

Standards in protection decision making

Discussion paper for Theme 3 meeting of 2 March 2015

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This discussion paper focuses on 8 issues which are key to the protection process:

- Early legal advice
- Quality interpretation
- Standards in recruitment
- Training and professional development for first and second-instance decision-makers
- Identification of vulnerable applicants
- Special procedural and substantive guarantees for vulnerable applicants
- A mechanism to oversee the protection system
- Adequate funding of the protection sector

A section is devoted to each of these issues and the structure of each section is generally the same: the current legislative and practice situation is described, relevant EU standards are outlined and questions for discussion are posed. In terms of the relevant EU standards, the relevant instrument is generally the Asylum Procedures Directive and I focus on the standards in the recast directive because it reflects the current EU consensus, notwithstanding that Ireland has not opted in.

I wish to underscore that these issues are key protection issues, and not ‘other matters’ or a ‘wish list’. While I appreciate that a central issue for Theme 3 is the single procedure, a single procedure will not be a panacea for all the problems that have dogged the Irish protection system. I further appreciate the need to address the issue of long stayers. However, long stayers who are at the LTR or DO stage are no longer in the protection process and, as such, not protection matters. Therefore, while we must address the issue of long-stayers for political and humanitarian reasons, there should be no suggestion that by doing so we have exhausted our protection mandate. I reiterate that the issues identified in this document are key protection issues and, as such, central to the work of our group.

Early legal advice

The Current situation

The Refugee Act 1996, as amended, makes no reference to a right to legal advice, early or otherwise. However, the Legal Aid Board (LAB) does provide a legal service to protection seekers under the auspices of the Civil Legal Aid Act 1995. General advice on the procedure is provided by paralegals, under the supervision of a solicitor, prior to the first instance interview. With some exceptions (e.g. unaccompanied minors and exceptionally vulnerable applicants) legal representation is generally confined to the appeals stage and beyond. Legal representation at this stage is provided by a solicitor of the LAB or a solicitor or barrister drawn from a private practitioners panel.

However, it is generally accepted that early legal advice (ELA) i.e. prior to the first instance interview is the most effective and ultimately cost-saving form of legal advice, in that it increases the likelihood of applicants receiving an appropriate first-instance decision, concluding the procedure in the case of applicants who are recognised, and facilitating an expeditious appeals decision in the case of applicants who are not recognised.

The Irish Refugee Council's Independent Law Centre provides a well-regarded ELA service to a small number of persons and is about to publish a manual on ELA. The RLS is currently piloting an ELA service with a view to making such a service more widely available, subject to resources.

EU standards

Recast Asylum Procedures Directive

At the EU level, there has been a shift from a 'back-loaded' model of legal advice (at the appeals stage only) to a 'front-loaded' model (beginning at the first instance stage and carrying through to the end of the procedure). Thus, Article 19 of the recast Asylum Procedures Directive provides that in the first instance procedure, 'Member States shall ensure that, on request, applicants are provided with *legal and procedural* information free of charge, including, at least, information on the procedure *in the light of the applicant's particular circumstances*.' Article 20 provides for free legal assistance and representation in appeals procedures.

Questions for discussion

- ***Who should provide ELA?***
- ***What model of ELA should be provided and what are the resource implications?***
- ***Should there be a trade-off for ELA such as a merits test at appeal stage?***
- ***Should ELA be referenced in the Protection Bill 2015?***

Quality interpretation

The current situation

The Refugee Act 1996, as amended, provides that the initial interview (which is conducted at the time an application is lodged) and the substantive first-instance interview 'where necessary and possible, be conducted with the assistance of an interpreter'. The Act further specifies 'that the Tribunal shall 'use its utmost endeavours to procure the attendance of an interpreter to assist in the hearing'.

As indicated in the Law Society Submission to Working Group, 'there is no legislation regulating translators or 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.'

The problem, then, is not a failure to provide interviewers, but that the interpreters who are provided are not necessarily competent.

EU standards

Recast Asylum Procedures Directive

This directive addresses the issue of the right to interpretation but not the quality of such interpretation:

Article 12 – Guarantees for applicants

(b) [applicants] shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to provide those services at least when the applicant is to be interviewed [...] and appropriate communication cannot be ensured without such services. In that case and in other cases where the competent authorities call upon the applicant, those services shall be paid for out of public funds.

