



# No End in Sight

Lives on Hold Long Term in the Asylum Process

## Working Paper

Durable Solutions for Direct Provision Residents waiting in excess of 5 years for a Final Determination of their Asylum Application

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## 1. JRS Ireland

The Jesuit Refugee Service (JRS) is an international non-governmental organisation, founded in 1980. The mission of JRS is 'to accompany, to advocate and to serve the cause of refugees and forcibly displaced persons worldwide'. JRS programmes are found in over 50 countries, providing assistance to refugees in camps, to people displaced within their own country, to asylum seekers in cities and those held in detention.

JRS Ireland has a mission to accompany, advocate and serve the cause of forced migrants in Ireland. It has been serving asylum seekers residing in Direct Provision (DP) since 2002. At the present time it provides regular outreach and support to asylum seekers in 10 Direct Provision centres in Dublin, Kildare, Portlaoise, Meath, Clare and Limerick. JRS Ireland prioritises the need of children growing up in Direct Provision running Homework Clubs in DP centres in Dublin; supporting the delivery of crèche and afterschool services in Knockalisheen; organising a four week Summer Programme of activities and other project supports for children in DP.

JRS Ireland aims:

- To promote improvements in the reception and integration of asylum seekers, refugees and migrants.
- To support non-Irish nationals who are in detention under immigration legislation.
- To advocate for a more just immigration system and asylum process.
- To foster a more positive public image of asylum seekers and migrants in Ireland and deepen public understanding of asylum and migration issues.
- To encourage the active engagement of volunteers and to support the work of JRS Europe, the JRS International Office and JRS projects on the ground worldwide.

JRS Ireland works principally in the areas of:

- Asylum Seeker Support: providing support to persons seeking asylum through direct outreach, language classes and psychosocial support.
- Integration: contributing to integration by providing language support, by running capacity building courses and sporting activities, by organising intercultural events and by developing intercultural services and resources for teachers and migrant parents.
- Detention: visiting immigration detainees in prisons, organising training for detention visitors and advocating for more just detention policies.
- Advocacy: working for fairer immigration and asylum systems through lobbying, submission of policy papers, education and media work and collaboration with other organisations.

## 2. Duration Priority Concern

JRS Ireland recognises the intrinsic right, and indeed responsibility, that states have to control their borders. However, natural justice demands asylum applications be concluded within a reasonable period of time. It is clear that matters relating to asylum and immigration are complicated and pose a considerable challenge for states, but resultant processes and procedures must be balanced against the inherent right to dignity of all human beings, regardless of their immigration status<sup>1</sup>.

In the experience of JRS Ireland the biggest single issue facing asylum seekers is the excessive length of time spent in the system awaiting a final determination of their claim. JRS Ireland believes living long term in Direct Provision results in significant human costs, impacting on physical and mental health, on skills and training, family relationships and the ability to participate in society. In addition to the human cost experienced by persons living long term in the system, the State also suffers from a financial, societal and reputational perspective.

<i>Year</i>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
<i>Number of applications for asylum</i>	2,689	1,939	1,290	956	946
<i>Numbers living in Direct Provision</i>	6,494	6,107	5,423	4,841	4,360
<i>% of Direct Provision residents who first claimed international protection 3 or more years previously</i>	33%	46%	58%	59%	68%

The rapid fall in the number of people seeking asylum from a peak of 11,634 in 2002 has not resulted in a similar corresponding fall in the number people residing in Direct Provision. Although numbers in DP have fallen, the trend is much more gradual. Clearly people have got ‘stuck’ in the system, spending increasingly longer periods of time awaiting a final determination of their claim, with the average length of time in the asylum process increasing on a yearly basis<sup>3</sup>.

Three in seven asylum seekers have been waiting at least five years since they first applied for asylum in Ireland. One in seven are waiting seven or more years. During these years waiting they cannot work and endure a *de-facto* barrier to third-level and further education, while living on €19.10 per week.

<b>&lt; 1 Year</b>	<b>1-2 Years</b>	<b>2-3 Years</b>	<b>3-4 Years</b>	<b>4-5 Years</b>	<b>5-6 Years</b>	<b>6-7 Years</b>	<b>&gt;7 Years</b>
608 (13.7%)	379 (8.5%)	423 (9.5%)	525 (11.8%)	584 (13.2%)	687 (15.5%)	543 (12.2%)	685 (15.4%)

The asylum process is not operating as intended. But there are no quick fixes. Successive Governments promised and failed to introduce a Single Procedure where all applications for different forms of protection are lodged together. The announced fast-tracking of this long awaited legislation will constitute a significant step forward for new applicants. However, questions remain:

- Why are asylum seekers spending ever-increasing periods of time within the asylum system?
- What are the consequences for individual asylum seekers and the Irish State?
- Are there other approaches and what can be learned from international experience?
- What durable solutions can JRS Ireland offer for those stuck long term in the asylum system?

<sup>1</sup> Article 2, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>2</sup> Reception and Integration Agency (2013), ‘Annual Report 2013’ and corresponding editions for 2009-12. However, it is important to note that 2014 will see a significant percentage increase in the number of applications.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid* at 19.

### **3. Who is Living Long Term in the Asylum System?**

#### **3.1 Structural Challenges in Asylum System**

The continued absence of a ‘single procedure’ - under which a person seeking protection could make one application, which would be assessed on whether it met the requirements for granting refugee status or some other form of protection – has been a failure by successive governments to bring Ireland in line with other EU States and add much needed efficiency to the asylum process. As recently as 2012, the absence of such a mechanism was conspicuously highlighted by the Supreme Court<sup>5</sup> as an undesirable feature of the asylum process that was resulting in significant delays.

Legislation to facilitate the introduction of a Single Procedure mechanism is anticipated in early 2015 and will be universally welcomed. Although the Single Procedure will represent an important structural reform for future asylum applicants in Ireland, it is not a panacea for all the ills in the system and crucially it will not address the plight of existing asylum seekers who are ‘stuck’ long term in the system.

#### **3.2 Defining Long Term**

For the purpose of this paper JRS Ireland has defined ‘long term’ as 5 years or more.

Few would contest that 5 years constitutes a reasonable period of time for the State, with all the resources at its disposal, to complete a final determination of an applicant’s claim for protection. Many asylum seeker advocates could validly argue that the maximum period for a state to process protection claims to completion should be significantly shorter.

5 years constitutes a significant proportion of an adult’s life and working career. In the case of children, who make up one third of residents in Direct Provision centres, 5 years may constitute much or all of their lives.

#### **3.3 Who is Living Long Term in the Asylum Process?**

As at 31 December 2013 there were 1,915 residents<sup>6</sup> who have been living long term in Direct Provision, that is, in excess of 5 years. They are the subject of the recommendations in this working paper.

JRS Ireland analysis subdivides the target group into 4 main cohorts:

1. Persons awaiting determination of applications for leave to remain on humanitarian grounds under Section 3 of the 1999 Immigration Act.
2. Persons with outstanding subsidiary protection applications and engaged in the new arrangements for the processing of applications.
3. Applicants subject to a deportation order, signing on with Garda National Immigration Bureau.
4. The fourth category is cross cutting; applicants awaiting or engaged in Judicial Review proceedings.

A fifth category, families with members at different stages of the asylum application process, is not analysed separately. This paper will seek to propose practical, implementable and durable solutions for cohorts 1-4, with a crosscutting focus on children that are actionable in the short to medium term.

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<sup>5</sup> *Okunade v Minister for Justice Equality and Law Reform & the Attorney General* [2012] IESC 49.

<sup>6</sup> See supra note 2.

## 4. Where are Applicants on Hold in the Asylum Process?

### 4.1 Stages in the Asylum Process

The prevalence of long delays in the status determination process has been acknowledged since the inception, implementation and administration of Direct Provision<sup>7</sup>. Identifying a clear reason however for why the asylum application process takes so long is no simple task<sup>8</sup> and there is also discordance between the official perspective on the issue and that held by asylum seeker advocates.

By mapping the path taken by applicants as they navigate the Irish asylum system, the potential roadblocks and barriers to protection can be identified. Once an asylum seeker accesses the Irish territory and makes an application for protection, the procedure unfolds in the following steps:

1. Determination of the asylum claim at first instance by the Office of the Refugee Applications Commissioner (ORAC), which is a full oral hearing.
2. An independent review of the ORAC decision at first instance on appeal by the Refugee Appeals Tribunal (RAT).

If unsuccessful on appeal, an asylum seeker will receive a letter with an intention to deport offering a number of options; determination of/application for subsidiary protection; application for leave to remain; voluntary return or consent to deport:

3. An application for Subsidiary Protection is subject to new procedures and will be determined going forward by ORAC.
4. Leave to Remain is granted at the discretion of the Minister of Justice, usually on the basis of a recommendation by an official in the Irish Naturalisation and Immigration Service (INIS).
5. Voluntarily repatriation is where an applicant decides to return to their country of origin of their own accord.

If a person seeking asylum is unsuccessful in applying or does not avail of these options the next step is deportation:

6. The initial step is the issuance of a deportation order, usually with an associated reporting requirement on a monthly basis with the Garda National Immigration Bureau (GNIB). The execution of a deportation order triggers a removal process of the unsuccessful applicant.

