IHRC Roundtable Asylum Process and Direct Provision System Challenges and Solutions from a Human Rights and Equality Perspective

Asylum Application Process, Delays and Access to Justice

Patricia Brazil, Barrister-at-Law, Averil Deverell Lecturer in Law, Trinity College Dublin

Introduction

The purpose of this brief paper is to provide an overview of the asylum process in Ireland including the various types of applications which may be made and decisions which may issue. I will then set out a brief account of the judicial review system as it applies to the asylum context with a particular focus on areas where delay and issues pertaining to access to justice may arise.

Brief history of asylum system in Ireland

Until the 1990s there was no formal legislative basis in Ireland governing the asylum process. This is not surprising given the very low numbers of applicants who claimed asylum in the State. However, the sharp increase in applications by the mid-1990s, leading to a peak of over eleven thousand applications in 2002, required the State to put in place a mechanism which would set out how such applications would be processed. This led to the introduction of the Refugee Act 1996 (much of which did not come into force until 2000), and this Act remains the foundation of the legislative framework governing the refugee process in Ireland. However, further piecemeal reforms have been effected by a number of subsequent pieces of legislation, including the Immigration Act 1999, Illegal Immigrants (Trafficking) Act 2000, Immigration Act 2003 and Immigration Act 2004.

In more recent years, the Irish legislative framework has also been impacted by developments at EU level concerning the "Common European Asylum System". The Qualification Directive (2004/83EC) was intended to standardise key terms and concepts across the EU member states bound by it, which resulted in the introduction in Ireland of the European Communities (Eligibility for Protection) Regulations 2006 (SI No.518 of 2006). These Regulations formally introduced the concept of subsidiary protection into Irish law. The Procedures Directive (2005/85EC) sought to impose minimum procedural rights for applicants in the asylum process in the EU, and this resulted in the introduction of the European Communities (Asylum Procedures) Regulations 2011 (SI No.51 of 2011) and the Refugee Act 1996 (Asylum Procedures) Regulations 2011 (SI No. 52 of 2011). The most recent legislative provisions in this area, introduced in November 2013, are the European Union (Subsidiary Protection) Regulations 2013 (SI No. 426 of 2013).

As is clear from this brief account, the legislative framework in Ireland governing the asylum process is fragmented, with potential negative impacts on the accessibility and overall coherence of our statutory code governing this important area. There have long been proposals for a wholesale reform and restatement of the statutory framework in this regard, as long ago as the Immigration, Residence and Protection Bill 2006. The most recent version of that Bill was withdrawn at Committee stage last year and while the Minister for Justice has indicated his

intention to pass the legislation this year, the redrafted version of the Bill has not yet been published.

Legal regime applicable to asylum seekers

Applications for asylum may be made by a person at the frontiers of the State, or by a person who is already in the State (whether lawfully or unlawfully).[1] Once a person has made an application for asylum, that person has a limited right to remain in the State, generally speaking until the determination of that application.[2] However, this is not a "general immigration permission" and carries with it clear restrictions; a person who is applying for asylum in the State is not permitted to leave or attempt to leave the State without the permission of the Minister; and is not permitted "to seek or enter employment or carry on any business, trade or profession before the final determination of his or her application".[3]

Asylum-seekers whose applications for refugee status are pending, and who are subject to the policy of direct provision, are assigned accommodation in designated refugee hostels where they receive food and board, and further receive the limited sum of €19.10 per week by way of financial support. Allied to the policy of direct provision is the so-called dispersal policy, which was introduced to alleviate difficulties arising from a high demand on accommodation in Dublin in or around 2000, as a result of the large numbers of asylum seekers entering the state; the policy of dispersal involves "ensur[ing] a more equal distribution of asylum seekers … throughout the country",[4] often in remote, rural areas.

Overview of the asylum process in Ireland

As noted above, a person may apply for asylum at the frontiers of the State or from inside the State. In either case, the same procedure applies; the person is referred to the Refugee Applications Commissioner which receives the application for asylum. At that stage, a brief, initial interview ("the section 8 interview") is carried out to ascertain basic biographical data (name, date of birth, country of origin and a brief statement of the reason for claiming asylum). The applicant is assigned accommodation at this stage, usually at an initial reception centre in Dublin, before subsequently being "dispersed" to a direct provision centre outside of Dublin.

The next step in the asylum process is for the Refugee Applications Commissioner to call the applicant to attend for a substantial interview to fully investigate the basis for the asylum claim ("the section 11 interview"). Such interviews can take a number of hours, and in some cases cannot be completed on the same day so the person may be required to attend for a number of follow-up interviews with the Refugee Applications Commissioner.