Questions for discussion

- ***How can the protection bodies ensure that only competent interpreters are used?***

Standards in recruitment

The current situation

The Refugee Act 1996, as amended, provides for the appointment of the Refugee Applications Commissioner by competitive selection of the Civil Service Commissioners. The Commissioner is independent in the performance of his/her functions. The Minister for Justice and Equality appoints 'such and so many' members of the staff of the Commissioner 'as he or she considers necessary to assist the Commissioner in the performance of his or her functions'. In practice, ORAC decision-makers are relatively junior civil servants sourced from within the Department of Justice and Equality. The intention of the Department of Justice and Equality is to subsume ORAC into the Irish Naturalisation and Immigration Service (INIS) of the Department and this is provided for in the Heads of the Protection Bill 2015.

The Refugee Act 1996, as amended, further provides for the appointment of a chairperson of the Refugee Appeals Tribunal by competitive selection of the Civil Service Commissioners. The Minister appoints 'such number of ordinary members as the Minister, with the consent of the Minister for Finance, considers necessary for the expeditious dispatch of the business of the Tribunal'. Tribunal Members must have not less than five years' experience as a practising barrister or practising solicitor. Tribunal Members are part-time and remunerated according to the number of appeals they conduct. The Minister can remove a Tribunal Member from office for stated reasons. The Tribunal is independent in the performance of its functions. In the last round of appointments, the former Minister for Justice and Equality appointed Tribunal Members following public advertisement and competitive selection on the basis, not only of being a barrister or solicitor of five year's standing, but also of a satisfactory knowledge and experience of national, EU and international asylum and human rights law and practice.

EU standards

The recast Asylum Procedures Directive contains a number of noteworthy standards in this regard:

Article 4 - Responsible authorities

1. Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications in accordance with this Directive. Member States shall ensure that *such authority is provided with appropriate means, including sufficient competent personnel*, to carry out its tasks in accordance with this Directive.

Article 10 - Requirements for the examination of applications

3. Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an *appropriate* examination. To that end, Member States shall ensure that:

(a) applications are examined and decisions are taken *individually, objectively and impartially*;

Article 15 – Requirements for a personal interview

3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

(a) ensure that the person who conducts the interview is *competent* to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability;

Article 46 - The right to an effective remedy

1. Member States shall ensure that applicants have the right to an *effective remedy* before a court or tribunal
2. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [the recast Qualification Directive], at least in appeals procedures before a court or tribunal of first instance.

Questions for discussion

- ***What constitutes an adequate resourcing of the first and second instance decision-making body?***
- ***Is it appropriate that the position of the independent Refugee Applications Commissioner be abolished and that protection business be subsumed into what is essentially an immigration service (INIS)?***
- ***Should standards be introduced for the selection of decision-makers at first instance?***
- ***Should Tribunal members be political appointments? Or should they be independently appointed by way of a competitive process?***
- ***Should the power to remove a Tribunal Member be vested in the Chairperson, as opposed to the Minister? Should the grounds for such a removal be stated in legislation?***
- ***Are the qualifications currently required for members of the Tribunal appropriate? For example, should Tribunal members be required to have knowledge and experience of national, EU and international protection and human rights law and practice, as per recent good practice?***
- ***Should Tribunal members be remunerated per case? What, if any, are the viable alternatives?***
- ***Which of the above issues should be addressed in the Protection Bill 2015?***

Training and professional development for first and second-instance decision-makers

The current situation

The Refugee Act 1996, as amended, makes no reference to training and professional development of first instance decision-makers. However, the act directs the Chairperson of the Tribunal to 'convene a meeting of the members of the Tribunal at least twice a year to review the work of the Tribunal and, where necessary, to make provision for training programmes for members of the Tribunal.'

As a matter of practice, the Refugee Applications Commissioner and Chairman of the Tribunal organise the provision of initial and on-going general and specialised training for decision-makers in conjunction with UNHCR and others. It is generally acknowledged that these capacity-building initiatives have borne fruit, particularly over the past number of years. However, there is a legacy of poor-quality decision making, particularly at the appeals stage, which is reflected both in the historical low recognition rate and high numbers of JRs (notwithstanding other contributory factors). The question then becomes one of how to sustain current good practice.

