

LAW SOCIETY SUBMISSION



SUBMISSION ON THE LEGAL ASPECTS OF THE ASYLUM PROCESS

Protection Process Working Group (Theme 3 Sub Group)

Department of Justice

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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Introduction

The Law Society of Ireland ("the Law Society") welcomes the opportunity to make a submission to the Protection Process Working Group ("the Working Group").

In her letter of 12 February 2015, the Chair of the Theme 3 Sub Group requested the Law Society to address the following issues:

- Processing times of legal proceedings in the Superior Courts;
- Lack of effective communication between Protection Seekers and their legal representatives.

Representatives from the Law Society met with representatives from the Sub Group to discuss the issue of effective communication between Protection Seekers and their legal representatives.

This submission will take the opportunity to address the Working Group on the issue of 'Processing times of legal proceedings in the Superior Courts', as well as the following additional issues:

- The urgent need for a Single Procedure;
- Early Legal Advice;
- Interpreters;
- Legal Aid;
- The Refugee Appeals Tribunal;
- Children in the asylum process.

Summary of recommendations

- The State should ensure that sufficient resources are allocated to the High Court at all times in order to clear the backlog of the asylum list and avoid future backlogs.
- The single procedure should be implemented as a matter of urgency.
- Early legal advice and representation is highly important in the development of an efficient and fair protection system. The Law Society is of the view that the pilot project of providing early stage legal advice should be extended on a national basis with each applicant being entitled to this service as of right.
- Due to the critical importance of evidence in protection claims, particularly in the context of the credibility assessment of an applicant where such evidence is often the deciding factor, it is essential that competent interpreters and translators are provided at all stages of the process.
- In the interests of bolstering judicial independence, and as the Refugee Appeals Tribunal acts in a judicial capacity, it is the Law Society's view that tribunal members should have the same level of tenure as members of the judiciary. Hearings should be recorded and public, if the appellant so wishes. A "list to fix dates"/case management procedure should be introduced. The backlog should be cleared.
- The Law Society refers to the recommendations of the Special Rapporteur on Child Protection regarding the necessity to take legislative and other measures to ensure that the best interests of unaccompanied or separated children seeking asylum are adequately represented.

Issue 1 - Processing times of legal proceedings in the Superior Courts

- 1.1. The volume of litigation in relation to asylum/protection and immigration cases increased dramatically from the year 2000 onwards. Litigation in this field has usually taken place by way of judicial review proceedings.
- 1.2. Before the coming into force of the *Illegal Immigrant (Trafficking) Act 2000*, asylum/protection and immigration judicial reviews were dealt with under the general judicial review regime governed by Order 84 of the Rules of the Superior Courts 1986 (as amended). Under this general regime, leave is sought ex-parte, an arguable grounds threshold applies, a case obtains a date as soon as both parties confirm that the pleadings are closed, and there is a full appeal to the Supreme Court.
- 1.3. Section 5 of the *Illegal Immigrant (Trafficking) Act 2000* introduced a statutory scheme of judicial review in respect of asylum/protection and immigration matters. The section covered judicial review challenges against the vast majority of asylum/protection and immigration matters, and most notably decisions of the Refugee Applications Commissioner, decisions of the Refugee Appeals Tribunal refusing an appeal, deportation orders, and decisions of the Minister refusing to re-admit an applicant into the asylum process. The Section 5 scheme imposed stricter time limits, a contested leave on notice procedure (which therefore required potentially two contested hearings), and a restricted right of appeal to the Supreme Court. However, the general Order 84 procedure still applied to certain types of decisions such as subsidiary protection decisions. The inadequacy of this fragmented framework was highlighted by the Supreme Court in the case of *Okunade v MJE [2012] IESC 49*:

"(...) the difference in the statutory regime applicable to judicial review between a challenge to, on the one hand, a subsidiary protection refusal and, on the other hand, a deportation order makes the court process extremely complicated and, in my view, unnecessarily so. It is again noted that there are proposals for reform in this area. However, unless and until any such measures are adopted by the Oireachtas, the courts have to deal with the statutory regime as it stands."

