Neutral Citation [2015] IEHC 432

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 31 J.R.]

BETWEEN

C. A. AND T. A. [COSTS]

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 10th day of June 2014.

1. This is the judgment of the court on costs applications arising from the judgment delivered in these proceedings on the 14 November, 2014. (The applicants are mother and son but for ease of reference I shall refer to the mother as the applicant) Both parties have sought their costs to which they say they are entitled on a straightforward application of the default rule as to costs as provided by Ord. 99 r.1 (4) of the Superior Courts which is that costs "shall…follow the event". In other words both parties argue that they have succeeded to some extent. The relevant event for the applicant was its success in securing relief which it had sue to obtain. The relevant event for the respondent was its overwhelming success in resisting the vast majority of the applicant's claims. Alternative positions were also argued and these will be described in more detail later.

2. To appreciate some of the costs arguments made it is necessary to set out certain core documents and pleadings in full. I have set out some of these documents in schedules attached to this judgment.

3. As will be seen from a cursory consideration of these documents the applicant launched a comprehensive attack on the state's reception facilities for asylum/subsidiary protection seekers. Ms. Butler S.C. for the respondent stated that the proceedings aimed a cannonball at every aspect of the reception facilities and related rules referred to throughout the proceedings as "direct provision". The proceedings were indeed ambitious in seeking to attack every conceivable aspect of direct provision - not a formal scheme but a set of circumstances derived from government action and statutory provision - in one court action. The analogy of a cannonball does not adequately describe the nature of the assault which was attempted. The proceedings, in my view, were more in the nature of a cluster bomb, most of which missed its target. The court was aware that in parallel with these proceedings - whether by design or not- a public campaign against the perceived deficiencies in "direct provision" was underway. During the costs application I referred to this litigation as "a campaigning case" and counsel for the applicants' did not demur.

4. The applicant entered direct provision in April 2010. The first complaint (apart from some very minor issues) she made about her circumstances was through her solicitors by letter dated 10th September, 2013. The letter is at schedule 1 hereof. It is a letter of extraordinary length. Like much of the written material advanced on behalf of the applicant, the same effect or better effect could have been achieved using a fraction of the number of words. As will be seen this is not a gratuitous criticism. The reply to the letter is at schedule 2.

5. Not being satisfied with the reply received the applicant instituted these proceedings, very shortly after the exchange of letters, by ex parte application for leave to seek judicial review which the court ordered to be heard on notice. The State did not contest the leave application and leave was granted in the terms in which it was sought. The statement required to ground application for judicial review is at schedule 3 hereof.

6. The case was at hearing for twenty-three days and there were a number of directions hearings. Given the grave allegations of breach of human rights which were alleged, the court was anxious to give the earliest possible date for hearing and permitted the case to commence prior to the delivery of most of the affidavits in the belief that any disadvantage or difficulties which might thereby be caused were outweighed by the expedition achieved in hearing the applicant's case. In retrospect the court regrets having permitted the case to commence when affidavits were awaited. It was in these circumstances that a case which was indicated (by the applicant) would take a week and would not involve any dispute as to facts became a six-week case with fundamental and irresolvable disputes as to fact. In all nine affidavits were filed during the course of the case. With each new affidavit the extent of the dispute as to facts deepened.

7. Prior to the hearing the court expressed concern as to possible disputes as to fact. The court also asked for an issues paper which was delivered by the applicant though not with the agreement of the respondent. No issue identified on that paper is referable to a dispute as to facts. Had the court waited for all of the affidavits to be filed before commencing the hearing it would have been possible to identify the extent as to the dispute as to facts and to suggest or order a plenary hearing or to suggest cross examination on affidavit as a means of permitting the court to resolve disputed facts. At no stage did the applicant seek such measures.

8. Distinct costs arguments were made in relation to the costs of matters adjudicated upon by the court and in relation to measures raised by the proceeding but rendered moot. I shall deal first with the costs of the matters adjudicated upon by the court in its judgment of the 14th November, 2014. The court identified three issues which required adjudication: -

1. Direct provision is a breach of human rights under the Constitution and the European Convention on Human Rights.

2. The direct provision allowance was unlawful.

3. The direct provision scheme is a breach of Article 15 and/or Article 28 of the Constitution.

The respondent acknowledges that the applicant's chief success was in securing the following order from the court: -

"The Court doth declare that

1) the provisions of the current Reception and Integration Agency House Rules in relation to –

a. the room inspection regime

b. monitoring of presence by way of daily sign-in/registration

c. requirement to notify intended absence

d. prohibition on receiving guests in private quarters constitute a disproportionate interference with the Applicants' right to privacy pursuant to Article 40.3 of the Constitution

2) the Applicants are entitled to an independent complaints handling procedure in respect of their direct provision accommodation."

9. However the respondent says that that the matter in which the applicant succeeded was barely mentioned in the letter before action or in the applicant's pleadings. I agree with this submission. Whilst acknowledging that the success achieved is of personal importance to the applicant the respondent argues that the extent of the matters in which the applicant succeeded were a very minor part of the overall breach of human rights alleged and in turn, an even more minor part of the proceedings generally. The respondent also accepts that the applicant succeeded in defeating the respondent's argument that the proceedings constituted an attempt to enforce unenforceable social economic rights.

10. Apart from the complaint as to house rules invading privacy and the absence of an independent complaints handling procedure, the focus of the human rights complaint was on the alleged negative effect of direct provision on the applicant. Approximately nine days of the trial was spent dealing with this issue and most of than was spent arguing breaches of the European Convention on Human Rights.

11. During the course of the trial the court observed that no remedies pursuant to the Human Rights Act, 2003 had been sought in the pleadings. The applicant resisted the contention that relief under that Act was the exclusive remedy for breach of a Convention right. The court ultimately ruled that the applicant's pleadings were deficient by reason of this omission and granted the applicant liberty to seek to amend the proceedings to include a claim for damages under the 2003 Act. The respondent did not oppose the application but the court adjourned the application until it had decided whether or not a breach of the Convention had occurred. The reason for this decision was that by the time the application to amend was accepted by the applicant to be necessary, the hearing in relation to the alleged breach of Human Rights had concluded. In the event that no breach of the Convention was found the amendments sought would have been unnecessary.

12. Following the delivery of judgment the application to amend was initially pursued but nominal damages only were sought in connection with the established breach of rights. The court queried why the applicant sought nominal damages only which seemed peculiar given the established poverty of the applicant and her elaborate complaint about the degraded circumstances of her life attributable in part at least to the fact that she received only €19 or so per week from the State (who provide her with housing, food, heat, healthcare, education for her son etc.). The applicant then decided not to pursue her application to amend the proceedings and thereby withdrew any allegation of breach of the Convention, being satisfied that the remedy based on breach of Constitutional rights was sufficient to support the issue on which she had succeeded.

13. The respondent has argued that this retrospective abandonment of the allegations of breach of the E.C.H.R. should be weighed in any costs order. On one interpretation the effect of the applicant's withdrawal of her application to amend the pleadings to include the proper claim relative to breach of the Convention is that the court's time and the respondents' time were entirely wasted by the lengthy submissions on the topic at trial, not to mention the time spent reading through multiple lever arch folders of E.C.H.R. jurisprudence and lengthy pleadings and written submissions.

14. The second significant submission by the respondent in respect of the human rights module is that the human rights claim with the exception of the privacy elements failed because the applicant did not discharge the burden of proof to establish that negative effects had been caused.

15. Overall the respondent concedes that the applicant is entitled to an acknowledgement in costs of the extent of her success. They submit that the applicant is entitled to approximately 20% of the overall costs of the proceedings in recognition of the success achieved on the breach of the right to privacy, the right to an independent complaints handling procedure and the success of the argument on the socio economic rights issue.

16. The respondent submits that they were completely successful in defeating the applicant's case regarding direct provision being a breach of Article 15/28 of the Constitution. Similarly, the respondents say they are entitled to an award of costs in respect of the module concerning the legality of the direct provision allowance.