EU standards

The recast Asylum Procedures Directive provides as follows:

Article 4 – Responsible authorities

3. Member States shall ensure that the personnel of the determining authority [...] *are properly trained*. To that end, Member States *shall provide for relevant training* which shall include the elements listed in Article 6(4)(a) to (e) of [the EASO Regulation].¹ Member States shall also take into account the relevant training established and developed by the European Asylum Support Office (EASO). Persons interviewing applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect the applicants' ability to be interviewed, such as indications that the applicant may have been tortured in the past.

Article 10 - Requirements for the examination of applications

(c) the personnel examining applications and taking decisions *know the relevant standards* applicable in the field of asylum and refugee law;

(d) the personnel examining applications and taking decisions have the *possibility to seek advice*, whenever necessary, *from experts on particular issues*, such as medical, cultural, religious, child-related or gender issues.

Questions for discussion

¹ These elements are: 'Specific or thematic training activities in knowledge and skills regarding asylum matters shall include and shall not be limited to: (a) international human rights and the asylum acquis of the Union, including specific legal and case-law issues; (b) issues related to the handling of asylum applications from minors and vulnerable persons with specific needs; (c) interview techniques; (d) the use of expert medical and legal reports in asylum procedures; (e) issues relating to the production and use of information on countries of origin'.

- ***Recognising current good practice in the area of capacity-building within the asylum institutions, what are the particular measures that should be continued or built upon?***
- ***Should the obligation to provide training to decision-makers be formalised in the Protection Bill 2015?***

Identification of vulnerable applicants

The current situation

The Refugee Act 1996 contains only one provision related to the identification of vulnerable persons, the scope of which is confined to unaccompanied minors. Section 8 establishes a procedure to be followed where an unaccompanied minor is identified by an immigration officer or the ORAC. Essentially, the child is referred to the HSE, the provisions of the Child Care Act apply and an employee of the HSE may make a protection application on behalf of the child.

EU standards

The recast Reception Conditions Directive

The recast Reception Conditions Directive articulates who is considered a vulnerable person and how such persons are to be identified in Articles 21 and 22. These articles are important because they are cross-referenced in the recast Asylum Procedures Directive.

Article 21 – General principle

Member States shall take into account the specific situation of vulnerable persons such as *minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation*, in the national law implementing this Directive.

Article 22 – Assessment of the special reception needs of vulnerable persons

1. In order to effectively implement Article 21, Member States shall *assess* whether the applicant is an applicant with special reception needs. Member States shall also *indicate the nature of such needs*. That assessment shall be *initiated within a reasonable period of time* after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, *if they become apparent at a later stage in the asylum procedure*. Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.

2. The assessment referred to in paragraph 1 need not take the form of an administrative procedure.

3. Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.

4. The assessment provided for in paragraph 1 shall be without prejudice to the assessment of international protection needs pursuant to [the Qualification Directive].

The recast Asylum Procedures Directive

Article 24 - Applicants in need of special procedural guarantees

1. Member States shall *assess within a reasonable period of time* after an application for international protection has been made whether the applicant is an applicant in need of special procedural guarantees.
2. The assessment referred to in paragraph 1 may be integrated into existing national procedures and/or into the assessment referred to in Article 22 of [the recast Reception Conditions Directive] and need not take the form of an administrative procedure.
3. Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with *adequate support* in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.
4. Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, *where such a need becomes apparent at a later stage* of the procedure, without necessarily restarting the procedure.

Questions for discussion

- ***Should the Immigration Bill 2015 enumerate a list of vulnerable applicants?***
- ***Should the Immigration Bill 2015 detail a procedure for the identification of vulnerable applicants?***
- ***What might such a procedure entail?***
- ***What support do vulnerable applicants require in the protection process and who should provide such support?***

Special procedural and substantive guarantees for vulnerable applicants

Current situation

The only special procedural guarantees for vulnerable applicants (other than those for unaccompanied minors detailed above) in the Refugee Act 1996, as amended, relate to the possibility of prioritising applications. Thus, the Minister, pursuant to Section 12 can direct the Refugee Applications Commissioner and/or the Tribunal to accord priority to certain classes of applications including on the basis of age and ‘special circumstances regarding the welfare of applicants or the welfare of family members of applicants’. Similarly, pursuant to the first and second schedule to the Act, the Commissioner and Chairperson of the Tribunal respectively, can determine the order in which difference classes of business are discharged on the basis, for example, of age. This is ‘in the interest of the fair and efficient discharge of business’.