Once the Refugee Applications Commissioner has completed the assessment of the application, a decision will issue ("the section 13 report"). If this is positive, the Minister must grant a declaration of refugee status. If this is negative, the person has a right of appeal to the Refugee Appeals Tribunal. There are two separate procedures in respect of appeals to the Refugee Appeals Tribunal, depending on the particular recommendations made by the Refugee Applications Commissioner in the section 13 report. If the Refugee Applications Commissioner makes one of a specified list of findings (set out in section 13(5) of the 1996 Act), the person is subject to an accelerated appeals procedure and denied the right of an oral hearing on appeal.

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[1] Section 8 of the Refugee Act 1996.

[2] Section 9(2) of the Refugee Act 1996.

[3] Section 9(4) of the Refugee Act 1996.

[4] See FLAC Reports *Direct Discrimination? An Analysis of the Scheme of Direct Provision in Ireland* (2003) and *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal Policy in Ireland Ten Years On* (2009).

The person must lodge their notice of appeal papers within ten working days and the Refugee Appeals Tribunal will decide the appeal "on the papers only".

If the Refugee Applications Commissioner does not make one of these findings, the person is entitled to a full rehearing of their asylum claim on appeal. The notice of appeal in this case must be lodged within fifteen working days. Once the Tribunal has received the appeal, a notice of the oral hearing will be issued, but there is no timeframe governing this aspect of the appeals process.

Regardless of whether the appeal to the Tribunal is on the papers or by way of full rehearing, the outcome will be a written decision from the Tribunal either allowing the appeal (ie effectively a decision to grant refugee status) or a decision refusing the appeal (ie a decision refusing refugee status).

If a person has been refused refugee status by both Refugee Applications Commissioner and the Refugee Appeals Tribunal, they are then issued a "proposal to deport" (sometimes referred to as a "section 3 letter" or the "three options letter").[5] This letter informs the person that the Minister, acting on the recommendations of the Refugee Applications Commissioner and Refugee Appeals Tribunal, has refused the application for refugee status. The person is then advised they have three options:

- To leave the State voluntarily;
- To make an application for subsidiary protection;
- To make humanitarian representations as to why the person should not be deported.

Until recently, the application for subsidiary protection was dealt with "on the papers", ie without any oral hearing of the application. The application was made by way of usually detailed written submissions, and the file would then be considered by an official within the Department of Justice, who would ultimately issue a written decision. However, as noted above, recent changes have been introduced into the subsidiary protection system, apparently as a result of ongoing litigation before both the Irish and European courts.[6] The new procedure involves a totally separate consideration of the subsidiary protection application, to a large extent mirroring the procedures applicable in respect of the refugee application. Thus, under the new procedures, the subsidiary protection application is referred to the Refugee Applications Commissioner for first stage investigation; the Refugee Applications Commissioner may interview the applicant and investigate the claim before issuing a written decision on the application. If the Refugee Applications Commissioner refuses the subsidiary protection application there is a right of appeal to the Refugee Appeals Tribunal (interestingly this is a full right of appeal at the applicant's request and there is no procedure for an accelerated, papers-only appeal unless the applicant him or herself forfeits the right to an oral hearing).

The normal course was for the subsidiary protection application to be assessed first. If that decision was negative, a decision in those terms would issue to the applicant. Again, there were no requirements or guidelines in terms of the time taken for such decisions and there is anecdotal evidence that some applications were several years awaiting a decision on the subsidiary protection/leave to remain claim.

At the conclusion of the subsidiary protection process, the applicant's file is passed to the repatriation unit in the Department for a decision on the leave to remain/deportation aspect. An

[5] Pursuant to section 3 of the Immigration Act 1999.
[6] *MM v Minister for Justice* (Case C-277/11), judgment of the Court of Justice, 22 November 2012.

official within the Department considers all humanitarian submissions as well as any non-refoulement grounds, and then issues a recommendation on whether a deportation order should be made.

The Judicial Review process

Judicial review is a mechanism which allows the High Court to review the lawfulness of decisions by State bodies. It is often said that judicial review is not an appeal but rather is a review of the legality of the decision. The High Court is therefore not free to simply substitute its decision for the one made; it must be satisfied that the original decision-maker erred in law, and can only quash the decision or not.

There are different types of orders which can be sought by way of judicial review; the most commonly sought orders are "certiorari" ie an order quashing a decision; "declaration" eg a declaration that a decision was in breach of a person's human rights; or "mandamus" which is an order compelling a public authority to carry out a specified action, such as to issue a decision on an outstanding application.