17. The respondents say that approximately five days of the action was taken up with procedural arguments which the applicants lost. The first of these issues related to the applicants attempt to introduce documents for the purposes of establishing facts in the case. The court ruled that the statements in the documents were inadmissible hearsay. Secondly, the respondent succeeded in defeating the applicant's argument concerning the exclusive nature of remedies for breach of the E.C.H.R. as established by the Human Rights Act, 2003. In the round the respondent says that it won the vast majority of issues in dispute (including an issue as to whether the provisions of the EU Charter of Fundamental Rights applied - the Court rules that it did not) and the ultimate order which the court should make is to direct the applicants to pay the respondent 80% of the proceedings, 20% reduction being an acknowledgment of the relatively minor success achieved.

18. The applicant has urged the court to identify their success as the event which should determine the costs of the whole of the proceedings. In the alternative they argue, acknowledging that this case falls to be treated in line with those exceptional decisions where costs are awarded to a losing party As a further alternative it is argued that the applicant be awarded costs of the issues which were won and no order for costs for the respondents'. It was submitted that costs of the applicant's successful issues are in the region of 30%- 40% of the overall costs.

19. The principles which govern the exercise of discretion in favour of the unsuccessful party have been set out in a number of decisions which have been usefully summarised in a recent decision of a divisional High Court entitled *Collins v. Minister for Finance & Ors* [2014] I.E.H.C. 79.

20. The principles identified by the Court were as follows: -

"13. First, costs (either full or partial) have been awarded against the State in cases where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition. Examples here might include *Norris v. Attorney General* [1984] I.R. 36 (homosexuality), *Roche v. Roche* [2006] I.E.S.C. 10 (the constitutional status of human embryos) and *Fleming v. Ireland* (2014) (assisted suicide).

14. Second, costs have similarly been awarded to losing plaintiffs in constitutional cases of conspicuous novelty, often where the issue touched on aspects of the separation of power between the various branches of government. Examples here include *Horgan v. An Taoiseach* [2003] 2 I.R. 468 (what constituted participation in war for the purposes of Article 28) and *Curtin v. Dáil Éireann* [2006] I.E.S.C. 27 (aspects of the judicial impeachment power).

15. Third, costs have been awarded where the issue was one of far reaching importance in an area of the law with general application. Examples include *T.F. v. Ireland* [1995] (constitutionality of Judicial Separation and Family Law Reform Act 1989), *O'Shiel v. Minister for Education* [1999] 2 I.R. 321 (aspects of the State's duty under Article 42.4 to provide for free primary education), *Enright v. Ireland* [2003] 2 I.R. 321 (constitutionally of the Sexual Offenders Act 2001) and *M.D. (a minor) v. Ireland* [2012] I.E.S.C. 10, [2012] 1 I.R. 697 (constitutionality of legislation making it an offences under under-age males only to have sexual intercourse with under-age females) (sic).

16. Fourth, in some cases the courts have stressed that the decision has clarified an otherwise obscure or unexplored area of the law. This point was emphasised by Murray C.J. in dealing with the costs question in *Curtin*. This was, after all, the first case in which the impeachment provisions of Article 35 had ever been commenced by the Houses of the Oireachtas in respect of a serving judge…

17. Fifth, as Murray C.J. pointed out in *Dunne*, the fact that the litigant has not been brought for personal advantage and that the issues raised 'are of special and general public importance are factors which may be taken into account.' As *Dunne* itself shows, however, the mere fact that a litigant raises such issues in circumstances where no suit is brought for purely personal advantage does not in itself justify a departure from the general rule…

18. Sixth, even in those cases where the court was minded to depart from the general rule and award the plaintiff costs, this did not necessarily mean that the plaintiff was held to be entitled to full costs. Thus, for example, in both *Horgan* and *Curtin* the respective plaintiffs were awarded 50% of their costs. In yet other cases – such as *Roche v. Roche* and *Fleming v. Ireland* – full costs were awarded to the losing party in this Court."

21. Ms. Butler for the respondent argues that no significant point of public law or Constitutional law was clarified or achieved in the litigation. In particular she argues that the complex and lengthy module of the case relative to human rights failed to advance any matters of public interest because it essentially failed due to the absence of adequate evidence. The legal question as to whether direct provision breaches human rights was left undetermined because of the paucity of the evidence. In addition, it is said that no novel point in relation to the extent of executive powers was addressed and that the question of the legality of the direct provision allowance was not of such special importance as to attract a positive costs order for the losing party. This was not a case, she says, which decided significant legal questions.

22. The applicant argues that the special features of the case which merit an award of costs notwithstanding the extent of the applicant's losses relate to the marginalised circumstances of the applicant being an international protection seeker living for a very lengthy period in circumstances which were only ever intended to be for six months but due to the delays by the State in processing her application for subsidiary protection she has ended up living in difficult circumstances for a long time. Her case, it is said is like that of Mr. Norris because it concerned the sensitivity of the human condition arising from her feeling of being in limbo in a hopeless environment with no end in sight, prohibited from working or from receiving social welfare and having a miniscule amount of money. She said that great public controversy has been caused by the direct provision system and that the Government has acknowledged the controversy by establishing a review of the regime.

23. The costs of these proceedings are a matter within the discretion of the court. That is the first principle of Order 99 RSC. If I wish to depart from the default rule that costs follow the event, I may only do so for stated reasons. I must be convinced that the interests of justice are served by any order I might make.

24. I do not accept that this case has any special feature or characteristic which would permit the court to award the losing party her costs. In the context of this case what this means is that I am unwilling to award the applicant the costs of the issues on which she did not succeed. I agree with the respondent and disagree with the applicant in their competing assessments as to the percentage of the costs which should be attributed to the success the applicant achieved. My decision is that the applicant's success is attributable to about 20% of the time and effort expended in preparing and running these proceedings.

25. The respondent has strenuously urged the court to make an order for costs against the applicant in respect of the very many issues on which the respondent succeeded. Notwithstanding my rejection of the applicant's argument that there were special features in the case which would permit the applicant to recover costs in respect of the matters which the respondent won, I am of the view that awarding the respondent its costs would cause significant injury to the interests of justice, not only in this case but also more generally. The reason I say this is because such an order would be set-off against the costs awarded to the applicant in respect of the matters on which she succeeded thereby ensuring that the applicant's lawyers would not be paid for the work they did in respect of these issues. (In answer to a question posed by the Court, and which the Court indicated it would respect a refusal to answer, the applicant has confirmed that the applicant's case was completely unfunded and that her lawyers acted on a conditional fee arrangement meaning that the applicant's liability for fees and outlay would only arise in the event that the respondent was required to pay costs.) (Lest it need to be said, I reject any suggestion that such arrangements disentitle a party from securing costs on taxation on the basis that such party has no liability to his or her own lawyers and therefore the party against whom costs have been ordered has no liability either, notwithstanding the costs order of the court. Such a view is not consonant with modern reality.)

26. If this were ordinary private litigation the court would have no reason to be concerned by the possibility of the applicant's lawyers not being paid. However, the court acknowledges that the only manner in which a person in the circumstances of the applicant can exercise a right of access to court is if her lawyers are willing to act on a conditional fee basis. That a vulnerable group of people have been living in the challenging circumstances of direct provision for extremely lengthy periods of time, well beyond the six months for which the scheme was intended, is exclusively attributable to inefficiencies on the State side. The sorry saga of direct provision cannot be described as the State's finest hour. A legal challenge of some sort was surely inevitable – as inevitable as the public campaign addressed to the Government. To award the respondent the costs of the issues which it won would have a chilling effect on litigation of this sort and might have the effect of denying vulnerable and marginalised people their constitutional right of access to the courts. Therefore, I refuse to make an order in favour of the respondents.

27. However, much of the submission by the respondent in respect of the inefficient manner in which the litigation was conducted by the applicant has merit. In particular the court accepts that the applicant failed to assess how to discharge the burden of proof with respect to facts they needed to prove in order to succeed. The case had all the hallmarks of not having been subject to a careful "advice on proofs" scrutiny.

28. I also accept the respondents' submission that there was confusion in and prolixity of pleading which added to the expense and difficulty of the case. As can be seen from the pleadings which are set out in schedule 3, they seem to be the sort of "over extensive" pleading identified by the Supreme Court in the decision of *Babbington v. The Minister for Justice* [2012] IESC 65. I refer to the dicta of MacMenamin J where he said at para. 9 :-

> "Time which is wasted in court is the public's time. Judges of the Superior Courts have a broad discretion in dealing with costs issues, subject to precedent and guidelines occasionally laid down by this Court. The fact that leave is granted on a more limited basis, when over-extensive grounds have been pleaded by an applicant, may be met with a sanction in costs. The fact that an applicant obtains leave on a broad range of grounds, and then abandons some of these only at the start of the hearing may also meet the same outcome."