In terms of substantive guarantees, the prohibition of *refoulement* in the Refugee Act provides in Section 5(2) that ‘a person’s freedom shall be regarded as being threatened if, *inter alia*, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature). At the time of enactment this was regarded as an early recognition of the relevance of sexual violence to asylum.

EU standards

The Qualification Directive

The Qualification Directive (relevant provisions unchanged in the recast) provides in Article 4(3) that the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account, inter alia, 'the individual position and personal circumstances of the applicant, including factors such as *background, gender and age*, so as to assess whether, on the basis of the applicant's *personal circumstances*, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm'.

Acts of persecution are defined in Article 9 as including 'acts of *physical or mental violence*, including acts of *sexual violence*' and 'acts of a *gender-specific or child-specific nature*'.

The recast Asylum Procedures Directive

Article 4 – Responsible authorities

3. Member States shall ensure that the personnel of the determining authority [...] are properly trained. To that end, Member States shall provide for relevant training which shall include the elements listed in Article 6(4)(a) to (e) of [the EASO Regulation].² Member States shall also take into account the relevant training established and developed by the European Asylum Support Office (EASO). Persons interviewing applicants pursuant to this Directive shall also have acquired general knowledge of *problems which could adversely affect the applicants' ability to be interviewed*, such as indications that the applicant may have been *tortured* in the past.

Article 15 – Requirements for a personal interview

3. [...] Member States shall

(a) ensure that the person who conducts the interview is competent to take account of the [...] applicant's [...] *vulnerability*.

(e) ensure that interviews with minors are conducted in a *child-appropriate manner*.

Article 25 – Guarantees for unaccompanied minors

3. Member States shall ensure that:

(a) if an unaccompanied minor has a personal interview on his or her application for international protection [...] that *interview is conducted by a person who has the necessary knowledge of the special needs of minors*;

(b) an official with the *necessary knowledge of the special needs of minors prepares the decision* by the determining authority on the application of an unaccompanied minor.

6. The *best interests of the child* shall be a primary consideration for Member States when implementing this Directive.

² Of particular note for our purposes, Article 6(4)(b) of the EASO Regulation provides for training on issues related to the handling of asylum applications from minors and vulnerable persons with specific needs, while sub-paragraph (c) provides for training on interview techniques.

Questions for discussion

- ***Should there be a reference to the principle of the best interests of the child in the Protection Bill 2015?***
- ***Given the reference to sexual violence in the Refugee Act 1996, as amended, should this be updated and supplemented by a reference to acts of a gender-specific or child-specific nature in the Protection Bill 2015?***
- ***It is current practice, if not law, that decision-makers at first and second instance who deal with vulnerable applicants are specially selected and required to undergo specialised training. Should this be formalised in the Protection Bill 2015?***

A mechanism to oversee the protection system

Current situation

Section 7A of the Refugee Act 1996, as amended, provides for the establishment of an independent Refugee Advisory Board. The function of the Board is, *inter alia*, to 'prepare and submit to the Minister a report in writing [every second year] 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.'

However, the Refugee Advisory Board was never established.

Comment

It seems to me that if the Refugee Advisory Board had been established, the problems with which the Working Group on Protection is now grappling could have been formally identified and headed off at a much earlier stage.

Questions for discussion

- ***Should the Protection Bill 2015 reintroduce the concept of the Refugee Advisory Board?***

Adequate funding of the protection sector

We have spoken in Theme 3 about the clear need for the protection bodies to be adequately resourced. However, protection services are not only provided by the State: information and referral services, early legal advice, counselling and support for vulnerable persons, medico-legal reports for victims of torture and violence, and capacity-building and professional training activities are provided by a range of NGOs, some of whom are represented in the Working Group. The fact that some of these NGOs also conduct advocacy and

lobbying activities in order to bring about change should not detract from the fact that they also operate in partnership with State bodies, providing key services that the State is unable or unwilling to provide. With the withdrawal of the two main external funders of the asylum/migration sector, namely the One Foundation and Atlantic Philanthropies, the sustainability of some of these organisations is in doubt. Consequently, the question of adequate resourcing is not confined to the State protection bodies but also extends to the NGO sector.

Questions for discussion

- ***Should the government commit to allocating a certain amount of funding to the NGO sector?***