It is worth highlighting the asylum applicant has an option of seeking judicial review of any or all of these stages.

At the end of December 2013 there were more than 1,900 RIA residents who submitted their initial asylum application 5 or more years ago. This group is broken down into four distinct cohorts:

1. Number of Applicants seeking Judicial Review	900
2. Number of RIA Residents subject to a Deportation Order	300
3. Outstanding Number of Subsidiary Protection Applications	450
4. Outstanding Number of Section 3 Leave to Remain Applications	<u>250</u>
	1,900 <sup>9</sup>

<sup>7</sup> Liam Thornton (2013) 'Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion'. *Journal of Social Security Law*, 20 (2), at 33. However, it should be noted that the median processing time for first instance refugee status decisions is 14 weeks for the year 2014.

<sup>8</sup> 'No reason for 11-year asylum decision delay', *Irish Examiner*, 23 September 2013 (available at [www.irishexaminer.com](http://www.irishexaminer.com)).

<sup>9</sup> The estimated figures for outstanding subsidiary protection and leave to remain cases are based on numbers collated by the Department of Justice and Equality at the end of August 2013. This breakdown across the cohorts is not exact but is based on recent data so should be a sound approximation.

## 4.2 Initial Application (First Instance Hearing and Appeal)

Both ORAC and RAT have committed themselves to meeting minimum timeframes<sup>10</sup> and delivering on their mandate expeditiously<sup>11</sup>. In this regard, both institutions have consistently issued more decisions than new applications or appeals received on an annual basis respectively. The timeframes for processing decision are not excessive and backlogs are not extensive, therefore it is reasonable to conclude that the operation of these institutions are not the main reason for the length of time people are spending in the procedure.

However, one aspect of the way the procedure operates at this stage has been the subject of proposed reform. Only the refugee convention claim which offers the highest form of protection is considered at this stage. Other forms of protection may have to be considered *ab initio* later.

<i>Year</i>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
Total cases processed to completion	4,581	3,098	2,192	1,834	1,198	1,122
Total applications for declaration as refugee	3,866	2,689	1,939	1,290	956	946
<b>Positive Recommendations</b>	<b>295</b>	<b>97</b>	<b>24</b>	<b>61</b>	<b>67</b>	<b>128</b>

<i>Year</i>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
Appeals Received	3,050	2,720	1,552	1,106	686	660
Decisions Issued	2,461	3,424	2,781	1,330	691	584
<b>Live appeals at end of year</b>	<b>3,354</b>	<b>2,306</b>	<b>888</b>	<b>642</b>	<b>602</b>	<b>661</b>

While these institutions have achieved quantitative goals (and there is a need to recognise the changing application rates in 2014), questions have previously been raised about the quality of the decision making. The experience of an individual applicant is naturally of critical importance to any evaluation of the qualitative efficacy of ORAC and RAT. JRS Ireland recognises the necessity for applicants to play a constructive role in the process especially with respect to the integrity and credibility of their claim for protection from the Irish State.

At the first instance the duty of the State is to facilitate the applicant “to the full in establishing the facts of his case”<sup>14</sup>. Refugee Legal Service (RLS) case workers and solicitors provide legal advice and support to asylum seekers. In the experience of JRS Ireland, the advice and assistance provided by the RLS is uneven and thus there is a lack of consistency in the experience of individual applicants.

Although not a panacea, the argument for the frontloading of legal advice during the initial stages of the application process is based on the grounds of efficiency, fairness, the potential for improved decision-making and future proofing against any additional informational requirements that could be made of the applicant as part of a single procedure process<sup>15</sup>.

<sup>10</sup> Office of the Refugee Applications Commissioner (2013), ‘Office of the Refugee Applications Commissioner Strategy Statement 2013-2015’, at 15.

<sup>11</sup> Refugee Appeals Tribunal (2011), ‘Refugee Appeals Tribunal Strategy Statement 2011-2013’, at 2.

<sup>12</sup> Office of the Refugee Applications Commissioner, ‘Annual Report’. Table derived from 2009, 2010, 2011, 2012 and 2013 reports.

<sup>13</sup> Office of the Chairperson, ‘Refugee Appeals Tribunal Annual Report’. Table derived from 2009, 2010, 2011, 2012 and 2013 reports.

<sup>14</sup> UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html> [accessed 24 September 2013].

<sup>15</sup> Elizabeth O’Rourke (2009), ‘Frontloading: The Case for Legal Resources at the Early Stages of the Asylum Process’, Working Notes, No. 62 (available at [www.jcfj.ie](http://www.jcfj.ie)).

Such grounds have previously been recognised by ORAC and the frontloading of legal advice is accepted as being “in the applicant’s best interest and should also result in the more effective and efficient use of resources”<sup>16</sup>. However, it must be acknowledged that some commentators suggest that this approach would be counterproductive in terms of decreasing decisions times because there is a risk of a consequent increase in legal challenges and recourse to the courts.

In the case of the RAT, quality of decision making has previously been the subject of controversy and legal challenge. Serious allegations have been made of bias in regard to its decision-making and a lack of independence and transparency<sup>17</sup>. Indeed, specific accusations were made against a former tribunal member<sup>18</sup> who resigned at the time of the controversy. However, it is now widely acknowledged that there has been significant improvement in the quality of decision making and overall process in recent years. Similarly, ORAC has engaged in significant consultation with UNHCR to develop internal quality and training initiatives.

The impact of any poor quality decision making at this stage is that it may ultimately result in an increased number of applicants resorting to the courts to challenge the substance of a decision or the process undertaken to reach that decision. Some critics point to the number of judicial reviews as evidence of systemic problems in this stage of the asylum determination procedure. On the other hand, department officials question whether the large number of judicial reviews reflects opportunism on behalf of the applicant or members of the legal profession.

#### 4.2. Subsidiary Protection and Leave to Remain

The nature of forced migration means that many asylum seekers who seek protection in Ireland will not fall within the strict definition of refugee but are nonetheless deserving and in need of some alternative form of assistance from the State. For those that fail to secure protection during the initial application stage discussed above, recourse to subsidiary protection and leave to remain is often made.

<i>Length of Time since Initial Asylum Application submitted</i>	<i>Outstanding Applications for Leave to Remain under Section 3 of the Immigration Act 1999 Only</i>	<i>Outstanding Application for both Subsidiary Protection and Leave to Remain Application under Section 3 of the Immigration Act 1999</i>
>1 since initial application	23	38
1-2 since initial application	18	129
2-3 since initial application	33	203
3-4 since initial application	57	212
4-5 since initial application	66	267
5-6 since initial application	67	221
6-7 since initial application	71	132
7+ since initial application	72	116

<sup>16</sup> Correspondence between JRS Ireland and ORAC, 3 September 2009.

<sup>17</sup> *Nyembo v The Refugee Appeals Tribunal & anor*, 19 June 2007, [2007] IESC 25.

<sup>18</sup> This statement refers to the allegations made against former tribunal member Mr. Nicholson, suggesting he had never been known to decide a case in favour of an asylum seeker.

<sup>19</sup> Private correspondence from Minister Alan Shatter TD in response to Parliamentary Question by Clare Daly TD (PQ 459), Tuesday, 25 June 2013, Dáil Éireann Debate, Unrevised. It must be acknowledged that significant inroads into this backlog have been made since these figures were provided.

#### 4.2.1 Subsidiary Protection Applications

Tables 5 and 6 demonstrate the significant backlogs that had existed in the processing of subsidiary protection claims in recent years. 1,680 decisions were issued in the period 2008-10, which equates to roughly one third of the 5,053 new applications for subsidiary protection received in that period. JRS Ireland commonly encountered frustration among applicants in the past who were unsure when, or how, their claims would be processed.

<i>Year</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>
Applications	1,498	2,089	1,466	-
Decisions	479	680	521	884
<b>Granted</b>	<b>7</b>	<b>27</b>	<b>4</b>	<b>13</b>

However, in response to a recent High Court decision<sup>21</sup>, new regulations concerning the adjudication of subsidiary protection applications were implemented at the end of 2013. Responsibility was assigned to ORAC and was accompanied by an investment of additional resources and training. The new structure and the leadership of ORAC is to be commended as the processing rate for the 1,400 outstanding claims has been encouraging during 2014. Indeed, over 700 determinations have already been made to date.

#### 4.2.2 Leave to Remain Applications

Traditionally, this was one of the areas where asylum seekers experienced greatest delays. However, in recent years a significant number of long term Direct Provision residents have been granted leave to remain as evidenced by Table 7. In the past 12 months, the assignment of additional resources and an apparent prioritisation of longer duration applicants has led to the backlog in outstanding cases being reduced significantly.

<i>Year</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>	<i>2012</i>
Granted	215	731	1052	457	188	1,101	564

### 4.3. Deportation Order

The final stage of the asylum process, if an applicant has been unsuccessful at the previous stages, is to be issued with a deportation order. Asylum seekers subject to a deportation order are permitted to reside in Direct Provision, ensuring they do not become destitute. However, there are monthly reporting requirements to sign on with GNIB. In theory the deportation order will ultimately be executed and the applicant will be returned to their country of origin. In practice often this is not the case; at the end of August 2013 there were 946 residents in DP centres subject to Deportation Orders. An inability to remove unsuccessful asylum applicants from their territory has been experienced by States throughout Europe. This phenomenon of non-returnable migrants is explored in Chapter 6.