28. I agree with the respondent that the letter before action (see schedule 1), far from clarifying issues and setting up proceedings, succeeded in causing confusion and difficulty by raising countless issues without any obvious hierarchy and demanding an immediate response. One can only sympathise with officials who had to grapple with this extraordinary missive. The respondent has correctly submitted that the attitude of the applicant to the hearsay issue and the Human Rights Act issue displayed a degree of intransigence which added to the expense and length of the trial. I also bear in mind that the allegations of breaches of the E.C.H.R. were abandoned after the case had been concluded, meaning that the entire consideration of these complex issues was a waste of the respondent's time and of the court's time. This was a waste of scarce public resources.

29. I accept that it is especially important in cases of this nature that lawyers acting for vulnerable people do not believe they can plead and argue every conceivable point in the belief that if they win something they'll be paid for everything. Indeed one of the attractive features of conditional fee cases is that lawyers are usually discriminating in what points should be taken. Given that a litigant in a special case might ask the victorious party to pay its costs, special care is required to conduct such litigation efficiently and in a manner which does not unreasonably inflate expense for a defendant. For these reasons I have decided to award the applicant 20% of the costs of the proceedings but that the resulting amount is to be reduced by 25% to take account of the inefficiencies which characterised the applicant's approach to the litigation.

Mootness

30. As can be seen from the pleadings set out in the schedule, the applicant sought reliefs relative to obtaining permission to be in the State pending outcome of her application for subsidiary protection. She also sought a different regime for the processing of such application. By the time the trial commenced, no reliefs in respect of these matters were needed because a regime for subsidiary protection had been established and formal permission had been granted to the applicant to remain in the State pending the outcome of her application for subsidiary protection.

31. The proper approach to costs of proceedings which have become moot is outlined by Clark J. in *Cunningham v. President of the Circuit Court & Anor* [2012] 3 I.R. 222. The learned judge states, at para. 24, as follows: -

> "…a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot."

He goes onto say, at para. 27: -

> "Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of proceedings rendered moot should lie.

32. On the facts of this case, the establishment of the new regime for subsidiary protection caused the claim in relation thereto to become moot and the mootness was clearly caused by the unilateral action of the respondent. However, due to the proximity of the application for relief to the introduction of new legislation it could not be said that this application prompted the legislative change. The changes were flagged well in advance of the letter before action and lawyers practising in this area, including the applicants' lawyers must be taken to have been informed that a new regime was imminent. The applicant is not entitled to costs of this issue.

33. As to the second moot issue, the respondent at first denied that the applicant was entitled to formal permission to be in the State pending the outcome of her application for subsidiary protection. This position was reversed after litigation commenced. My view is that the applicant is entitled to the costs of this issue. In the context of the pleadings, the point hardly features and given the fact that other then including the point in the letter before action and in the pleading it is difficult to see how it has added in any significant was to the efforts expended by the applicant's lawyers. In an effort to avoid expense in seeking to isolate and quantify the costs of this issue, I am prepared to award the applicant costs of €1500 plus V.A.T. to cover solicitor and counsel work on the matter. I am aware that I am making this finding without the assistance of evidence as to costs of the issue but I am not sure it would be possible for any expert to isolate and separately assess the costs of this minor issue among so many more complex matters without disproportionate (and expensive) effort. This court is in a much better position to do this because of its familiarity with the proceedings. Had it been the only issue litigated I acknowledge that much greater costs would have been achieved but as a small point in a big case, a different approach is appropriate.

34. I therefore order the respondent to pay the applicant 20% of the costs of the proceedings less 25% of that sum, to be taxed in default of agreement, plus €1500 and V.A.T..

Applicant's Letter Before Action

Mr. James Boyle

Repatriation Unit,

INIS,

Dept. Justice Equality and Law Reform

13/14 Burgh Quay

Dublin 2

Fax: 01 6167814

AND

Minister Joan Burton T.D. (Jacinta Crawford, Private Secretary to the Minister),

Minister for Social Protection

Arás Mhic Dhiarmada,

Store Street,

Dublin 1.

Fax: 01 7043869

10th September, 2013 Our ref: UOB/IM/A1903

Re: Our client – C. A., a Ugandan national (Legacy Ref: 69/475/10, INIS Ref; 350487-10, Application No. 1501097-11), & her son T. A./G. (a minor) (Legacy Ref: 69/475/10, INIS Ref; 350487-10, Application No. 1501097-11).

Outstanding subsidiary protection applications/Application for temporary leave to remain [temporary residence certificates]/application for permission to reside with permission to work/Direct Provision Scheme and Arrangements/Access to Social Welfare Benefit

Dear Mr. Boyle/Minister Burton,

We refer to our above named clients and to their outstanding applications for subsidiary protection (made by letters dated of 12th and 19th December, 2011). C. A. is a Ugandan national who claimed asylum in Ireland upon her arrival in the state on 12th April, 2010. Ms. A. gave birth to her son, T. A./G., on 22nd January, 2011, and made an application for asylum on his behalf in February, 2011.

As you will be aware our clients who have outstanding applications for subsidiary protection, are living under the direct provision scheme/in direct provision accommodation, and in respect of Ms. A., since her arrival in the state in April 2010 (in excess of three years). Ms. A. is most anxious to have her and her young son's outstanding applications for subsidiary protection determined as soon as possible and with due and reasonable expedition, and in a decision making system and process which meets and accords with fair procedures and natural justice and EU and national law. She is particularly anxious for her and her child's status in the state to be regularised so that she will be in a position to provide for her child in a secure, stable and more long term/permanent environment and circumstances, and extricate herself, together with her young child from the current limbo, uncertain, wholly unsuitable and transient circumstances, conditions and environment in which they live (as detailed subsequently herein).

As you will be aware there has been a breakdown in the functioning and operation of the subsidiary protection process and determination system in this state since late January 2013, with no applications for subsidiary protection being processed and determined arising from the MM judgment of Mr. Justice Hogan. Despite the passage of some 7 months since that judgment no appropriate steps have been taken to put in place any revised system which meets the requirements of EU and national law or for the resumption of the processing and determination of outstanding subsidiary protection applications. We are aware that the Department of Justice states that it is working on a revised system and is posting information on the INIS website in that regard. The latest resumption of subsidiary protection assessments/determinations, and that not revised system has been installed. Moreover, little concrete or substantive information/detail has been provided by the Department of Justice with regard to any proposed revised system and/or the manner in which any such revised system would meet and accord with the requirements of EU and national law including the principle of equivalence as between EU and national law. As mattes stand and insofar as our clients' subsidiary protection applications are is concerned and the mode, manner and system for its determination, they remain in a situation of deep uncertain T. and limbo.

Throughout the period since our clients made applications for subsidiary protection, and indeed since Ms. A. arrived in the state and made an application for asylum, and subsequently on behalf of her son (and through its processing), our clients have been constrained to live under the direct provision scheme, in direct provision living and environment conditions, on a meagre allowance of €19.10 per week for Ms. A. and €9.60 per week for her child (known as direct provision allowance). Ms. A. was initially allocated accommodation for a brief period following her arrival in the state in Balseskin, Dublin, shortly thereafter she was moved to accommodation at Eglinton Hotel, Salthill, County Galway, in which her and her young son have been residing in one room accommodation.

Since arriving in the state Ms. A. has not been permitted to work/seek work and/or earn a living nor has she been permitted to access social welfare benefits, including but no limited to child benefit under the social welfare legislative code. Indeed since the refusal to her (and in turn to her son) of a declaration of refugee status by the Minister for Justice pursuant to S.17, Refugee Act 1996 they have been deemed to be persons without any formal permission of any description to remain in the state. Unlike asylum seekers, applicants for subsidiary protection are not afforded any recognition of temporary permission to remain, nor are they issued with temporary residence certificates (TRC). This practice and policy is in breach of the principle of equivalence as between EU and national law. Moreover, the direct provision scheme and arrangements under which they live (apart altogether from the denial to Ms.