There are two different types of judicial review in Ireland; "conventional judicial review" and "statutory judicial review".[7] Conventional judicial review is governed by Order 84 of the Rules of the Superior Courts 1986 (as amended). The general features of conventional judicial review are as follows:

- A two-stage process, involving an ex parte application for leave and a subsequent fully contested substantive hearing;
- A low threshold of "arguable grounds" must be established at the leave hearing;
- Applications for leave must generally be brought within three months of the decision being challenged (limited grounds for extension of time);
- Full right of appeal to the Supreme Court from the decision of the High Court.

However, in more recent years the Oireachtas has sought to limit or restrict the circumstances in which judicial review can be sought of certain types of decisions. Section 5 of the Illegal Immigrants (Trafficking) Act 2000 introduced a statutory scheme of judicial review for certain decisions in the asylum context. The key features of the statutory scheme of judicial review, in contrast to the conventional judicial review rules, are:

- A two-stage process, involving an "on notice" contested leave application and a subsequent fully contested substantive hearing;
- A higher threshold of "substantial grounds" must be established at the leave hearing;
- Applications for leave must generally be brought within fourteen days of the decision being challenged (limited grounds for extension of time);
- Can only appeal to the Supreme Court if the High Court certifies that the case involves a point of law of exceptional public importance and that it is in the public interest that an appeal be brought.

Partly because of the fragmented statutory scheme governing the asylum process, and partly because of developments in the area which occurred after the 2000 Act came into force, certain decisions in the asylum process are covered by the statutory scheme of judicial review while others are governed by conventional judicial review rules. For example, decisions covered by statutory scheme of judicial review include:

- Refugee Applications Commissioner refusal of refugee status

[7] See generally LRC Consultation Paper and Report on Judicial Review Procedure.

- Refugee Appeals Tribunal refusal of appeal
- Decision to make deportation order

However, certain decisions fall outside of the statutory scheme and are therefore governed by the conventional judicial review rules; for example:

- subsidiary protection refusals
- refusal to revoke a deportation order;
- refusal of family reunification applications.

The practice and procedure of the Asylum list in the High Court

Historically all judicial review applications, once issued, were initially channeled into a single "judicial review list" where they were managed before ultimately being listed for hearing. However, for at least nine years, a separate "Asylum List" has operated in respect of judicial review applications of asylum, immigration and citizenship decisions. The Asylum List takes place every Monday morning in the High Court. All new cases are initially listed for mention, with a view to case management; this allows the respondents time to consider the case made, whether they wish to settle or file any opposing papers or affidavits etc. Once all papers are in, if the case is proceeding to a hearing, the case is transferred to a list to fix dates. The list to fix dates is heard once a term, when the presiding judge assigns cases for hearing on Tuesdays, Wednesdays, Thursdays and Fridays in the following term. There are currently three judges assigned to hear asylum cases, although generally all three judges do not sit concurrently. Either one or two judges will hear cases on any given day, operating by a system of rotation intended to allow the non-sitting judge either read papers for upcoming cases or prepare written judgments for cases already heard.

At the most recent list to fix dates, there were 54 cases in the "post-leave list" and 974 cases in the "pre-leave list". While cases in the "post-leave list" are generally concluded within twelve months, there are very significant backlogs in the pre-leave list. The judges in charge of the asylum list are very conscious of these delays, and recently took a proactive approach to identifying 2009 and 2010 cases in the pre-leave list in order to prioritise hearing dates for those cases. The most recent list to fix dates involved fixing of mostly 2011 cases from the pre-leave list. The court generally lists between 50 and 60 cases for hearing per term. The point has been made in the list that at the current rate, cases issued in 2014 may not be heard for over ten years. As noted above, the judges of the asylum list are very conscious of the problems caused by delays and in particular the hardship caused for people waiting many years for their cases to be heard. However, the judges are also conscious that they should not permit "queue jumping". A person may apply for a priority (early) hearing date but only in the most pressing circumstances, eg on the basis of medical reports verifying the impact of delay on the applicant's mental health.

The judges of the asylum list have also sought to adopt other practices with a view to tackling the backlog in asylum cases. In particular, the recent practice of directing cases to be heard on a "telescoped" basis may yet have a significant impact on the overall time taken for conclusion of judicial review proceedings. A telescoped hearing generally applies only to judicial review applications governed by the statutory scheme; instead of two hearings, which often involves duplication and a waste of judicial time and resources, the court holds one hearing within which (theoretically) the two stages are conducted.