### 4.4 Judicial Reviews

Almost half the cases of all asylum seekers stuck long term (i.e. more than 5 years) in Direct Provision are subject to judicial review. An impasse has arisen as a result of the large number of asylum cases before the courts for judicial review. In light of the backlog of asylum related cases and the lack of available court resources, it is estimated it will take many years to resolve the existing caseload. Chapter 5 looks at the impact of this structural challenge in delaying final determination.

<sup>20</sup> Written answer to Parliamentary Questions by Clare Daly TD, Paschal O'Donoghue TD and Aengus Ó Snodaigh TD (PQ 18089/12, PQ 18190/12, PQ 18199/12), Wednesday, 18 April 2012, *Dáil Éireann Debate*, Col. 761, No 3.

<sup>21</sup> *M. M. v Minister for Justice and Law Reform, Ireland and the Attorney General (No.3)*, 2013 IEHC 9.

<sup>22</sup> Table courtesy of Department of Justice and Equality (2012), 'Annual Report 2012', Dublin: Department of Justice and Equality AND Department of Justice and Law Reform (2010), 'Annual Report 2010', Dublin: Department of Justice and Law Reform (available at [www.justice.ie](http://www.justice.ie)).

## 5. Lives on Hold in the Asylum System: Judicial Review

### 5.1 Context

The splintered structure, detailed above, of the Irish asylum process has had the unintended consequence of pushing protection applicants to seek redress outside the ostensibly flawed process. Recourse to the courts by individuals seeking to vindicate their rights was so prevalent that judicial review effectively became an unofficial, de facto stage of the asylum determination process.

In 2013, there were 385 asylum/immigration-related applications in the High Court and although this represents a decrease on the number of applications in 2012 (12.5% decrease), this still accounts for almost 40% of the total number of judicial review cases before the courts<sup>23</sup> – a very high ratio but lower than peak rates experienced in 2010-11. In addition, it must be borne in mind that there was a corresponding 32% increase in appeals to the Supreme Court in relation to the judicial review of asylum matters<sup>24</sup> in 2012. However, recent trends indicate a significant decrease in applications.

<i>Year</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>	<i>2012</i>	<i>2013</i>
Total Applications	1,403	1,317	1,581	1,193	998	973
Asylum Related	785	749	936	703	440	385
<b>% Asylum Related</b>	<b>56%</b>	<b>57%</b>	<b>59%</b>	<b>59%</b>	<b>44%</b>	<b>39%</b>

Recent statistics also indicate there is now an aggregate waiting time of 37 months for asylum related judicial review cases, 33 of which account for time before leave is granted. In April 2014, there were roughly 900 outstanding judicial review cases in respect of persons who made an application for asylum over 5 years ago<sup>26</sup>. The scale of the backlog and the defining characterisation of judicial review by inordinate delay engender the need for reforms to be undertaken to address the underlying process and unsatisfactory final outcomes.

### 5.2 Judicial Review Process

The objectives of judicial review are; to determine the lawfulness of decision making in the public field; ensure finality and certainty at an early stage; and provide access to the courts and effective remedies<sup>27</sup>. It is not a process of appeal<sup>28</sup> in the face of unpalatable decisions or a mechanism that allows the judiciary to step into the shoes of a decision maker<sup>29</sup>. Rather, it is a strictly limited power held by the Superior Courts of the land to ensure that the decisions of lower courts, tribunals, administrative bodies and others are made properly and in accordance with the law.

Judicial review can be divided into two main categories:

- (i) Conventional judicial review.
- (ii) Statutory schemes of judicial review<sup>30</sup>.

<sup>23</sup> Courts Services (2013), 'STATISTICS: Judicial review: High Court – archive', available at <http://www.courts.ie/courts.ie/library3.nsf/0/422545A51C14E8188025774A004FCF31> [accessed 23 September 2014].

<sup>24</sup> Courts Services (2012), 'Courts Services Annual Report 2012'.

<sup>25</sup> Courts Services (2011), 'STATISTICS: Judicial review: High Court – archive', available at <http://www.courts.ie/courts.ie/library3.nsf/bab3b6ee1e72b50780256e5400521ec9/5c386880e563d08e8025774b004f92e8?OpenDocument> [accessed 23 September 2014].

<sup>26</sup> Clare Daly TD, Parliamentary Question (PQ 19221/14), Wednesday 30 April 2014, Dáil Éireann Debate, Unrevised.

<sup>27</sup> Sunniva McDonagh SC, Sinéad Costello BL and Imelda Kelly BL (2012), 'Challenging Times in Asylum and Immigration Judicial Review: Is The System Stretched to Breaking Point?', (2012) 17(5) BR 127, at 127.

<sup>28</sup> Judgement of Mr Justice Fennelly, *Meadows v Minister for Justice Equality and Law Reform*, 21 January 2010, [2010] IESC 3, at para 37.

<sup>29</sup> See supra note 28 at para 35.

<sup>30</sup> These schemes relate to areas of public decision making, including asylum and immigration, which the executive and legislative consider in need of dedicated judicial review processes and procedures due to the policy concerns involved.

The procedures governing conventional judicial review are found in Order 84 of the Rules of the Superior Courts 1986<sup>31</sup>, as amended<sup>32</sup>. In relation to statutory schemes, the rules outlined in Order 84 will also apply unless contrary procedures are outlined in statute, as is the case with asylum related judicial review. Although the processes involved in both categories are similar, there remain significant distinctions. In particular, the unique procedures associated with immigration and asylum related judicial review applications and the resulting case management framework employed by the High Court have warranted considerable academic analysis and debate over the past 14 years. However for the sake of clarity, the basic stages that applicants for judicial review must navigate are:

- 1) **Application for Leave** – An application for leave, or permission, to bring judicial review proceedings must be made within time limits defined by the category of judicial review sought. Applications must outline what relief is sought and on what grounds.
- 2) **Leave Hearing** – Applicants must appear before the court to apply for leave based on the papers previously submitted. This will be conducted on an *ex parte* or *inter partes* basis depending on the category of judicial review sought or by judicial discretion as appropriate.
- 3) **Assignment of Hearing Date** – If leave is granted and following the notification of all relevant parties, the filing of a statement of opposition and the exchange of affidavits; a date will be assigned for a full hearing.
- 4) **Full Hearing** – The High Court will concern itself, not with the decision at hand, but rather the decision making process<sup>33</sup> and may uphold the original decision, grant a declaration or make an order of certiorari, mandamus, prohibition or quo warranto.

In relation to the key distinctions that are applicable to the asylum related judicial review process, Section 5 of the Illegal Immigrants (Trafficking) Act 2000<sup>34</sup> prescribes:

- 1) **Leave on Notice** – An application for leave must be made on notice to ORAC, RAT or the Minister for Justice (who, in the majority of cases, will oppose the grant of leave). In the conventional process, the application for leave is made on an *ex parte* basis.
- 2) **Substantial Grounds** – Leave will only be granted if substantial grounds are established, as opposed to the arguable grounds threshold required in the conventional judicial review process.
- 3) **Time Limits** – An application for leave must usually be brought within fourteen days of the decision being challenged, which is a considerably shorter time limit.
- 4) **Limited Appeal** – Appeal to the Supreme Court will only be allowed if the High Court declares that the case involves a point of law of “exceptional public importance”.

A practical consequence of this statutory framework is that the judicial review list related to asylum is made up of pre and post-leave cases. Management of this list requires a significant investment of extremely limited court resources and applicants are obliged to follow a painstaking process<sup>35</sup> just to secure a hearing.

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<sup>31</sup> The Rules of the Superior Courts, S.I. No. 15/1986.

<sup>32</sup> Rules of the Superior Courts (Judicial Review), S.I. No. 691/2011. For an explanation of the changes made by this amendment, please see <http://www.mhc.ie/latest/news/changes-in-judicial-review-procedure> or <http://hb.betterregulation.com/external/New%20High%20Court%20Judicial%20Review%20Procedure%20Comes%20into%20Effect.pdf> [accessed 23 September 2014].

<sup>33</sup> Judgement by Lord Brightman, *Chief Constable of the North Wales Police v. Evans*, [1982] 1 W.L.R. 1155, at 1173-4

<sup>34</sup> Act No. 29 of 2000, Illegal Immigrants (Trafficking) Act, 2000 [Ireland], 20 November 2000

<sup>35</sup> Practice Direction HC56 – Judicial Review: Asylum, immigration and citizenship list, 19 December 2011.

In spite of such problematic features however, the constitutionality of Section 5 was upheld by the Supreme Court<sup>36</sup> and judicial review has been recognised as being an effective remedy in Ireland at both the National<sup>37</sup> and European<sup>38</sup> level.

In upholding the constitutionality of Section 5, the Supreme Court expected it to be capable of ensuring the early establishment of the certainty of decisions. This is required for the proper management and treatment of persons seeking asylum in Ireland. However, following a recent critique of the operation of Section 5 in *Okunade v Minister for Justice, Equality and Law Reform*<sup>39</sup>, this capacity has been called into question.