A. of the right to work/seek work and access to social welfare benefits in order to be able to provide for her child) is a deeply controlled and restrictive environment which constitutes a very significant interference with our clients' personal, private and family life, and denies them freedom of choice and movement, and also significantly and adversely affects the development and well being of Ms. A.'s child. Not only is Ms. A. not permitted to work/seek work (unless granted permission to do so by the Minister for Justice and Equality) and denied access to social welfare benefits, she and her child are required to survive on the meagre allowance allocated them, whilst being constrained in the direct provision system and scheme to live with their lives on hold, and in a situation of deep limbo and uncertainty, and in particular where Ms. A. cannot set about getting on with and developing an progressing her and her son's lives with particular reference to providing a secure, stable and appropriate family environment and extricate herself and her young child from the shackles of the direct provision environment and scheme.

With respect to our clients' outstanding subsidiary protection applications and the on-going significant delay in respect of them, you should note that for applicants such as our clients, whose applications for subsidiary protection were made in late 2011, given the current breakdown in the determination system, the inevitable further delay consequent upon that and the significant backlog of applications which already await determination from prior periods/years, it appears to us that out clients are going to be left in a situation of continuing deep uncertainty and limbo with on-going delay. This is not acceptable, nor does it meet the obligations on this state under EU law to have in place a functioning system for the determination of subsidiary protection applications in a fair and transparent manner with due and reasonable expedition. It is clear that in this regard the state is failing in its obligation to afford our clients an effective remedy to an independent adjudication in respect of their subsidiary protection applications. As matters stand and with the inevitable on-going further delay arising from the breakdown of the system and the internal review being conducted, they have no remedy at all.

Our clients have an entitlement to be best equipped an to be in a position with their legal advisors to be best equipped to pursue and prosecute their applications for subsidiary protection and to do so in a system which is fair, independent, transparent and in accordance with the principle of equivalence and the right to an effective remedy. At a minimum, this requires that the subsidiary protection determination procedure and system should include the following:

a) The determination system respects the right to be heard,

b) The adjudication is conducted on a genuinely impartial and independent basis by a statutorily appointed adjudicator/adjudicating body wholly independent from the Minister for Justice in the performance of his or her duties.

c) That there will be access to previous relevant subsidiary protection decisions and access to published guidelines with regard to the criteria to be applied in the decision making process.

d) That the procedure adopted in relation to subsidiary protection determinations will allow for an appeal against an initial refusal.

e) That the qualifications and standing of adjudicators appointed (at firs instance and on appeal) will be regulated by statute,

f) That there is no enmeshment of the subsidiary protection and deportation/S.3 Immigration Act 1999 decision making processes,

g) The decision makers for subsidiary protection at first instance and on appeal are a wholly independent body/adjudicator/Tribunal who have not previously had any decision making role or function in respect of Ms. A. and/or her child's asylum application(s),

h) That the application for subsidiary protection in respect of Ms. A. and her child be determined with due and reasonable expedition.

In addition to all of the above, the deeming of our clients as persons without any formal permission to remain in the state during the currency and pending the outcome of their subsidiary protection applications, is unlawful. The principle of equivalence as between EU law and national law requires this state and the Minister for Justice afford our client family formal permission to remain in the state an recognition in that regard pending the outcome of their subsidiary protection applications. In this regard, you might note that an applicant for asylum pursuant to s.9(2) , Refugee Act 1996 is afforded and granted a formal permission to remain the state pending the outcome of his or her asylum application and through to its final determination (by way of a decision under s.17, Refugee Act 1996 by the Minister for Justice). An applicant for subsidiary protection on the other hand, and in stark contrast, is deemed from the outset of the making of his/her subsidiary protection application, and thereafter during its processing to be a person without any formal permission to be in the state pursuant to the principle of equivalence as between EU law and national law our clients should be granted a formal permission and recognition to remain in the state until the final determination of their subsidiary protection applications.

In addition to being in breach of the principle of equivalence, the denial to our clients, and in particular to Ms. A. of any formal permission to remain in the state during the currency and pending the outcome of her and her son's subsidiary protection applications, compounds the uncertainty and limbo already affecting her in an adverse manner and amounts to a failure to protect her and her son's personal rights, private and family life rights pursuant to Article 40.3 and 41 of the constitution and Article 8 ECHR and also amounts to a breach of and failure to respect the rights of our clients as protected under Article 2 of the Fourth Protocol of the ECHR. The denial to them of any formal recognition of permission to remain in the state also serves to interfere with the establishment and enjoyment of normal family life for them in the state and is a disproportionate measure which is not justifiable or reasonable in the context of the constitutional and fundamental rights at stake. The classification of our clients as persons without permission to reside in the state during the processing and determination of their subsidiary protection applications also causes a prejudice and negative impression in the context of the subsidiary protection determination itself (they have entered this process as persons who are unlawful in the state, and as persons who have been issued with proposals to deport).

In light of the foregoing, please note our application and request on behalf of Ms. A. and her child that they now be issued with and granted temporary permission to remain in the state pending the outcome of their subsidiary protection applications, and that they be issued by way of formal recognition of same with temporary residence certificates or equivalent. We have advised Ms. A. that a failure to grant her and her child such permission and recognition is, for the reasons outlined above, unlawful.

As already stated herein, Ms. A. has lived, since her arrival in the state in April 2010, and together with her son since his birth in January 2011, in direct provision accommodation under the direct provision scheme. They currently reside in Eglinton Hotel, Salthill,

County Galway. As applicants for asylum and now subsidiary protection, Ms. A. and her child have been constrained to remain living in this wholly unsuitable situation with all the adverse consequences which flow from it for in excess of three years. With regard to the particular circumstances of our clients' current direct provision living conditions and arrangements, and the unsuitable and inadequate nature of them and the manner in which it fails to respect and vindicate the right to protection of family, private life and personal rights as warranted under Article 8 ECHR and Article 40.3, 41 and 42 of the Constitution, you might note as follows.

Ms. A. instructs that daily life, in particular in circumstances where she is not permitted to work or seek work, is empty and without purpose, ambition or function and dominated by the limbo and uncertain situation in which she finds herself. Ms. A. instructs that, as a result of the restrictions that are on her life in relation to work/ movement and activities in which she can be involved, and as a result of the severe financial constraints on her, she spends most of her days in the hostel looking after her. Ms. A.'s son attends the Hostel crèche/playgroup during the week from 9.30-12.30am. Ms. A. instructs that she volunteers sometimes in the crèche/playgroup. Ms. A. has attended and recently completed a basic computer studies course provided art the Hostel, and is due to commence a course in knitting in September. The Knitting Course also takes place at the hostel.

Ms. A. instructs that the Hostel environment is not good for her, and in particular is not a good environment for her young son. She instructs that being restricted and confined to one room is extremely difficult and she feels mentally drained from the situation. Ms. A. instructs that here financial limitations place her in a permanent state of intense financial pressure, and greatly restricts her with regard to any other activities (outside the Hostel crèche/playgroup) which she can provide for her son. Ms. A. has grave concerns with regard to her son Lind his development with particular reference to the lack of age appropriate activities, leisure and learning available to him in their current direct provision environment. She has particular concerns with regard to the extremely limited facilities, toys and activities available for her son in the Hostel crèche/ playgroup, where she considers that much of the activities are not age appropriate for her son. Ms. A. instructs that, being a Christian, she goes to the Calvary Pentecostal Church in Salthill, Galway. She instructs that this is not within walking distance, but usually the church organises for residents to be picked up. She instructs that once every 3-4 months, the church may not be able to provide transport so she uses the bus. If this happens she will buy a day pass for €3.50. She attends church Tuesday, Friday and Sunday.