- 1.4. The worst periods in terms of delays and backlog in the asylum list took place while this fragmented Section 5/Order 84 system was in place. At one point the asylum list had over one thousand cases awaiting a hearing date. It is not possible to identify with certainty the main factors that caused the backlog but, in the Law Society's view, a combination of the following factors were the probable cause, despite the best efforts and enormous dedication of those charged with ensuring the listing of applications and the continuing efforts that were made by the High Court to eliminate unnecessary delays:
 - The proliferation of litigation in the area;
 - The procedural delays caused by the Section 5 regime, in particular the "leave on notice" requirement;

- The failure to provide the High Court with sufficient resources to deal with the increasing volume of cases;
 - The very late engagement of the State with cases that were ultimately resolved in the applicant's favour.
- 1.5. At a certain point during this period, it is the Law Society's understanding that the average waiting time for an applicant in a judicial review in the High Court, from start to finish, was four and sometimes five years. Further, the Law Society has been informed that many applicants withdrew their proceedings out of desperation, solely on the basis of the delays, or simply decided against instituting meritorious proceedings due to the anticipated delays.
- 1.6. The Law Society is also concerned that many judicial reviews taken against decisions particularly from the asylum processing bodies are ultimately settled by the State days before the hearing, after years contesting the case in the asylum list. The Law Society welcomes the efforts made particularly by the Refugee Appeals Tribunal (RAT) in recent times to settle cases promptly and review cases that have been a long time in the list for the purposes of a possible settlement. However, the Law Society notes that there is still a vast number of decisions which are successfully challenged after a full hearing in the High Court. Therefore, the Law Society respectfully suggests that the Minister and the asylum processing bodies should increase their efforts in reviewing extant cases in the asylum list which await a hearing date.
- 1.7. A new statutory framework was introduced last year by the *Employment Permits (Amendment) Act 2014*. The main feature of the current regime is that it has reverted to an ex-parte leave system, with a "substantial grounds" threshold. Thus, there is only one potential contested hearing if leave is granted by the Court. Further, it is the Law Society's understanding that the vast majority of asylum/protection decisions, if not all, are covered by the current regime, and therefore we no longer have a fragmented judicial review framework in this area. This is a most welcome development.
- 1.8. The Law Society further acknowledges the appointment of additional judges to the High Court in recent times, and it is the Law Society's understanding that four judges have now been assigned to the asylum list. Further, 'positive callovers' have recently taken place with a view to filtering cases in the list, disposing of cases that are not being proceeded with, and assigning dates to cases that are being called on for hearing. It appears to the Law Society that this exercise has only been possible due to the increased number of new judges assigned to judicial review in the High Court, which has allowed the Court to allocate more hearing dates. However, the Law Society considers that an increased number of judges is of no benefit if this is not followed by an equal number of courtrooms and registrars. There is little benefit in having four judges available every day if there are only two available registrars and two available courtrooms. The Law Society therefore recommends that increases in judges should be matched by increases in registrars and courtrooms.
- 1.9. The Law Society welcomes all of these recent developments and hopes that the long-standing backlog and delays in the asylum list will be a thing of the past as a consequence. Nonetheless, and as acknowledged during the discussion with the Theme 3 Sub Group of

the Working Group on 19 January 2015, these changes are still very recent so it is not possible to fully assess their effectiveness at this time.

Issue 2 – The urgent need for a single procedure

- 2.1. Ireland requires applicants to apply for and be refused refugee status before they can apply for subsidiary protection. This has been one of the main factors that has caused the egregious delays which sadly are a feature of the Irish asylum/protection system.
- 2.2. The Law Society understands that there is a new legislative framework under consideration which will see the introduction of a single procedure. It must be noted that similar undertakings were given in the past on a number of occasions, and the fact remains that Ireland is the only European Union Member State without a single procedure.
- 2.3. The lack of a single procedure has been, in the Law Society's view, one of the main factors that have caused long periods of residence for many applicants in direct provision. The other main factors have been the fragmented litigation framework and Court delays as stated above.
- 2.4. The Law Society urges that the new legislative framework must become a reality as a matter of urgency. Until then, Ireland will continue to have a dysfunctional protection system, which benefits neither protection seekers nor the State.

Issue 3 – Early Legal Advice and Representation

- 3.1. The Legal Aid Board provides early representation in all cases where the applicant is an unaccompanied minor. In relation to all other cases, applicants can register with the Legal Aid Board at the stage of the Office of the Refugee Applications Commissioner (ORAC), and will be provided with information in relation to the asylum and interview process. In addition, private practitioners provide early representation, more often than not on a *pro bono* basis, as there is currently no formal legal aid scheme in relation to the provision of such representation.
- 3.2. At present, the Irish Refugee Council provides early legal advice and representation for the initial asylum stage on a *pro bono* basis, in a limited number of cases.
- 3.3. The Law Society is of the view that meaningful early legal advice and representation are paramount if it is intended to develop an efficient and fair protection system.
- 3.4. The Irish Refugee Council has also carried out research on this issue in their report: "*Providing Protection - Access to early legal advice for asylum seekers*".
- 3.5. Robust provisions for legal aid at all stages of the process must be put in place. In this regard, the Law Society welcomes the Legal Aid Board's internal pilot project on early legal advice, which is now looking at delivering this form of service to legally aided asylum clients internally and through the Board's private practitioners' panel for asylum and related matters. The Law Society is of the view that the pilot project of providing early stage legal advice should be extended on a national basis with each applicant being entitled to this service as of right.