The following extracts from the judgement of Clarke J. illustrate some of the key irregularities that have arisen as a consequence of the unique structure of the asylum judicial review list. Firstly, although cognisant of the remit of the Irish Government to legislate to address complicated immigration matters, Clarke J. noted:

*“it seems to me that the amount of court resources that have to be allocated is significantly increased by reason of the anomalies in that statutory structure...”*<sup>40</sup>

When drawing attention to the particularly negative impact of the operation of the leave stage, Clarke J. stated:

*“...as the hearing of the application involves, in the majority of cases, opposition from the Minister to the grant of leave, it follows that the hearing requires a significant allocation of court time (far beyond that which would be required to deal with an ex parte application) and thus requires the court to manage its list in such a way that adequate time is given for the filing, on behalf of the parties, of written submissions and in a manner which requires cases to be placed in a queue of those awaiting hearing until such time as court time becomes available. For all of those reasons the regime which derives from s.5 of the 2000 Act leads inevitably to a reasonably significant wait before a contested leave application, in the cases to which that regime applies, can be heard.”*<sup>41</sup>

and concluded:

*“It seems to me that the concept of leave on notice, while well intended, has turned out to be counter-productive.”*<sup>42</sup>

Commenting on the requirement that applications for leave must be submitted within 14 days of the decision being challenged and contrasting this pre-requisite with the long delays inherent in the processing of applications, Clarke J. added:

*“An extremely short period for commencement and a very long period before even the leave application can be considered, hardly makes sense.”*<sup>43</sup>

It is clear that there is little faith held by Clarke J., who was speaking for a five-judge Supreme Court, in the efficacy of the legislation governing this area of the immigration and asylum system.

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<sup>36</sup> *In the Matter of Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill 1999*, [2000] 2 IR 360.

<sup>37</sup> See supra note 28.

<sup>38</sup> *Adio and Ors v Ireland*, Application No. 8596/08, European Court of Human Rights (17 May 2011).

<sup>39</sup> See supra note 5.

<sup>40</sup> See supra note 5 at para. 6.1.

<sup>41</sup> See supra note 5 at para 2.10.

<sup>42</sup> See supra note 5 at para 6.3.

<sup>43</sup> See supra note 5 at para 6.4.

Likewise, the often remarked contention that applicants for judicial review are somewhat responsible for the delay in the final determination of their asylum application should be re-considered in light of Clarke J.'s remarks about the operation of the asylum process in general:

*“If persons have a legitimate case to remain in Ireland, on whatever basis, then the sooner a positive decision is made the better for all concerned. If persons do not have a legitimate case to remain in Ireland then it is very much in the interests of the State that a final decision to that effect is made as quickly as possible and acted on within a timeframe that does not give rise to persons in the system putting down roots. If people are not to be permitted to remain in Ireland then the final decision in that regard should be made and acted on as quickly as possible consistent with fair process. If such persons are to stay then they are also entitled to know that fact as quickly as possible.”<sup>44</sup>*

In response to such challenges inherent in the process, judges assigned to manage the asylum judicial review list have engaged in creative activism to address the backlog. In addition to the ad hoc prioritisation of cases, a key component of this activism has been the use of telescoped hearings<sup>45</sup>, which empowers the court to treat the application for leave as if it were the hearing of the substantive application. This addresses one of the key anomalies that lies at the heart of Clarke J.'s critique but is an insufficient solution due to the absence of judicial guidelines for this practice<sup>46</sup> and the fact that only three judges are assigned (on a rotational basis) to manage the congested list. More fundamentally, such intervention is ad hoc whereas a systematic response is required by both the Court Services and the State to address the failings of the process.

It must also be noted that the operation and impact of Section 5 will change as a result of the passing of the Employment Permits (Amendment) Act 2014 in July. Section 34 of that Act will expand the scope of the statutory scheme governing judicial review in asylum matters to include even more categories of cases (for example, refusals of subsidiary protection), which could compound the problems highlighted above. However, the introduction of a procedure for hearings on a “leave ex parte” basis could also represent a very positive development.

### 5.3 Outcome of Judicial Review Proceedings

Navigating such an extremely complicated legal process and enduring years of delay could still be considered an attractive option if the end justified the means. Therefore, understanding the outcomes of judicial review proceedings and determining whether this mechanism is acting as an effective remedy or roadblock for applicants is key to any evaluation. Table 9 - 11 offer an overview.

<i>Year</i>	2010	2011	2012	2013	<b>Total</b>	<b>% Disposed</b>
<b><i>Won (by ORAC)</i></b>	27	8	7	3	<b>45</b>	<b>21.3%</b>
<b><i>Lost (by ORAC)</i></b>	12	2	1	0	<b>15</b>	<b>7.1%</b>
<b><i>Settled</i></b>	5	4	35	13	<b>57</b>	<b>27%</b>
<b><i>Other / Struck Out</i></b>	15	6	5	10	<b>36</b>	<b>17.1%</b>
<b><i>Withdrawn by Applicant</i></b>	12	5	15	26	<b>58</b>	<b>27.5%</b>
<b><i>Total Cases Disposed</i></b>	71	25	63	52	<b>211</b>	

It should be noted that following a Supreme Court decision in 2009<sup>48</sup>, applicants seeking the judicial review of decisions taken by ORAC are instructed that an appeal to the RAT is the more appropriate remedy if the issue of concern relates to the quality of the original decision.

<sup>44</sup> See supra note 5 at para 6.7.

<sup>45</sup> See supra note 31 and 32, as amended at Order 84.

<sup>46</sup> See supra note 27 at 130.

<sup>47</sup> Private correspondence between JRS Ireland and the Office of the Refugee Applications Commissioner, July 2014.

This has resulted in a decrease in the number of applications for judicial review in respect of ORAC decisions and a corresponding increase in the numbers seeking review of decisions issued by the RAT.

<i>Year</i>	2010	2011	2012	2013	<b>Total</b>	% Disposed
<b><i>Won (by RAT)</i></b>	87	25	17	54	<b>183</b>	23.5%
<i>Lost (by RAT)</i>	22	13	13	62	<b>110</b>	14.1%
<b><i>Settled</i></b>	28	36	31	77	<b>172</b>	22%
<i>Other / Struck Out</i>	4	8	6	31	<b>49</b>	6.3%
<i>Withdrawn by Applicant</i>	30	35	42	159	<b>266</b>	34.1%
<b><i>Total Cases Disposed</i></b>	171	117	109	383	<b>780</b>	

<i>Year</i>	2010	2011	2012	2013	<b>Total</b>	% Disposed
<b><i>Won (by INIS)</i></b>	79	47	60	43	<b>229</b>	22.7%
<i>Lost (by INIS)</i>	13	17	12	22	<b>64</b>	6.3%
<b><i>Settled<sup>51</sup></i></b>	88	99	252	180	<b>619</b>	61.3%
<i>Withdrawn by Applicant</i>	37	6	18	37	<b>98</b>	9.7%
<b><i>Total Cases Disposed</i></b>	217	169	342	282	<b>1010</b>	

What is clear from an examination of outcomes involving the key actors (respondents) is that a significant number of cases over the past 5 years have been settled. JRS Ireland recognises that a vast array of considerations are taken into account when settlements are agreed and that settlements generally involve a reconsideration of the individual case rather than any major policy change. However the fact remains that there appears considerable appetite among applicants, ORAC, RAT and INIS to bring about speedy resolutions and avoid the full rigours of the judicial review process and associated legal costs.

Unfortunately from the perspective of applicants, given the nature of judicial review the most positive outcome that can be anticipated from judgements in their favour is a full re-hearing of their case at the relevant stage of the asylum process. This fresh hearing will be conducted by a different individual decision maker and may result in a different determination, although the probability of such an outcome is a contested subject.

What is indisputable, however, is that accompanying the many successful outcomes will be the numerous cases of persons who remain living in Direct Provision with a pause upon their original application for asylum only to resume that application after a delay of up to 4 years.

This is further complicated - as has been acknowledged<sup>52</sup> by the previous Minister for Justice, Alan Shatter - when matters of law arising in judicial review cases in the High Court are referred to Europe for adjudication and thus result in even further delay.

<sup>48</sup> *A.K v The Refugee Applications Commissioner*, Unreported, Supreme Court 28 January 2009.

<sup>49</sup> Private correspondence between JRS Ireland and the Office of the Refugee Appeals Tribunal, July 2014.

<sup>50</sup> Private correspondence between JRS Ireland and the Irish Naturalisation and Immigration Service, June 2014.

<sup>51</sup> Settlements increased in 2012 and 2013 in response to judgments by the European Court of Justice and the European Court of Human Rights.

<sup>52</sup> Alan Shatter TD, Direct Provision Debate, Wednesday 8 May 2013, Seanad Éireann Debate.

