who acted as editor of that draft, until 11 November.
>
> 13. Furthermore, many of the provisions of the 1937 Constitution followed directly the English wording of the 1922 Constitution. Therefore, the English version does not 'translate' the Irish term *comhallach* as 'executive' - it could be argued that the opposite would be more correct, although the issue is somewhat more complex than that . . .

14.37. Dr. Ó Cearúil goes on say as follows:

> "The sense of the Irish verb *comhaill*, on which the *comhallach* is based, would appear to correspond to the sense of the English verb 'execute', on which the adjective 'executive' is based.
>
> 23. In Dineen's 1934 Irish-English Dictionary, for the form of the first person singular of the verb, *comhallaim*, Dineen gives 'I fulfil or accomplish, discharge an office'. The word 'execution' is included in that Dictionary among the senses of the related noun form, *comhall* - 'act of fulfilling; covenant, performance, execution, fulfilment; act, deed', with *aithne chríost gan suim 'na cómhall* being cited in that entry from an Irish manuscript and translated as 'the commandment of Christ - no heed paid to its fulfilment'. For the related adjectival form, *cómhaltach*, Dineen has the senses 'fulfilling, fulfilled, keeping promises, contracts, etc.' Dineen gives *cómhallach* as another form of that head word *cómhaltach*."

14.38. Dr. Ó Cearúil completes his learned views as follows:

> "53. I say and believe that following a study of the above, the Irish and English texts of Article 28.2 would appear to be so reconcilable, and I would respectfully say that there is no conflict between *cómhaltach* in the Irish text and 'executive' in the English text of that Article. Both texts of Article 28.2 provide that the Government is the repository of the executive power of the State and neither text of that section of Article 28 delimits the powers of the Government."

14.39. I have no hesitation in accepting the views of Dr. Ó Cearúil that there is no difference in meaning between the phrases 'executive power of the State' and 'cumhacht chomhallach an Stáit' in Article 28.2 of the Constitution.

14.40. In conclusion, the establishment and operation of a scheme of material support for protection applicants by the Government without legislative basis is a lawful exercise by the Government of the executive powers conferred by Article 28.2 of the Constitution and does not infringe the separation of powers or trespass on the function of law making granted to the Oireachtas under Article 15 of the Constitution.

15. Conclusion

15.1. In these proceedings the applicants have failed to establish that 'direct provision' because of cumulative effects, with or without a temporal element, breaches their human rights whether arising under the Constitution or the European Convention on Human Rights. They succeeded in their claims that some of the RIA House Rules are unlawful. They have also succeeded in their claim that the complaints handling procedure is unlawful. Ultimately the applicants complaint that 'direct provision' breaches human rights

was doomed not because that proposition is wrong but because they pursued the claim without oral evidence and they did not cross examine the respondents witnesses who denied that 'direct provision' was harmful. The central dispute on the facts was not capable of being resolved in the procedure chosen by the applicants. All of the reliefs they seek in these judicial review proceedings could have been sought in plenary proceedings

15.2. The application to amend the pleadings to seek (nominal) damages pursuant to s. 3 of the European Convention on Human Rights Act 2003 stands adjourned. As the applicants have failed in their most important claims alleging breaches of the European Convention on Human Rights, my view is that the amendment sought may not be necessary but in view of their success in alleging breaches connected with the right to respect for private life under Article 8 of the Convention, the amendment sought may still be relevant. I adjourn a decision on this issue and the applicants have liberty to pursue that matter if they wish. I invite the parties to address the Court as to what form of Order should issue to reflect the court's decisions on these proceedings.