Issue 4 – Interpreters

- 4.1. The Law Society endorses the views of Goodwin-Gill and McAdam regarding the paramount importance of adequate interpretation in the protection process:

“...the use of interpreters in a manner which will best elicit the narrative of the claimant is something of an art. Translation is not a mechanical process, but a two-way, sometimes three-way street, that places particular responsibilities on every participant in the refugee determination process. The interpreter is both link and obstacle; link, because he or she facilitates an oral dialogue; and obstacle, because the questioner's intentions may be misunderstood, either because of a failure to communicate clearly and coherently, or because both parties do not possess a common basis of understanding and values. What the applicant says comes across filtered and then has to pass by the decision-maker's own baggage of preconceptions.”¹

- 4.2. Given the huge importance of evidence in protection claims, particularly in the context of the credibility assessment of an applicant where in most cases such evidence is the deciding factor, it is essential that competent interpreters and translators are provided at all stages of the process.
- 4.3. There is no legislation regulating translators and interpreters in Ireland, nor is there any national professional qualification on foot of statute, or a practice direction from the Courts. Translation and interpreting are unregulated in Ireland, which means that anyone who speaks English and another language can call themselves a translator or an interpreter. On occasion, the interpreters provided by the agencies for ORAC interviews in the ORAC and RAT hearings have been most unsatisfactory.
- 4.4. The Law Society understands that practitioners in this area have concerns in relation to the quality of the interpretation and translation services available at each stage of the process. It is the Law Society's view that the interpreters' and translators' professions should be regulated by the State to ensure that adequate interpreters are provided and that minimum standards must be discussed, defined and enforced in this area.
- 4.5. The Law Society is of the view that all parties should ensure that there is no potential conflict of interests or potential breach of confidentiality and that there are no situations where an interpreter attends an ORAC interview or a RAT hearing while at the same time being employed or providing services to the Dublin embassy of the country from which the protection seeker originates. In this regard, the Law Society understands that such incidents have occurred in the past.

¹ Goodwin-Gill and McAdam, *The Refugee in International Law*, (3rd ed, Oxford: Oxford University Press, 2007). This passage was also endorsed by Faherty J in her recent judgement, *M.A.I. -v- Minister for Justice Equality and Law Reform & Ors* [2014] IEHC 623.

Issue 5 – Legal Aid

- 5.1. Protection cases involve the most fundamental human rights and the vast majority of protection applicants are impecunious.
- 5.2. Therefore, it is the Law Society's view that, in terms of legal aid, it should be formally extended to all qualifying applicants at all stages of the protection process, including the initial stages of the process. See Issue 3 above ('Early Legal Advice and Representation').
- 5.3. It is also the Law Society's view that the fees payable at present to private practitioners under the Legal Aid Board's Private Practitioners' Panel are inadequate given the amount of work required in protection cases, particularly in relation to appeals before the RAT. Some appeals can be extraordinarily lengthy, work-intensive and complex. Adequate fees will ensure that appropriate lawyers with an expertise in the field will provide the required services and will continue to develop as experts in the field. The Court of Justice of the European Union (CJEU) has confirmed that the RAT is the appeal "*Court or Tribunal*" for the purposes of EU law in protection cases. Therefore, fees for proceedings before the RAT should be equivalent to the fees paid in Circuit Court cases in the criminal justice system.

Issue 6 – The Refugee Appeals Tribunal (RAT)

- 6.1. While it is acknowledged that the RAT has undergone a process of important reform in the last two years and the quality of its decisions has dramatically improved, there are still a number of areas of concern. Many of these issues are, however, a matter for the Oireachtas.
- 6.2. Security of tenure is a key aspect of judicial independence. As the RAT acts in a judicial capacity, it is the Law Society's view that RAT members should have the same level of tenure as members of the judiciary. The independence of the Tribunal is in no way in dispute and is, in any event, guaranteed by the availability of judicial review (as per the CJEU in the *HID & BA* case).
- 6.3. Hearings should be public upon the applicant's request. Section 16(14) of the *Refugee Act 1996*, which requires that hearings be held in private, should be interpreted as allowing the applicant to waive his/her right to a private hearing. Justice must not only be done but must also be seen to be done.
- 6.4. Hearings should also be recorded, as in any other Court in the land, via Digital Audio Recording. This will avoid any dispute as to what occurred during the hearing, will allow for quality control in respect of interpreters, and will inevitably speed up settlements and facilitate alternative dispute resolution, etc. in the event of litigation. This should also apply to ORAC interviews.
- 6.5. The Law Society understands that there are still considerable delays in securing hearing dates at the RAT for asylum appeals. On occasion, as little as two weeks' notice is given once a hearing date is allocated (sometimes even less). A positive callover/list to fix dates system should be implemented, on a monthly basis, to assign dates with sufficient notice, and guidelines should be issued regarding applications for priority.
- 6.6. The Law Society submits that care should be taken to ensure that applicants are treated with respect at all stages of the process, including during the conduct of their hearing, given that many applicants have suffered physical and/or emotional trauma.