JRS Ireland is aware that despite this context, many applicants pursue judicial review out of the understandable fear that a negative decision at any point of the process could follow them and negatively influence later decisions and/or appeals. However, there are also commentators who argue that individual applicants avail of judicial review as a delay tactic or are not fully informed about the ramifications of the process by their legal representatives. Regardless of the motivation, there are human cost associated with living long term in Direct Provision as a result of such delay, which will be explored in Chapter 3.4 of this briefing paper. However it must also be noted there is a direct financial cost incurred by the State and other parties to judicial review, separate even to the costs associated with housing the applicants in Direct Provision accommodation centres:

<i>Year</i>	2009	2010	2011	2012	2013	2014 Q1
<i>ORAC<sup>54</sup></i>	1,130,946	1,201,902	333,580	345,268	76,695	57,244
<i>RAT</i>	4,520,000	4,360,000	3,170,000	1,430,000	1,620,000	1,720,000
<i>INIS</i>	3,662,194	5,711,458	4,778,203	4,365,862	3,489,039	846,066

### **5.3 The Way Forward**

Reconsidering the objectives of judicial review in light of its practical operation outlined above, it cannot be said that finality or certainty is provided at an early stage or that effective remedies are available. Although the lawfulness of decision making in the public field is determined, the large number of settlements does call into question the appropriateness of the current decision making process.

While JRS Ireland acknowledges the recent efforts by all stakeholders to secure resolutions for the significant number of cases still awaiting determination, the fact remains that the backlog will not be cleared without the employment of additional measures. Firstly, the issue of insufficient court resources must be remedied through the assignment of more judges to hear cases. If such case and list management proves an insurmountable problem, consideration should be given to the nomination and appointment of additional High Court judges.

However, even if such measures are adopted and the backlog is cleared, not all decisions will result in a fresh hearing and/or the awarding of protection. Thus, there will be a significant number of protection applicants who will simply move on to the next stage of the asylum process after enduring considerable delay awaiting a judicial review hearing. Whether in parallel with the above measure, or as an alternative, a case-by case review should therefore be employed to provide durable solutions for those persons with outstanding judicial review applications. This proposal is outlined in more detail in section 9 and the accompanying flow chart.

<sup>53</sup> See supra notes 47, 49 and 50. JRS Ireland acknowledges that costs paid/incurred in any year do not necessarily correspond to the number of cases concluded in that year.

<sup>54</sup> Qualification requested by ORAC: Historically there have often been considerable delays - sometimes several years - in the submission of Bills of Costs, particularly arising from cases where judgment has been given against ORAC. In relation to the size of costs paid out in 2009 and 2010, this figure includes a significant number of legacy Bills of Costs arising from cases going back a number of years, because there is a variable time lag between the finalisation of cases before the courts and the submissions of Bills of Costs over which ORAC has no control, with a consequential distortion of the payments patterns. Accordingly, the amount paid out in a particular year is not necessarily a reflection of outcomes in that year. To take 2010 as an example, of the 11 Bills of Costs processed for payment in December 2010, 10 were from one particular firm of solicitors and related to cases settled in 2007 and 2008. The same would apply to 2009.

## 6. Lives on Hold in the Asylum System: Deportation & Non-Returnable Migrants

### 6.1 Deportation: The Facts

While Ireland and other EU Member States have a sovereign, if not unrestricted, right to control their borders, the current asylum and immigration system in Ireland is open to accusation that it is designed to channel irregular migrants, including unsuccessful asylum applicants, towards removal<sup>55</sup>.

However, the reality experienced by many asylum seekers is that there has been a low execution rate of deportation orders, 22% on average in recent years<sup>56</sup>. Since 2009, over 14,000 orders have been made but only 1,500 persons removed were from the State during the same period<sup>57</sup>.

As can be seen in Table 13, there is a significant disparity across the board in relation to issued, signed and executed deportation orders:

<i>Year</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>	<i>2012</i>	<i>2013</i>
Issued Intention to Deport	3,185	5,037	4,326	2,471	1,779	1,860 <sup>59</sup>
Signed Orders	757	1,077	1,034	1,334	1,234	N/A
Executed Orders	161	338	343	280	246	210 <sup>60</sup>

This experience in respect of deportation is not exclusive to Ireland. Indeed, our nearest neighbour is faced with a similar challenge<sup>61</sup> and the concept of non-returnable migrants is recognised as a Europe-wide phenomenon<sup>62</sup>. While significant numbers of asylum seekers arrive in industrialised countries throughout the world, few are given refugee status and fewer still are forced to leave the country.<sup>63</sup> Deportation remains a relatively rare occurrence and there are legal, humanitarian, technical and policy-related obstacles to enforcing removal<sup>64</sup>.

Enforcing return is expensive. Tracking down individuals who may have gone underground is time consuming and resource-intensive. Even if an individual is detained prior to removal, normal carriers will often not take deportees, so additional chartered flights have to be arranged. A further constraint on return is the need for the agreement and cooperation of the country of origin. Many countries are unwilling to accept the return of their nationals and do not readily issue the required travel documents.

<sup>55</sup> Emma Quinn and Gillian Kingston (2012), 'Practical Measures for Reducing Irregular Migration: Ireland', Dublin: European Migration Network 2012.

<sup>56</sup> This percentage is based on the execution of 4,472 removals from 20,163 signed deportation orders. Please see written answer to Parliamentary Questions by Aodhán Ó Ríordáin TD (PQ 54881/12, PQ54882/12), Thursday, 6 December 2012, *Dáil Éireann Debate*, Col. 785, No 3.

<sup>57</sup> Clare Daly TD, Parliamentary Question (PQ 34026/14), Wednesday 17 September 2014, *Dáil Éireann Debate*, Unrevised.

<sup>58</sup> *Ibid.*

<sup>59</sup> Answer by Minister for Justice, France Fitzgerald to Parliamentary Question 591 from Eamon O'Cuiv, 17 July 2014

<sup>60</sup> Minister for Justice, Equality and Defence Alan Shatter T.D. (2014), 'Immigration in Ireland – 2013 in Review', 6 January 2014, available at <http://www.inis.gov.ie/en/INIS/Pages/Immigration%20in%20Ireland%20%E2%80%93%202013%20in%20Review> [accessed 23 September 2014].

<sup>61</sup> Amnesty International, 'Down and out in London - The road to destitution for rejected asylum seekers', London: 2006.

<sup>62</sup> European Union Agency for Fundamental Rights, 'Fundamental rights of migrants in an irregular situation in the European Union', Luxembourg: 2011 at 27.

<sup>63</sup> Matthew Gibney and Randall Hansen, 'Deportation and the liberal state: The forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom', *New Issues in Research*, Working Paper No. 77, Geneva: UNHCR, February 2003, p. 4.

<sup>64</sup> See supra note 62 at 29.

Finally, while the public may support removal conceptually, it tends to be ambivalent in practice in relation to individual cases where the only issue is a violation of immigration laws rather than reasons of public safety.

## 6.2 Becoming Non-Returnable

JRS Ireland recognises that the sensitive processes and procedures involved in effecting removals from the State are particularly challenging and is against the implementation of any fast-track processes to achieve that end. However, the State is still duty bound to ensure that applications, including those that are rejected and conclude with deportation, are resolved within a reasonable period of time. There must be a point when the failure to execute a deportation order necessitates a re-examination of the original application and an alternative remedy to removal. A failure to do so results in significant numbers of asylum seekers living in the Direct Provision system with the spectre of deportation hanging over them for years.

Unfortunately, there remains more than 900 people in this situation. This group has effectively reached the end of the process but are left in limbo and without the ability to influence their position or access remedial services or mechanisms. From a legal point of view, they should not be here and there are no effective provisions for them to avail of as they can neither be considered “in” (granted protection) or “out” (removed from the State)<sup>65</sup> despite the conclusion of the status determination process.

JRS Ireland works with many RIA residents who have been subject to a deportation order for several years, signing on each month with GNIB. This cohort is subject to considerable mental strain as their sentence in DP is indefinite. Essentially they have reached the end of the asylum process and their last legal hope has been quenched.

<i>Length of Time since Initial Asylum Application submitted</i>	<i>Number Subject to Deportation Order</i>
>1 since initial application	11
1-2 since initial application	5
2-3 since initial application	29
3-4 since initial application	124
4-5 since initial application	162
5-6 since initial application	197
6-7 since initial application	135
7+ since initial application	283

Their only hope is a ‘revocation’ of the deportation order, which has occurred under section 3(11) of the Immigration Act<sup>67</sup> in a very small number of cases over the last decade. It should be noted that some deportation orders have been revoked as a result of pragmatism on the part of State administration or as part of the agreed conditions of a judicial review out-of-court settlement.

## 6.3 International Responses

JRS national offices in many EU Member States have encountered the phenomenon of non-returnable migrants. In the case of unsuccessful asylum applicants, many have found themselves destitute as they have no rights under national laws.

<sup>65</sup> Mathilde Heegaard Bausager, Johanne Köpfler Møller and Solon Ardittis (2013), ‘Study on the situation of third-country nationals pending return / removal in the EU Member States and the Schengen Associated Countries’, prepared on behalf of the European Commission, at 4.

<sup>66</sup> See supra note 19.

<sup>67</sup> 150 orders were revoked between 1999 and the end of October 2012.

The experience of non-returnable migrants living destitute in cities and towns across Europe is captured in two JRS Europe reports, *Dying Silent*<sup>68</sup> and *Living in Limbo*<sup>69</sup>.