Ms. A. instructs that her and her child sleep in a one room bedroom, with a bathroom/ toilet. Ms. A. instructs that she has a fridge and microwave in her room which she purchased second-hand out of her direct provision allowance (€80 fridge and €25 microwave) from a former resident of the Hostel (she also has a kettle in her room). She instructs that it was necessary for her to obtain the fridge and microwave so that she could store and cook food for her son when needed. She instructs that it is difficult to feed her son from the food provided by the hostel as they do not cater very well for children (they cater for babies, or adults), and her son therefore has to eat the same food as the adults, and, owing to his age, he will often not eat much of the food provided. Furthermore, Ms. A. instructs that her son will often be hungry outside the allocated time for food provided by the Hostel (8arn - 10am, 12.30 pm-2.30pm and 5.30 to 7.30pm). Ms. A. instructs that she must therefore buy extra food that her son will eat out of her allowance, and to this end she spends approximately €9 - €10 per week on food. She buys food items such as crackers, tinned spaghetti, pasta, and noodles.

Ms. A. instructs that toiletries such as shampoo and shower gel are provided to the residents every two weeks (refills can be obtained if they run out in out within that period). She instructs that toilet paper, washing powder and nappies are distributed every Friday. She instructs that the laundry facilities in the Hostel are open between 8am -5pm daily, and each floor is allocated a day during the week on which they can use the facilities (her laundry day is Tuesday), and the facilities are open to all the floors at the weekend. She further instructs that there are five washing machines and five dryers (usually one of each is out of order). Ms. A. instructs that the residents are responsible for cleaning their own rooms, and are provided by the hostel with a two in one spray for the sinks and toilets, however because the cleaning products are very strong (as it is mixed up by the hostel), it smells very strongly of bleach and, as she feels that it is too much for her son and so she usually buys her own cleaning products. Ms. A. instructs that the hostel is quite dirty, and the carpets are extremely bad, and need to be changed (she instructs that the carpets in their room omit a bad odour). She instructs that although the mattresses for the beds do not cause her a problem, the bed sheets and covers provided are of poor/unsuitable quality, and so she has been constrained to buy her own out of her limited allowance. Ms. A. instructs with regards personal toiletries, the shampoo and shower gel with which they are provided is a two in one mix, and is very weak and not suited to African hair. Accordingly she is constrained to buy herself suitable African shampoo at a specialist shop. In light of the foregoing, and in addition to the expenses she has already outlined herein, Ms. A. instructs that she has to buy at 1 - 2 month intervals; Air freshener (approximately €1.00), Hand wash (approximately €1.00), Bathroom scrubs (approximately €2.25), Bathroom spray/cleaner (approximately €1.79), Sponges to wash dishes(approximately €.69), Washing up liquid (approximately €1.09) and Baby wash for her son (approximately €2.00 when on sale/ €3.50/€.4.00 full price). She also instructs that, owing to the bad smell of the carpet in her room, she buys Carpet cleaner- (approximately €4.50-€5.00) every few weeks.

Ms. A. instructs that it is extremely difficult living in the accommodation which she has been provided, and instructs that same is wholly unsuitable. The direct provision scheme, living environment and accommodation conditions (one bedroom, with no actual and proper cooking facilities) for our clients are most clearly and manifestly not in the best interests of Ms. A.'s young child. Ms. A. has been living in direct provision accommodation for in excess of three years (two years with her son). Ms. A. instructs that her and her son’s room in the accommodation centre is inspected 2-3 times per week, including without any warning or notice. She further instructs that Management use a master key to enter the room if she is not there. Ms. A. instructs that this disturbs her significantly and she feels that it is a complete invasion of her privacy.

As far as financial resources are concerned (and as already referred to herein), Ms. A. receives €19.10 per week in respect of herself, and €9.60 per week in respect of her child (known as direct provision allowance). Ms. A. further instructs that she receives €150 clothing allowance in respect of her and her young child every six months (€100 for Ms. A., and €50 for her child), and that she sometimes receives clothes from donations made by people to the hostel. Ms. A. instructs that there are not many donations made of late, so she does not receive clothes as often. Ms. A. instructs that the clothes donations, when they occur are very useful, as her son grows out of his clothes very quickly, and his twice yearly €50 clothing allowance does not last for long, and is inadequate.

Overall, Ms. A. instructs that she is severely financially constrained, and is forced to have to spend her and her son's limited direct provision allowance oil items such as food for her son, cleaning products and other essentials which are not covered or adequately covered by the Accommodation centre (for the reasons already outlined above). Furthermore, Ms. A. also needs to buy basic medicines for coughs, and colds (such as Calpol, Vics rub and honey) for her son from tune to time (particularly in the winter months), and such items (given the limited nature of her allowance) have an impact on her financially (this includes payments for repeat prescriptions of €1.50 whenever she has to pick up prescriptions). Ms. A. finds that as a single mother rearing her son on her own in the direct provision scheme and environment on extremely limited direct provision allowance resources, that she simply does not have enough resources or adequate facilities to manage, and she is under constant financial and emotional stress and pressure (Ms. A. instructs that T.'s father, V. G., is a Georgian national whom she met upon her arrival in the state, and she instructs that she does not maintain a relationship, nor is she in contact with this man, and is unsure of his whereabouts).

Denying our clients as applicants for subsidiary protection (and indeed denying all such applicants on a blanket basis) permission to remain in the state with right to work/ seek work for Ms. A., and also denying her access to social welfare benefits, including but not limited to child benefit, because she and her son are protection applicants without permission to reside and awaiting a decision and constraining them whilst awaiting a determination on the outstanding application to live in such wholly unsuitable and inadequate direct provision arrangements on meagre and unsustainable allowances and in a highly controlled environment which denies freedom of choice and movement and the right to privacy, and which clearly impairs the establishment and enjoyment of normal family life, amounts to a failure by the state to protect the personal and family rights of such persons pursuant to Article 40.3 and 41 of the Constitution. It also amounts to an unwarranted and unjustified interference in the private lives of such persons and families as protected under Article 8 of the ECHR and it also amounts, having regard to the interference with Article 8 private and family life, to discrimination within the terms and meaning of Article 14 ECHR and a breach and failure to respect the rights of such persons as protected under Article 2 of the Fourth Protocol of the ECHR . Having regard to the particular circumstances of our clients it is clear that the direct provision scheme, arrangements and conditions fail to respect this state's obligations under the UN Convention on the Rights of the Child, and do not at all serve the best interests of Ms. A.'s young child.

Direct provision arrangements in respect of protection applicants, such as our clients' herein, have a deep adverse effect on the private lives, family lives, health, mental health, wellbeing, development, career, dignity, housing, education and financial capacity to survive and manage of those consigned to such arrangements. Moreover, the direct provision living arrangements have a particularly adverse effect on Ms. A.'s young child and his welfare, nurturing and development and on the capacity to form and develop a normal family life. Where a family is consigned to live in such arrangements for any form of protracted period, it is deeply damaging for the members of the family, the dignity of Ms. A., the welfare of her child and the development and establishment of family life. With respect to the very negative and adverse effects of direct provision living arrangements, we refer you to the reports 'Once Size Doesn't Fit All' FLAC of November 2009 and 'State Sanctioned Child Poverty and Exclusion' Irish Refugee Council of September 2012, UN Human Rights Council, Report of the Independent Expert on the Question of Human Rights and Extreme Poverty: Addendum, Mission to Ireland, 17 May 2011 and UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, Addendum : Mission to Ireland (19-23 November 2012), 26 February 2013. The can be accessed at:

http://www.flac.ie/download/pdf/one size doesnt fit all full report final.pdf

http://www.irishrefugeecouncil.ie/wp-content/uploads/2012/09/State-sanctioned-child-poverT.-and-exclusion.pdf

http://www.refworld.org/docid/50f02ffd2.html

http://www.refworld.org/docid/5137184f2.html

The denial to Ms. A. of the right to work and seek work apart from the obvious deeply adverse financial consequences of such a denial, also amounts to an unwarranted and unjustified interference in private life as it denies them access to normal human relations and interaction with other human beings and the capacity to form and develop such relationships within the terms and meaning of Article 8 and as recognised by the jurisprudence of the ECHR in respect of Article 8. Consigning protection applicants such as our client family, to direct provision living and all that entails is a form of ghettoisation and isolation and strikes at the heart of the human dignity and morale for the family/ person involved. All told and taken cumulatively, the direct provision scheme, environment, conditions and living arrangements (along with the denial of the right to work/ seek work and denial of access to social welfare benefits) amount to inhuman and degrading treatment within the terms and meaning of Article 3 ECHR.