Issue 7 – Children in the asylum process²

- 7.1. Ireland participated in the Universal Periodic Review (UPR) conducted by the United Nations Human Rights Council General Assembly throughout 2011.³ The position of the rights and welfare of separated and unaccompanied minors seeking asylum in Ireland was raised by many of the bodies and non-governmental organisations submitting reports under the UPR. For example, the Office of the Ombudsman for Children noted that much progress had been made in the area of care for this group of children. However, the Office also stated that Ireland should have a child-centred process of age assessment, that an independent guardian should always be appointed for such children, and that asylum determination and service provision in Ireland should be in conformity with standards of international best practice.
- 7.2. The UPR Report of the Working Group (of the UN Human Rights Council)⁴ included a recommendation by Uruguay, which Ireland accepted, that laws should be enacted ensuring protection of the rights and welfare of separated and unaccompanied minors seeking asylum, in line with international law standards.⁵ However, the recommendation, again by Uruguay, that Ireland adopt immediate measures to ensure that such children have a guardian ad litem (a professional to represent the rights and interests of children), independently of whether an application has been submitted,⁶ was not accepted. In the Addendum, it is reported that Ireland did not agree to this measure, stating that *"[a]rrangements are in place to meet the needs of unaccompanied minor asylum seekers relating to accommodation, medical and social needs, as well as their application for refugee status."*⁷
- 7.3. The risk posed by the direct provision system to the welfare of children has been repeatedly raised as a matter of urgency in the reports of the Special Rapporteur on Child Protection, Dr Geoffrey Shannon. For example, in his Sixth Report, he recommended that the government:

*"(e)stablish a child-centred process of age assessment, appoint an independent guardian for children seeking asylum, and ensure that asylum determination and service provision in Ireland are in conformity with standards of international best practice."*⁸

² See the Sixth and Seventh Reports of the Special Rapporteur on Child Protection [2012 & 2014] for full analysis of the issue of immigration, asylum, and children.

www.dcy.gov.ie/viewdoc.asp?fn=/documents/Child_Welfare_Protection/SpecialRapporteurChildProtection.htm

This section has reproduced extracts from the Sixth Report with the permission of Dr Geoffrey Shannon.

³ www.ohchr.org/EN/HRBodies/UPR/Pages/IESession12.aspx

⁴ Report of the Working Group on the Universal Periodic Review Ireland, 21 December 2011, A/HRC/19/9.

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/175/20/PDF/G1117520.pdf?OpenElement>

⁵ Report of the Working Group, at p.15.

⁶ Report of the Working Group, at p.19

⁷ Report of the Working Group on the Universal Periodic Review Ireland, Addendum, 6 March 2012, A/HRC/19/9/Add.1, at p.5.

⁸ Sixth Report of the Special Rapporteur on Child Protection, January 2013, at p. 43.

www.dcy.gov.ie/documents/Publications/SixthRapporteurReport.pdf

- 7.4. The Law Society urges that consideration be given to the matter of how the particular vulnerability of children within the asylum application process should be addressed.
- 7.5. In particular, the Law Society considers that there needs to be specific provision in the *Child Care Act 1991* addressing the child in the asylum process. These issues should be further addressed in any proposed protection legislation.
- 7.6. In this respect, the Law Society refers to the recommendations of the Special Rapporteur on Child Protection regarding the necessity to take legislative and other measures to ensure that the best interests of children seeking asylum (who are separated and unaccompanied) are adequately represented, particularly in the context of processing such claims.⁹

⁹ In particular, see the Sixth and Seventh Reports of the Special Rapporteur on Child Protection [2012 & 2014] for full analysis of the issue of immigration, asylum, and children.
www.dcy.gov.ie/viewdoc.asp?fn=/documents/Child_Welfare_Protection/SpecialRapporteurChildProtection.htm

For further information please contact:

Cormac O Culain
Public Affairs Executive
Law Society of Ireland
Blackhall Place
Dublin 7
DX 79

Tel: 353 1 6724800
Email: c.oculain@lawsociety.ie