Some of the legal solutions provided in EU Member States where JRS is present include the: Regularisation of non-removed persons in exceptional circumstances in Belgium<sup>70</sup>; Temporary suspension of removal, provision of residence permits and regularisation in Germany<sup>71</sup>; Ad hoc regularisation in Italy<sup>72</sup>; Provision of tolerated status in Romania<sup>73</sup> and conditional temporary residence allocation in France<sup>74</sup>.

The European Union Agency for Fundamental Rights has argued that “*Mechanisms should be set up either at Union or Member State level to avoid a situation where persons who are not removed remain in legal limbo for many years*<sup>75</sup>” and steps have been taken by a number of other countries to put in place such mechanisms when a third-country national is actually cooperating with the return:

<b>Table 15: International Mechanisms for Non-Returnable Migrants</b> <sup>76</sup>	
<b>Member State</b>	<b>Mechanism</b>
Norway	Residence permit may be granted to failed asylum seekers if their return has been pending for more than 3 years and is unlikely to be enforced, on the condition that their identity is established and they have cooperated.
Netherlands	There are several possibilities to obtain a temporary residence permit based on situations in which return is not possible despite the third-country national cooperating on the return process.
Lithuania	After 1 year in official postponement, third-country nationals can be granted a temporary residence permit.
Sweden	When a return order expires after four years, a new application for asylum may be lodged. A right to stay will be granted on the basis of the new application if the third-country national can show the reasons for being non-removable have been beyond his control.

In total, one-third of EU Member States have enacted legislation that explicitly provides for the possibility of allowing irregular migrants to remain if their removal interferes unduly with their right to family life<sup>77</sup>. Also, the possibility for suspending removal, if it proves impossible due to technical reasons<sup>78</sup> or is considered to be in the public interest<sup>79</sup>, is available in roughly half of EU Member States. In recent years, regularisation programmes have also been used for the benefit of war refugees (Denmark), persons with expired permits (e.g. Greece) and other ‘unauthorized migrants’ (e.g. Spain and Portugal).

A consistent beneficiary of both practice<sup>80</sup> and theory<sup>81</sup> with regard to identifying target groups deserving of regularisation programmes or other legal solutions, is that of long term asylum seekers.

<sup>68</sup> Jesuit Refugee Service Europe, ‘We are Dying Silent: Report on Destitute Forced Migrants’, Belgium: 2007.

<sup>69</sup> Jesuit Refugee Service Europe, ‘ANDES Advocacy Network on Destitution | Living in Limbo – forced migrant destitution in Europe’, Belgium: 2010.

<sup>70</sup> See supra note 69 at 15.

<sup>71</sup> See supra note 69 at 27.

<sup>72</sup> See supra note 69 at 54.

<sup>73</sup> See supra note 69 at 96.

<sup>74</sup> See supra note 69 at 153.

<sup>75</sup> See supra note 62 at 11.

<sup>76</sup> See supra note 65, at 52-55.

<sup>77</sup> See supra note 62 at 30.

<sup>78</sup> See supra note 62 at 32.

<sup>79</sup> See supra note 62 at 34.

<sup>80</sup> Kate Brick (2011), ‘Regularization in the European Union: The Contentious Policy Tool’, *Insight*, Washington: Migration Policy Institute, 2011, at 10-17.

Criteria used for the basis of inclusion within such programmes has encompassed duration of stay, the undue length of asylum procedures, attempts to integrate into the host society and general issues of humanitarian concern – all of which apply in varying degree to asylum seekers living in excess of 5 years in Direct Provision.

#### **6.4 The Way Forward**

JRS Ireland recognises that the use of terminology such as regularisation, amnesty or normalisation often results in the severe demarcation between asylum seeker policy advocates and states' policy makers. It also understands that a blanket amnesty is not considered a practicable solution for those living long term in Direct Provision under the spectre of deportation as any such move could expose the State to liability.

However the fact remains that numerous regularisation programmes have been pursued by other states in recent years and past decades alike, to remedy anomalies within their immigration and asylum systems. These temporary measures are not ill-thought out, quick-fixes or knee jerk reactions to the challenges inherent in asylum systems, nor have they exposed other states to unwarranted legal action. Rather they are short term solutions that have the potential to offer satisfactory outcomes to both asylum seeker and the State<sup>82</sup>, when appropriately designed.

Finally, it should be noted that as *“important as the principle of maintaining the integrity of the asylum system undoubtedly is, it must sometimes yield – if only, perhaps, in unusual and exceptional cases - to countervailing and competing values...”*<sup>83</sup>. The reality is that many if not all of the asylum seekers subject to deportation orders, residing in DP centres, will never be deported. The question for policymakers is how long they have to stay in the system before this reality is recognised and at what cost to the State and to the individuals stuck in this situation.

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<sup>81</sup> International Centre for Migration Policy Development (2009), ‘Regularisations in Europe. Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU’, Ref. JLS/B4/2007/05.

<sup>82</sup> From the State's perspective, the Bishops Committee on Asylum Seekers and Refugees has long argued that by eliminating the backlog of unprocessed asylum applications through some form of regularisation, the target of processing new applications within six months would become considerably more attainable.

<sup>83</sup> *S. & Anor v MJELR*, [2011] IEHC 92, at para. 23.

## 7. Human Cost of Living Long Term in Direct Provision

### 7.1 Direct Provision System

Prior to 2000, people seeking asylum in Ireland were able to avail of mainstream social welfare payments, such as supplementary welfare allowance and rent supplement; in other words, they were assessed for entitlement along the same criteria as people already resident in the country. However, in the late 1990s the arrival of record numbers of people seeking the protection of the Irish State led to a change in policy in relation to the provision of accommodation and income for applicants during the processing of their claim. The result was the introduction of a system of ‘Direct Provision’. Under this system, people applying for asylum are accommodated in specified accommodation centres, which provide food and essentials such as heating, lighting and washing facilities. The system is under the administration of the Reception and Integration Agency (RIA).

New applicants are initially accommodated in a Reception Centre which is in Dublin, and are then allocated a place in one of the thirty-four accommodation centres located throughout the country. There are centres in sixteen of the country’s twenty-six counties, with several centres in the most populous locations – Dublin, Cork, Galway, Kerry, Limerick, and Waterford. Direct provision accommodation includes purpose-built centres; buildings that were formerly used as hotels, guesthouses, hostels, convents, or nursing homes; a mobile home site and a former holiday camp. Only two accommodation centres are self-catering.

In most cases, the parent or parents of young children will be allocated just one room in the accommodation centre for their entire family; single people usually have to share their living space with one or more residents of the same gender. Meals are provided at set times in a common dining room. Residents are not allowed to cook their own food. A weekly cash allowance of €19.10 per adult and €9.60 per child is payable to asylum seekers in Direct Provision centres.

Originally envisaged as a system that would accommodate individuals on a short-term basis (not more than six months)<sup>84</sup>, Direct Provision must be endured for on average four years (45 months) by asylum seekers and their families.

0>3	3>6	6>9	9>12	12>18	18>24	24>36	36>48	48>60	60>72	72>84	84+
247	233	162	181	249	301	414	450	511	<b>603</b>	<b>479</b>	<b>604</b>

Direct Provision, which may have merit as a form of short term secure accommodation, becomes one that is inhumane and cruel if it has to be endured on a long term basis. In the experience of JRS Ireland, the length of time people spend in the Direct Provision system is the greatest challenge to the delivery of services and promotion of integration. Long term residence increases the vulnerability of asylum seekers and their families to physical, emotional and mental trauma.

### 7.2 Boredom and Isolation

The prohibition from taking up any form of employment, imposed on asylum seekers in Ireland, is one of the most severe elements of the reception system and one that denies asylum seekers the opportunity to support themselves or their families in any meaningful way. Combined with limited access to education and the absence of any prospect of employing their qualifications or skills, adults living long term in Direct Provision must endure extreme boredom and isolation.

<sup>84</sup> Press release issued by the Minister for Justice, Equality and Law Reform, John O’Donoghue ED, reported in *The Irish Times*, Tuesday, 28 March 2000.

<sup>85</sup> See supra note 2.

### **Long Term Case Study 1:**

Theo is from an African country and has been in the Direct Provision system for over five years:

*I fled my country because I feared for my life. But since I have come to Ireland, I have found that there is more than one way to kill a person. I feel that while I am waiting for a decision these last four years I have been dying slowly.*

*I am deeply frustrated as an asylum seeker that I cannot work. I want to work. I do not want to be a burden on anyone. I want to pay my own way. About a year ago, I found myself getting depressed because there was no reason to get up in the morning. No reason to get out of bed. This is not good for a person. I lost hope and started to think bad thoughts.*

JRS Ireland helped Theo to return to education and to avail of volunteering opportunities in the community.

## **7.2 Family Life and Children**

Direct provision accommodation does not provide a normal family environment for raising children. A prolonged period living in this institutional setting, which is often characterised by inadequate and overcrowded physical conditions, can inhibit a child's healthy growth and development. For example, children and their parents have to share accommodation and common facilities with a large number of strangers. Often, children will grow up without the memory of their parents cooking a family meal. Parents' roles are further diminished by the fact that they are required to channel even the most basic decisions relating to their children's welfare through the management of the accommodation centre in which they are staying.