Some thoughts on causes of delay in the asylum process

It has been suggested that the delays in the asylum process are largely attributable to high rates of judicial review in asylum and immigration. For example, in the *Meadows* case, Hardiman J stated:

> "Judicial Review of Administrative action is a very significant part of the workload of the High Court and of this court on appeal. Asylum and immigration matters account in turn for a very significant portion of judicial review applications: between 2004 and December, 2008 the percentage of judicial review matters represented by asylum and immigration cases varied from 47% the first year to 54% in the last, and in two years, 2006 and 2007, constituted almost 60% of the total judicial review workload (59% in each year). This seems to suggest, though no figures appear to be available, that a very high percentage of applications for asylum which are decided unfavourably to the applicant, and/or subsequent deportation orders, rapidly become the subject of judicial review applications."[8]

There is certainly a perception that there is too much judicial review in the asylum context, often allied to a suggestion of opportunistic and unmeritorious litigation. However, on one view, given the fragmented asylum system in place in Ireland which leads to multiple decisions concerning the same person, it might in fact be said that the surprise is that the judicial review figures are not higher. It is perhaps also instructive to note that the rate of judicial review in asylum and immigration matters here is not unique; similar, if not higher, rates of judicial review have been reported in England and Wales.[9] Many commentators have called for the introduction of a "single procedure" in Ireland which would allow all aspects of an individual's claim be assessed in the same hearing, leading to a single decision.[10] Such a procedure would certainly address the difficulties caused by the multiplicity of procedures in Ireland at present.

The extremely high disparity between cases waiting for a hearing in the pre-leave list, as compared with the post-leave list, is also perhaps indicative of a problem in the statutory scheme of judicial review. To paraphrase MacEochaidh J in his recent decision in *KB v Refugee Appeals Tribunal*,[11] there is something absurd about a requirement to issue judicial review proceedings within fourteen days and then wait four years for those proceedings to be heard. The recent practice of the judges of the asylum list regarding "telescoped hearings" may yet have a positive impact on waiting times in the list, but given the backlog it may take years for the effect of this practice to be felt. In any event, the workings of the statutory scheme on judicial review might also be considered insofar as this may be said to be the root cause.

Resources at all stages of the process are undoubtedly crucial to the efficient operation of the asylum process. This involves adequate resourcing of the Refugee Applications Commissioner, Refugee Appeals Tribunal, Department of Justice as well as the High Court; otherwise, properly functioning parts of the system may simply lead to "bottlenecks" in other, less resourced areas. In terms of judicial resourcing in particular, while there is no doubt that more judges would allow more cases to be heard in the asylum list, it must be acknowledged that there are pressures for resources experienced in many other areas of the High Court. The Supreme Court backlog also has an impact here; where an asylum decision is being appealed to the Supreme Court, particular where it has been certified as a point of law of exceptional public importance, it may well be a "test case" whose outcome will determine the result of many other judicial review applications. The Chief Justice herself acknowledged during the recent referendum that there were unacceptable delays in the Supreme Court list;[12] it remains to be seen whether the forthcoming establishment of the Court of Appeal will have a positive impact in this regard.

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[8] [2010] 2 IR 710 at 755.

[9] For example, the UK Ministry of Justice Annual Statistics for 2011 indicate that 77% of all judicial review applications (or 8,649 cases) concerned asylum and immigration matters.

[10] Eg, UNHCR "UNHCR Ireland statement on need for introduction of single procedure" February 14, 2011.

[11] [2013] IEHC 169.

[12] "Chief Justice: Delays in appeals court system damages society" Irish Independent, 2 March 2013.

A number of aspects of practice and procedure in the asylum list may also contribute to delays. It is not unusual for a case to be waiting several years for hearing, only to be settled on or just prior to the hearing date. No explanation is ever given in such cases, and it strikes me as particularly wasteful for a court hearing to have been set aside and not used; for legal costs to have been incurred; and ultimately, an applicant to have waited years when the case could have been settled early to allow the applicant's case be reconsidered by the appropriate authorities. On a related note, failure to learn the lessons of judicial review can also give rise to repeated applications for judicial review for the same client (and sadly, sometimes on the same grounds). This can arise where an application for judicial review is taken on particular grounds, eg failure to proper consider medical evidence; the High Court ultimately quashes the decision and remits it for rehearing; a fresh decision issues only to make the same or similar errors as in the first decision.[13] It seems to me that better training, and ultimately better decisions, by refugee decision makers are key to the proper functioning of the asylum system in Ireland.

Conclusions

In attempting to deal with delays in the asylum system, including judicial review, it is important to distinguish between the legacy issues arising from historic problems in the system; and quite separately, the need to put in place measures to prevent recurrence of these problems in the future. Recent trends in litigation may broadly be divided into two categories; systemic challenges, which dispute the procedures by which asylum applications are determined; and individual challenges, concerned with the merits of individual decisions. The causes of delay are multiple and complex, and it does not seem to me there is a simple, one-stop solution. The challenge is to identify a range of responses which will ultimately achieve an efficient asylum process, but one that does not sacrifice fairness as a result.

[13] See eg *RMK v Minister for Justice* [2010] IEHC 367.