Furthermore, singling out applicants for subsidiary protection/ protection applicants as a category of persons living in the state who are denied such fundamental rights with deep adverse effect on their capacity to exist and survive in a manner consistent with basic human dignity (with particular reference to the negative and adverse effect on the development and welfare of T. - a 2 year old child, and the right to work and seek work for Ms. A. or obtain social welfare benefits including but not limited to child benefit) amounts to unjustifiable and impermissible discrimination and inequality of treatment within the terms and meaning of Article 40.1 of the Constitution. Furthermore, direct provision living with its grossly unsuitable environment and constraints and the meagre financial allowance applicable for a mother with a child amounts to a failure by the state in respect of persons such as our clients to vindicate and protect family life and the rights of parents in relation to their child within the terms and meaning of Article 41 and 42 of the Constitution.

The direct provision arrangements and system is also riot in compliance with this state's obligations under directly relevant international human rights protection instruments and we refer in this regard in particular to the ICCPR (Articles 2, 7, 12, 17, 22, 23, 24 and 26 thereof), ICESCR (Articles 6, 9, 10, 11 and 12 in particular thereof), the UN Convention on the Elimination of All Forms of Racial Discrimination and in particular with respect to the children, the UNCRC (and in particular Articles 2, :3, 4, 5, 6, 16, 19, 24, 26, 27, 31 and 37). This state by reason of the direct provision arrangements is failing to meet its obligations under international law.

Moreover, the direct provision scheme and system applicable to subsidiary protection applicants and the conditions prevailing for them in direct provision whilst exercising their right to apply for subsidiary protection under EU law pursuant to EU Council Directive 2004/83 (and in the course of the process of this state's implementation of that Directive) also amounts to a failure by this state in respect of the living conditions and circumstances applicable for those awaiting a decision to respect and vindicate the rights of our clients pursuant to the Charter of Fundamental Rights of the European Union and in particular Articles 1, 3, 4, 7, 15, 20, 21 and 24 thereof.

Furthermore, the direct provision arrangements and scheme (including the establishment and operation of RIA and the contracting out by RIA of accommodation provision and running of accommodation centres) which have been put in place to regulate and control the lives of protection applicants such as our clients herein in the most key, fundamental and far reaching respects including in relation to any financial support/ allowance (exclusion from any social welfare benefits) and accommodation arrangements and environment are in place without any statutory/ legislative basis at all. Such a situation does not accord with the requirements under our Constitution and Article 15.2.1 thereof with respect to the separation of powers. The direct provision arrangements in respect of the meagre allowances paid to protection applicants such as our clients and their exclusion from the social welfare system on the basis of Ministerial circular and without legislative basis or scrutiny by the legislature and particularly where that situation pertains as in the case of our clients for a lengthy and protracted period is unlawful, in breach of our clients' constitutional and ECHR rights and amounts to a form of discrimination and exclusion in respect of fundamental rights which strikes at the very heart of basic human dignity and fairness. Moreover, the direct provision allowance and the system for same is ultra vires the Social Welfare Consolidation Act and legislative scheme. In addition, the provisions of S.246 and in particular S.246(7) Social Welfare Consolidation Act and the operation of the habitual residence conditions in respect of protection applicants and/or those seeking leave to remain and/or those provisions in combination with the denial to such persons of the right to work and seek work are repugnant to the Constitution and in particular, in respect of our client, Article 40.3 thereof.

A continued denial to Ms. A. of the right to work and/ or to seek work and/ Or qualify for social welfare and/ or job seeker benefit and/ or allowances and the conditions and circumstances of direct provision living and arrangements including the very meagre allowance which she receives for herself and her child (which is also compounded by the on-going delay in the processing of their subsidiary protection applications and the breakdown in the functioning of the system for determining subsidiary protections) is in breach of our clients' private and family life rights as protected under Article 8 of the ECHR and is in breach of their personal and family life rights as protected under Article 40.3, 41 & 42 of the Constitution. Consigning and forcing protection applicants to continue to remain living over a number of years in these conditions on an on-going basis and especially where there are delays in the processing of their applications with particular respect to the situation currently pertaining with regard to subsidiary protection applications and having regard also in particular to the particular circumstances of our clients is an unlawful interference with private life and a failure to respect and vindicate personal rights as protected to Article 40.3 of the Constitution with particular respect to the right of Ms. A. in terms of denial of right to work or seek work so as to be able to provide for her child.

Unless granted permission to work/seek work and as necessary, access to social welfare benefits, Ms. A. is unable to extricate herself and her child from the stranglehold of the direct provision living environment and scheme, which scheme and arrangements, as outlined herein, constitute an on-going breach of their fundamental and constitutional rights and a very significant disproportionate and unreasonable interference in their personal, private and family life. Having regard to this situation please note Ms. A.'s application for temporary leave to remain with permission for her to work/ seek work in the state. Having regard to all of the circumstances set out herein relating to our clients' circumstances, their outstanding subsidiary protection application, wholly unacceptable living arrangements and conditions in the direct provision scheme, it behoves the Minister to put in place an appropriate system for persons such as our clients herein and by way of the grant of temporary leave to remain, to enable them to get on with their lives, reside here lawfully, extricate themselves from the totally unsuitable direct provision conditions and arrangements and for Ms. A. to set about seeking work and enable her to qualify in the meantime for a level of social welfare allowance and benefit which accords with basic human dignity for both her and her child.

We look forward to the confirmation by return of the grant to our clients of formal recognition of temporary permission to remain (temporary residence certificates or equivalent) along with the grant to Ms. A. of the permission to reside with right to work / seek work which we have sought herein. On receipt of your response we will provide further advices to Ms. A. having regard to the circumstances and situation including as necessary with regard to the making of an application to the Court in respect of the matters raised herein.

Schedule 2

Respondent’s Reply t0 Applicant’s Letter Before Action

Dear Ms. O’Brien,

I am directed by the Minister for Justice and Equality to refer to your correspondence dated 10th September, 2013, received by fax and in hard copy format, in relation to your above named clients.

In relation to the determination of your clients’ subsidiary protection applications, the position is that the decision of Hogan J, in the case of M.M v. the Minister for Justice and Equality and Law Reform (No. 3) has had a very significant impact on the ability of the Irish Naturalisation and Immigration Service (INIS) to process applications for subsidiary protection (SP). This Judgement has been appealed to the Supreme Court. In the mean-time and pending the determination of this appeal, in light of the Judgment of Hogan J, we are currently reviewing the manner of processing of existing subsidiary protection applications. The INIS is aware that your clients, like others, are anxious that their subsidiary protection applications are considered and decisions are reached at an early date.

The INIS, in conjunction with its legal advisers, is currently working on the development of a framework, legislative and administrative, under which existing and future applications for subsidiary protection will be determined. This work is being given priority attention in the INIS. When this new framework has been finalised, and a formal procedure is in place for the determination of existing and future applications for subsidiary protection, we will be advising all relevant parties accordingly, including all applicants who are awaiting a determination of their application for subsidiary protection as well as all relevant legal representative, Messrs. Sinnott Solicitors included.

For those who have lodged an application for subsidiary protection and are currently awaiting a determination of this application, we would again ask that they would bear with us until we have completed the work necessary towards putting the new procedures in place. ***As advised in our Website Notice dated 5th July, 2013, we hope to have all necessary arrangements in place within three months.*** In the mean-time, you and your clients can rest assured that their applications remain on file and we will advise you and them in due course on the specific details of the new procedures, and how they will apply to your clients’ applications. We have also posted an updated Notice on the INIS Website, on 26th July, 2013, to advise our customers on the most up to date position on the determination of applications for subsidiary protection and we will be further updating this Notice, as necessary, to ensure that all our customers have the most up to date information in this matter at all times. Of particular note in our latest update are the following elements:

(i) confirmation that we have your clients’ contact details on file and will contact them at the appropriate time so there is no need for them to contact us, directly or indirectly,

(ii) your clients are at no risk of deportation while they have pending applications for subsidiary protection and

(iii) the revised subsidiary protection determination procedures will provide for, among other things, an oral interview for each applicant and the right to appeal a negative determination to the Refugee Appeals Tribunal.

You may wish to advise your clients of these important details.