Living in Direct Provision becomes a defining element of a child's identity growing up. Services and activities are provided for them because they are asylum seekers. Unintentionally, such targeted provision can undermine integration by setting children apart from their peers. Lack of resources and the remote location of some centres may leave children socially excluded and cut off from the out-of-school activities of their classmates.

### **Long Term Case Study 2:**

The experience of Lisa, who has been transferred to four different Direct Provision hostels during her 9 years in Ireland, is indicative of the experience of many families:

*You know, if we had our own accommodation, I could cook what my children like and also get new clothes for them. When I see other people who came to Ireland after us get their papers, I feel almost hopeless and yet, for the sake of my children, I cannot lose hope.*

The long term consequences of growing up in the institutionalised environment of Direct Provision has to be a matter of concern. 500 children have been more than 5 years in the Direct Provision system. This constitutes a huge proportion of their lives. Few disagree that it is not an appropriate long term environment in which to raise children. Thus, JRS Ireland urges that applications involving children who have been long term in the system should be prioritised.

### 7.3 Creating Dependency

Despite the manifest control which the State has over the asylum and immigration system, it is not immune from the negative consequences associated with long term residence in Direct Provision. From a societal perspective, it is an illusion to believe that irregular migration can be completely tackled and that all irregularly staying third-country nationals will be removed in due time<sup>86</sup>. The reality is that there will always be a contingent of asylum seekers, who do not qualify for recognition as refugees, but who are nonetheless deserving of protection from the State for humanitarian reasons.

This need only intensifies with regard to asylum seekers who have been living long term in Direct Provision and who inevitably have taken active steps to integrate into Irish society, whether through schooling, the attainment of fluency with regard to the English language, participation in community work or the establishment of a network of friends and family.

An issue the State must consider, irrespective of the humanitarian propriety in granting some form of leave to remain in Ireland, is what condition long term asylum seekers - who may have suffered demotivation, despair and atrophy of their qualifications and capabilities – will be in when finally allowed to participate fully in society. Asylum seekers who have been out of the labour market for years and who have limited educational opportunities will struggle to find employment. The indirect result of prolonged periods of stay within Direct Provision will have been to create a dependent cohort of people who require State support long after their eventual departure from the system.

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<sup>86</sup> This contention has been borne out in research conducted by JRS Europe in its reports *Dying Silent* and *Living in Limbo*.

## 8. Conclusion: Structural Challenges in Asylum System

### Duration Priority Concern

1. A State has, of course, a right to control its borders but that right is not unrestricted. Natural justice requires that a fair and transparent asylum process is provided *and* that applications within that system are processed and concluded within a reasonable period of time.
2. In the experience of JRS Ireland providing outreach and delivering services in 10 Direct Provision centres the biggest single issue facing asylum seekers is the length time spent in the asylum process. The most negative aspects of life in Direct Provision such as institutionalisation, adverse effect on family life and relationships, the obsolescence of skills and qualifications and the creation of dependency are functions of duration and exacerbated by the length of time in the system.
3. Three in seven asylum seekers have been waiting at least five years since they first applied for asylum in Ireland.
4. The average length of time spent by protection applications in the asylum process, now more than 4 years, has increased on a yearly basis.
5. There are four main cohorts of people living long term in Direct Provision:
  - i. Persons awaiting determination of applications for leave to remain on humanitarian grounds under Section 3 of the 1999 Immigration Act.
  - ii. Persons with outstanding subsidiary protection applications and engaged in the new arrangements for the processing of applications.
  - iii. Applicants subject to a deportation order, signing on with Garda National Immigration Bureau.
  - iv. The fourth category is cross cutting; applicants awaiting or engaged in Judicial Review proceedings.

### Where are Applicants on Hold in Asylum Process?

6. At the end of December 2013 there were more than 1,900 RIA residents who submitted their initial asylum application 5 or more years ago. Based on available data a breakdown across the four cohorts is estimated as follows:

1. Number seeking Judicial Review	900
2. Number subject to a Deportation Order	300
3. O/S Subsidiary Protection Applications	450
4. O/S Leave to Remain Applications	<u>250</u>
	1,900

7. As a result of the new structures put in place to address the backlog of subsidiary protection and leave to remain applications, considerable progress has been made over the past 12 months for two of the long term cohorts.
8. The key structural challenges arise in respect of applicants awaiting judicial review proceedings or subject to deportation orders. These should be the priority concern of policymakers.

### Judicial Review

9. In light of the scale of the backlog and the inordinate delays (of up to four years) in completing judicial reviews there is an urgent need for reforms to be undertaken to address the underlying process and unsatisfactory final outcomes.

10. The issue of insufficient court resources must be remedied ideally through the assignment of more judges. However, even with additional judicial resources to tackle the backlog of cases, not all decisions will result in a fresh hearing and/or the awarding of protection. In parallel or as an alternative, a case-by case review could be employed to provide durable solutions for this cohort.

### Deportation

11. Deportation remains a relatively rare occurrence and there are legal, humanitarian, technical and policy-related obstacles to enforcing removal. However, there must be a point when the failure to execute a deportation order necessitates a re-examination of the original application and an alternative remedy to removal.
12. The concept of non-returnable migrants is recognised as a Europe-wide phenomenon and there will always be a contingent of asylum seekers, who do not qualify for recognition as refugees, but who are nonetheless deserving of protection from the State for humanitarian reasons.

13. There is evidence of a growing cohort of applicants who are in Direct Provision subject to deportation orders who are facing an indefinite sentence in the system. This group are at the end of the process and 'stuck' with their lives on hold. A systematic response to resolve their situation is required.

### Human Cost

14. The human costs of living long term in Direct Provision are significant. The prohibition from taking up employment combined with limited access to education ensures adult residents endure extreme boredom and isolation.
15. More than one third of residents in Direct Provision are children. A prolonged period in the institutional environment of Direct Provision can inhibit a child's healthy growth and development. For example, many grow up without the memory of their parents ever having prepared a family meal.

16. A consequence of applicants spending years and years within Direct Provision is likely to result in the emergence of a dependent cohort of people who will require State support long after their eventual departure from the system.

### The Way Forward

17. JRS Ireland understands the constraints operative within the policy of successive Irish Governments to avoid initiatives or programmes that could potentially (a) act as a pull-factor, (b) set a precedent or (c) prove financially more burdensome. These constraints have to be balanced against the human costs for individuals, families and children with their lives on hold, living long term in the Direct Provision system with no end in sight.

18. A Single Procedure will represent an important structural reform but will not be a panacea for all the flaws in the asylum system. In particular it will not address the situation of the long term cohorts residing in Direct Provision.

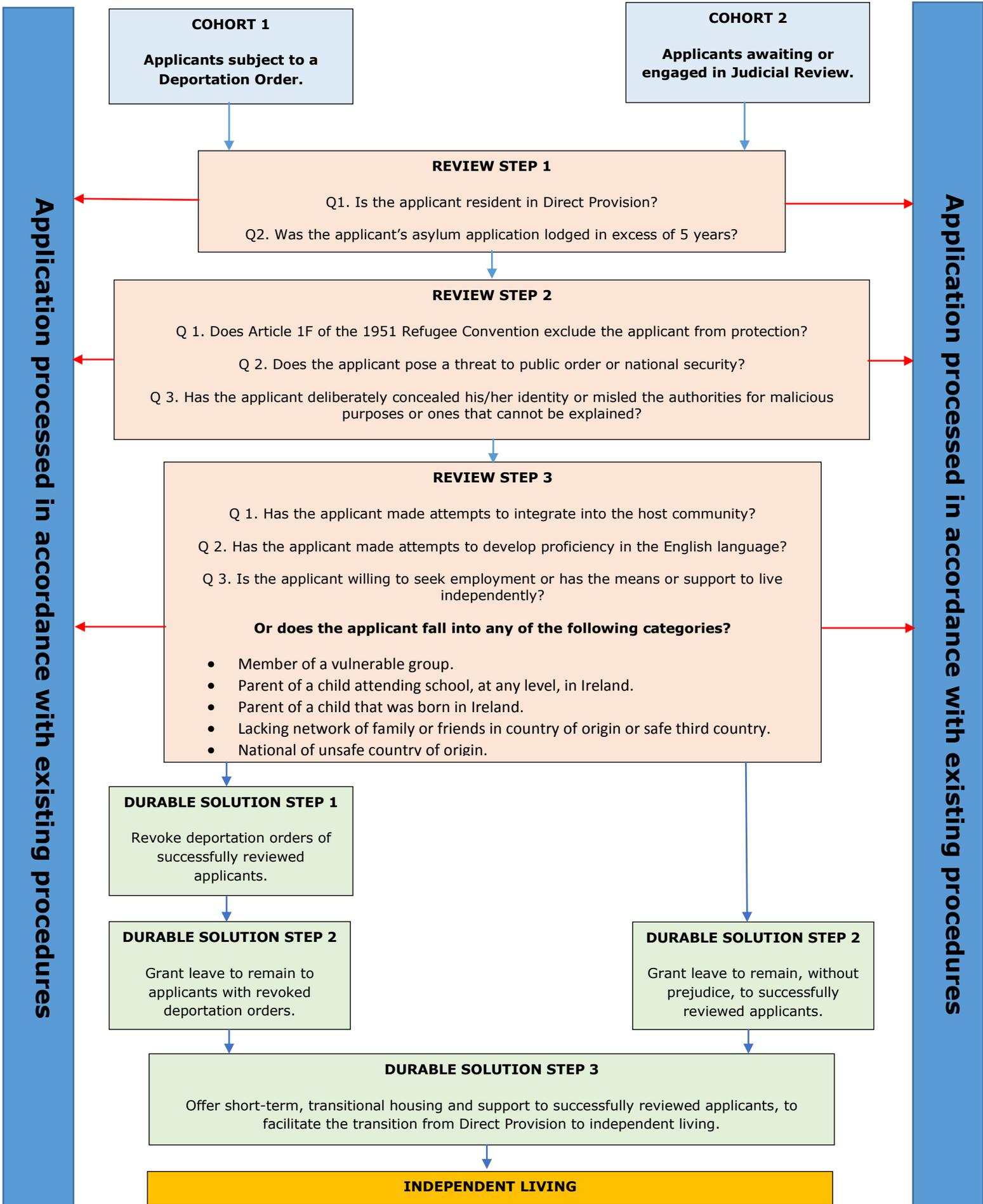
19. JRS Ireland proposes durable solutions in respect of each cohort. For long term applicants awaiting judicial review or subject to deportation orders an accompanying flow chart outlines the operation of a systematic case-by-case review.

## 9. JRS Ireland Recommendations: Durable Solutions for Long Term RIA Residents

<b>Table 17: Recommended Durable Solutions by Long Term Cohort</b>		
<b>Cohort Living Long Term in Direct Provision</b>	<b>Priority Action</b>	<b>Additional Actions</b>
1. Estimated 900 persons awaiting or engaged in Judicial Review proceedings.	To assign and/or appoint additional judges to hear more cases and clear the current backlog.	Where appropriate; ORAC, RAT and INIS to seek to settle proceedings within 6 months, prioritising cases that involve children, and proceed to hearings only with cases that they intend to contest.
	The Minister for Justice and Equality to initiate a case-by-case review in order to grant leave to remain, without prejudice, to all persons who satisfy the qualifying criteria and eligibility factors.  <i>(See attached flowchart)</i>	The Attorney General to request the Law Reform Commission to examine the operation of Section 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended.
		Assign a court or panel of judges dedicated to considering asylum related judicial review cases and/or future appeals following the implementation of a single procedure for adjudicating asylum applicants.
2. Estimated 300 persons subject to a Deportation Order, signing on monthly with the Garda National Immigration Bureau.	The Minister for Justice and Equality to initiate a case-by-case review in order to revoke deportation orders and grant leave to remain to all persons who satisfy the qualifying criteria and eligibility factors.  <i>(See attached flowchart)</i>	No deportation orders to be issued or executed that would adversely impact on the best interests of a child integrated into Irish society.
		Going forward to review the issuing of deportation orders to long term RIA residents especially those from unsafe countries of origin e.g. Somalia, Iraq, etc.
3. Estimated 450 persons awaiting a final decision on outstanding subsidiary protection applications and the new arrangements for the processing of applications.	A commitment by the ORAC to review and conclude all outstanding subsidiary protection applications within 6 months, prioritising cases that involve children.	A commitment by the Department of Justice and Equality (DJE) to review the new arrangements for processing applications before the end of 2014 to ensure decisions are being reached in a timely and transparent manner.
4. Estimated 250 persons awaiting a final decision on applications for leave to remain on humanitarian grounds under Section 3 of the 1999 Immigration Act.	A commitment by the DJE to review and conclude all outstanding leave to remain applications within 6 months, prioritising cases that involve children.	The DJE to mobilise/ second resources to enhance decision making capacity and accelerate the process.
		The DJE to conduct the review and utilise qualifying criteria and additional eligibility factors suggested above.

# Flow Chart: Case by Case Review

## Systematic Review and Clearance of Backlogs in Asylum Process



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## **Appendix A - Qualifying and Eligibility Criteria**

JRS Ireland offers a number of qualifying criteria to prioritise cases in process:

1. Does Article 1F (excluding war criminals) of the 1951 Refugee Convention exclude the applicant from protection?
2. Does the applicant pose a threat to public order or national security?
3. Has the applicant deliberately concealed his/her identity or misled the authorities for malicious purposes or ones that cannot be explained?
4. Has the applicant made attempts to integrate into the host community?
5. Has the applicant made attempts to develop proficiency in the English language?
6. Is the applicant willing to seek employment or has the means or support to live independently?

Additional eligibility factors that would add weight to prioritisation might include:

- The applicant is a member of a vulnerable group, e.g. minors and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.
- The applicant has a child attending school, at any level, in Ireland.
- The applicant has/is a child that was born in Ireland.
- The applicant no longer has a network of family or friends in their country of origin or safe third country.
- The length of time since initial application submitted.
- Country of origin, especially for RIA residents subject to a deportation order.

## **Appendix B - JRS Ireland Detailed Durable Solutions**

### **Durable Solution: Cohort 1 – Judicial Review Cases**

*For the 900 persons with asylum applications lodged IN EXCESS OF 5 YEARS and;*

*1) Awaiting or engaged in Judicial Review proceedings.*

- The Minister for Justice and Equality to grant leave to remain, without prejudice, to all persons based on the qualifying criteria and additional eligibility factors suggested above.
- Where appropriate; ORAC, RAT and INIS to seek to settle proceedings within 6 months, prioritising cases that involve children, and proceed to hearings only with cases that they intend to contest.
- The Attorney General to request the Law Reform Commission to examine the operation of Section 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended.
- Going forward, to assign a court or panel of judges dedicated to considering asylum related judicial review cases and/or future appeals following the implementation of a single procedure for adjudicating asylum applicants.

The experience of JRS Ireland, as outlined in this paper, strongly suggests that structural faults within the Irish asylum system are leading asylum seekers to seek remedial action from the courts. Alternative remedies must be provided that, while not prejudicing an individual's right of access to the courts, helps realise a final determination of their claim. Going forward there is also a need to correct the deficiencies that exist within the judicial review process itself.

### **Durable Solution: Cohort 2 – RIA Residents subject to a Deportation Order**

*For 300 persons with asylum applications lodged IN EXCESS OF 5 YEARS and;*

*2) Subject to a deportation order, signing on monthly with the Garda National Immigration Bureau.*

- No deportation orders to be issued or executed that would adversely impact on the best interests of a child integrated into Irish society.
- The Minister for Justice and Equality to consider revoking deportation orders and offering leave to remain as an alternative to removal where a person obtains eligibility based on meeting specific qualifying criteria and eligibility factors.
- Going forward to review the issuing of deportation orders to long term RIA residents especially those from unsafe countries of origin e.g. Somalia, Iraq, etc.,

JRS Ireland acknowledges there are concerns with any systematic revocation of deportation orders. Yet the reality is that many if not all of the asylum seekers currently subject to deportation orders and living in DP will never be deported. It makes sense to acknowledge the reality of the phenomenon of non-returnable migrants. Clearly this review process needs to be conducted in a way that does not undermine the integrity of the deportation system. However, in the experience of JRS Ireland, there are cases where deportation orders issued have been revoked without the veracity of the system being destabilised.

## **Durable Solution: Cohort 3 – Outstanding Applications for Subsidiary Protection**

*For the 450 persons with asylum applications lodged IN EXCESS OF 5 YEARS and;*

*3) Awaiting a final decision on outstanding subsidiary protection applications and the new arrangements for the processing of applications.*

- A commitment by the Department of Justice and Equality (DJE) to review the new arrangements for processing applications before the end of 2014 to ensure decisions are being reached in a timely and transparent manner.
- A commitment by the ORAC to review and conclude all outstanding subsidiary protection applications within 6 months, prioritising cases that involve children.

JRS Ireland recognises the progress made by ORAC in implementing new Subsidiary Protection determination procedures and making substantial in tackling the backlog. However, there is also an obligation to continue to prioritise these measures given the previous suspension of the processing of subsidiary protection applications and the impact of those delays for applicants and their families.

## **Durable Solution: Cohort 4 – Outstanding Applications for Leave to Remain**

*For the 250 persons with asylum applications lodged IN EXCESS OF 5 YEARS and;*

*4) Awaiting a final decision on applications for leave to remain on humanitarian grounds under Section 3 of the 1999 Immigration Act.*

- A commitment by the DJE to review and conclude all outstanding leave to remain applications within 6 months, prioritising cases that involve children.
- The DJE to mobilise/ second resources to enhance decision making capacity and accelerate the process.
- The DJE to conduct the review and utilise qualifying criteria and additional eligibility factors suggested above.

It is the recent experience of JRS Ireland that an increased number of leave to remain applications are being positively concluded. JRS Ireland also recognises that there will always be a percentage of outstanding applications at any given time. However, given the relatively low number of outstanding applications, a dedicated allocation of resources could conclude the remainder in a short period of time and simultaneously address the lack of consistency that has been raised as a concern by applicants.