We very much regret that we cannot issue decisions on your clients’ subsidiary protection applications as soon as you, your clients or we might wish. However, as stated above, your clients’ subsidiary protection applications remain on file and we can assure you that once the new subsidiary protection determination procedures are in place, your clients’ cases will be given early and appropriate attention.

In relation to your clients’ accommodation in the Direct Provision system, your correspondence seems to infer that your clients are compelled to remain in RIA/Direct Provision accommodation. This is not the case. They are free to source alternative accommodation

as befits their needs. However, unless and until they do so, they, as subsidiary protection applicants, will be provided with accommodation by the Reception and Integration Agency. Additionally, the option of voluntary return remains open to your clients if they consider their position in this State to be intolerable. The specific issues raised in your correspondence about the quality of your clients/ accommodation should be addressed directly to the Reception and Integration Agency.

In relation to your request that your (adult) client be granted a right to work, or a right to access social welfare payments, including child benefit payments, while her case is 'pending', this request cannot be accommodated as successive Irish governments have decided that asylum (or protection) applicants cannot access paid employment and, as such, they cannot access job-seeker based social welfare payments. Given the current economic climate, and the fact that there are already over 400,000 people on the 'Live Register', a figure which would be much higher were it not for the numbers of Irish people of a working age who have left the State to seek employment in Australia, Canada and elsewhere, it is difficult to see this position being changed. Additionally, it is difficult to see the Irish tax-paying public being sympathetic to the needs of a person, with no known connections to this State, arriving here with no, or meagre, resources and seeking to have the Irish State meet her and her child's every need, particularly in circumstances where their asylum claims had already been found to be without merit. While the Irish tax-paying public are internationally renowned for their generosity towards charitable causes, a case such as that of your clients is not likely to be viewed sympathetically by the Irish tax-paying public at a time when their own economic and financial circumstances have taken such a hit from the global, and national, economic recession.

In relation to your request to have some form of a permission to remain granted to your adult client while she is in the subsidiary protection process, the position, as your Offices are aware, is that not steps can be taken to remove from the State a person who has a pending application for subsidiary protection. However, such a person cannot be given a temporary residence certificate (TRC) as such certificates are only made available to persons who are in the asylum process and who have not had a final decision made in their asylum application. Additionally, a TRC is not an identification card and cannot be used as such. It merely represents an asylum seeking person's details as presented to the Office of the Refugee Applications Commissioner on the day the formal asylum application was lodged. There are no plans to issue such certificates to subsidiary protection applicants, however, it may be that, in the future, when asylum, subsidiary protection and 'leave to remain' cases are dealt with as a single procedure, this position may change. Your client will therefore need to have her own identification documentation so as to be in a position to produce it as necessary as evidence of her identity and nationality.

It is hoped that this clarifies matters for your Offices and for your clients.

Yours sincerely

Schedule 3

Applicant Pleadings

APPLICANTS STATEMENT GROUNDING APPLICATION FOR JUDICIAL REVIEW

1. The Applicants are C. A. and T. A. (a minor).

2. The first named Applicant is the mother of the second named Applicant.

3. The Applicants address is Eglington Hotel, Salthill, Co. Galway.

4. The first named Applicant is a national of Uganda. The second named Applicant was born in this state on 22nd January 2011 and does not qualify as an Irish citizen. The Applicants seek subsidiary protection status in this state. The Applicants live in the direct provision scheme and system in the Eglington Hotel, Accommodation Centre, Salthill, Co. Galway.

5. Relief Sought.

Temporary Residence Certificate

A. An Order of Certiorari quashing the decision of the first named Respondent as notified to the Applicants' solicitors by letter dated 12th September 2013 refusing the Applicants' request /application as made by letter of the 10th September 2013 seeking to be issued with temporary residence certificates or equivalent and to be granted recognition of temporary permission to remain in the state pending the outcome of their subsidiary protection applications.

B. An Order of Mandamus directing the first named Respondent to issue (or take appropriate steps to facilitate the issuing) to the Applicants of temporary residence certificates (TRC)/ registration certificates or equivalent by way of formal recognition of their permission to reside in the State pending the determination of their subsidiary protection applications.

C. A Declaration that, as applicants for subsidiary protection, the Applicants are entitled to be granted temporary permission to reside in the state pending the outcome of their subsidiary protection applications and to be issued with documentary confirmation of same by way of temporary residence certificates (TRC) or equivalent.

Direct Provision Scheme and System/ Social Welfare and denial of right to work

D. An Order of Certiorari quashing the decision of the first named Respondent as notified by letter of 12 t" September 2013 refusing the application of the first named Applicant for temporary leave to remain with permission for her to work/ seek work and/ or refusing to properly and adequately consider and process said application

E. An Order of Mandamus directing the first named Respondent to properly and adequately consider and determine in accordance with law and having regard to the constitutional and fundamental rights of the Applicants, the application of the first named Applicant for temporary leave to remain with permission to work/ seek work pending the outcome of her subsidiary protection application and/ or pending a final determination on her immigration status in the state.

F A Declaration that the Direct Provision scheme in respect of the Applicants as protection applicants (and as necessary, applicants

seeking leave to remain), and in particular the payment of the weekly direct provision allowance and the setting of rates for same, is ultra vires the Social Welfare Consolidation Act 2005 (as amended) and unlawful by reason of the lack of any statutory basis for said payments.

G Declaration that the Direct Provision scheme and system and the operating by the Reception and Integration Agency (RIA) of the direct provision scheme without any statutory or legislative basis, is invalid having regard to the provisions of Article 15.2.1 of the Constitution and amounts to a breach of the principle of separation of powers.

H. A Declaration that s.246, Social Welfare Consolidation Act 2005 (as amended) and in particular s.246(7)(b) and (c) thereof and/ or said provisions in combination with the denial to persons such as the first named Applicant herein of the right to work/ seek work and earn a living is invalid having regard to the provisions of the Constitution and in particular Articles 40.3, 41, 42.1 and 40.1 thereof.

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

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

K. A Declaration that the direct provision scheme and system as operated by the first and/ or second named Respondent insofar as it applies to the second named Applicant is in breach of this state's obligations pursuant to the UN Convention on the Rights of the Child and fails to safeguard and/ or serve the best interests of the second named Applicant.

Subsidiary Protection

L. A Declaration that this State has failed in its obligations pursuant to EU Council Directive 2004/83 (the Qualifications Directive) and having regard to Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) and Articles 4(3) and 19 of the Treaty on European Union (TEU) to have in place a functioning system and procedure which accords with national and EU law for the processing and determining, with due and reasonable expedition, of the Applicants applications for subsidiary protection.

M. A Declaration that in respect of the system for processing and determining subsidiary protection applications (including those of the i Applicants herein) and with respect to permission to remain in the state for subsidiary protection applicants pending the outcome of their subsidiary protection applications, this State is obliged to ensure compliance with the principle of equivalence under EU law as between asylum applicants and applicants for subsidiary protection and as between the statutory schemes, rules and procedures regulating same.

N. An Order of Mandamus directing the first named Respondent, for the purposes of determining the Applicants' subsidiary protection applications, to put in place a functioning procedure and system for the processing and determining of subsidiary protection applications which meets the requirements of EU and national law and complies with the principle of equivalence as between EU and national law.

O. Further and/ or other Relief.

P. Costs.

6. Grounds upon which Relief is sought.

Temporary Residence Certificates (TRC)/ Registration Certificates/ The first named Respondent's refusal by letter of 12t September 2013 of the application for same/ unlawful deeming of the Applicants as subsidiary protection applicants as without temporary permission to reside in the state

Ground (i)

a) The deeming of the Applicants as persons without any formal permission to remain in the state whilst their subsidiary protection applications are being processed and determined is in breach of the principle of equivalence as between EU law and national law and represents less favourable rules and procedures in respect of the Applicants as applicants for subsidiary protection as compared to an applicant for a declaration of refugee status pursuant to the Refugee Act 1996 and S.9(2) and (3) thereof. The failure of the first named Respondent when giving effect in national law to EU Council Directive 2004/83 to put in place any system or provision granting or extending temporary permission to remain (TRC or equivalent) to applicants for subsidiary protection pending the outcome of that application fails to respect the principle of equivalence and fails to give due and proper effect to EU Council Directive 2004/83.

b) The denial to the Applicants as applicants for subsidiary protection (and in particular to the first named Applicant) of any formal permission to remain in the state and the refusal to grant them TRC or equivalent and registration certificates for the purposes of compliance with the Immigration Act 2004 (applicable to the first named Applicant) and in particular Sections 9 and 12 of that Act unlawfully and prejudicially denies to them, in breach of the principle of equivalence as between EU law and national law any formal status or recognition of temporary permission to remain in the state as protection applicants and/ or unlawfully alters or interferes with their legal status and position in the state (as compared to their status as an asylum seeker).

c) The deeming of the Applicants as applicants for subsidiary protection as persons without permission to remain in the state and the refusal to them (and in particular the first named Applicant) of TRC or equivalent (as requested by them by letter of 10th September 2013) and the failure to afford the Applicants fresh or extended permission to reside in the state during the subsidiary protection process is unlawful as it is an unwarranted and unjustified interference with and failure to protect their personal rights as warranted by Article 40.3.1 of the Constitution and their private life rights as protected by Article 8 of the ECHR and is in breach of Article 2 of the Fourth Protocol, ECHR with respect to its adverse impact on right to freedom of movement in particular for the first named Applicant.

d) The classification of the Applicants as persons without permission to reside in the state during the processing and determination of their subsidiary protection applications is a cause of prejudice to the Applicants in respect of their subsidiary protection applications having regard to the impression and perception it creates in the context of the subsidiary protection decision making process. The Applicants enter that process as persons without permission to remain and as persons who have entered the S.3 Immigration Act 1999/ deportation process. The Applicants being deemed as persons whose right/ permission to remain in the state has expired whilst their applications for subsidiary protection remain outstanding is conspicuously unfair, in breach of natural and constitutional justice and ultra vires EU Council Directive 2004/83.

e) The refusal by the first named Respondent communicated by letter of 12th September 2013 to grant the request and application that the Applicants be issued with TRC or equivalent is in all the circumstances unreasonable and/or irrational and/or amounts to the unlawful application of a blanket fixed and rigid policy by the first named Respondent and/ or the first named Respondent has erred in law in failing to properly or adequately consider the application made by the Applicants for TRC or equivalent having regard to their constitutional and fundamental rights and the principle of equivalence as between EU and national law.

Facts and matters supporting Ground 6 (i)

The Applicants were notified under cover of the first named Respondents letters of 22nd November and 29th November 2011, that their permission to remain in the state which pertained whilst they were applicants for asylum had expired. During the currency of their asylum applications and until the final determination of those applications by way of decisions from the first named Respondent pursuant to S.17 Refuge Act 1996, the Applicants, pursuant to S.9(2) and (3) Refugee Act 1996, had temporary permission to remain in the state and they were issued by ORAC with Temporary Residence Certificates (TRC). There is a statutory obligation on ORAC to issue a TRC to all applicants for asylum (declaration of refugee status) in this state. Such certificates are a formal recognition of legal status in the state and are deemed (in respect of those non nationals over age 16 to whom it applies) to be registration certificates for the purposes of compliance with the provisions of the Immigration Act 2004 - Section 9 and 12 of same. There is no provision in the statutory scheme implementing EU Council Directive 2004/83, insofar as it relates to subsidiary protection equivalent to S.9(2) and (3) Refugee Act 1996, which allows for the granting of permission to remain in the state or a TRC or equivalent to a non national who has been refused a declaration of refugee status and is an applicant for subsidiary protection status and awaiting a decision on that application. The situation therefore is that the Applicants, during the period of the processing and determination of their subsidiary protection applications have no formal status as persons with permission to remain in the state and the first named Applicant has no registration certificate for the purposes of compliance with the Immigration Act 2004. The Applicants have no status or standing in terms of registration or acknowledgment of permission to remain in the state of any description. The deeming of their permission to reside as having expired on the conclusion of their applications for asylum and the failure to extend that permission or confer a fresh permission pending the outcome of a subsidiary protection application (and the failure to issue or grant a TRC/ registration certificate or equivalent) represents a change in the Applicants' formal legal position and status in the state. Whilst the Applicants cannot in the normal course be deported from the state pending the outcome of their subsidiary protection applications, the withdrawal to them of any formal recognition and documentation attesting to and confirming permission to reside in the state is a material alteration in their legal status and position in this state and material prejudice to them, with particular regard to the first named Applicant, in terms of compliance as a non national with registration and identification requirements of the Immigration Act 2004 and in her dealings and interaction in society and/ or with state authorities and agencies. There is a material difference in the legal sense for a non national who has official and documented permission to remain in the state during the asylum process (which permission by way of the issuing of a certificate also ensures compliance for adult applicants with the Immigration Act 2004) as against the significant uncertainty associated with being a person who has no such status or documented position during the subsidiary protection application and determination process. The Applicants, by letter from their solicitor of 10th September 2013, applied for and requested that they be issued with Temporary Residence Certificates or equivalent and a formal recognition of permission to remain pending the outcome of their subsidiary protection applications. This request and application was refused by letter from the first named Respondent of 12th September 2013 which letter made clear their position that there were no plans to issue such certificates or equivalent to subsidiary protection applicants.

Direct Provision scheme/ Direct Provision Allowances ultra vires Social Welfare Consolidation Act 2005 / absence of legislative basis for Direct Provision scheme in breach of separation of powers and Article 15.2.1 of the Constitution / unconstitutionality of s. 246, Social Welfare Consolidation Act 2005 and habitual residence conditions

Ground (ii)

a) The first and/ or second named Respondent(s) has unlawfully established and installed, and unlawfully operates, by circular and unregulated administrative arrangements and without any legislative basis, a parallel system for the governance and regulation of direct provision for protection applicants (and those seeking leave to remain), including the Applicants herein, and for the making of payments (direct provision allowance) and the setting of levels for said payments to protection applicants. There, is no statutory basis for the payment of direct provision allowance or for the setting of the amounts aid and the scan s are expressly excluded, as a result of a series of legislative provisions and amendments thereto, from receiving payments of this nature under the Social Welfare Consolidation Act 2005 (as amended) (hereafter, `the 2005 Act') apart from single, once off payments for exceptional needs or in cases of urgency (see sections 201 and 202, 2005 Act). In these circumstances the payment of the weekly direct provision allowances is ultra vires `the 2005 Act'.

b) The payment of the weekly direct provision allowances under the direct provision scheme by the first and second named Respondents and the system, scheme and operation in respect of these payments as administered by and through the Department of the second named Respondent amounts to the unlawful manipulation of the social welfare code and payment system and is in that manner ultra vires `the 2005 Act'.

Ground (iii)

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

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

Ground (iv)

Section 246, Social Welfare Consolidation Act 2005 (as amended), and in particular ss.(7)(b) and (c) thereof, is invalid having regard to the provisions of the Constitution. The effect of said provisions is a blanket exclusion of persons such as the Applicants herein (as subsidiary protection applicants and/or as necessary applicants for leave to remain in the state pursuant to S.3 Immigration Act 1999), from receipt of social welfare allowances and benefits (including but limited to child benefit). This blanket exclusion is in place regardless of the intentions of the Applicants, the number of years they have resided in the State and regardless of evidence that this State is the main centre of interest for the Applicants and regardless of how long their protection applications have remained outstanding. Denying, on a blanket basis, the Applicants, regardless of their circumstances in the state, access to social welfare benefits and allowances and/or such denial taken in conjunction with the refusal to the first named Applicant of permission to work/ seek work and earn a living to support her child, directly impairs and disproportionately interferes with and fails to protect the personal, family and private life rights of the Applicants, including with reference to the rearing, nurturing, development and best interests of the second named Applicant. The provisions of S.246, and ss.(7)(b) and (c), (and/ or those provisions taken together with the denial to the first named Applicant of the right to work/ seek work) are in breach of the Applicants' constitutional personal and family life rights and right to equality pursuant to Articles 40.1, 40.3.1, 41 and 42 of the Constitution.

Facts supporting Ground 6 (ii) to (iv)

There is no legislative basis for the Direct Provision scheme and the Social Welfare Consolidation Act 2005, as amended, in particular by S.15, Social Welfare and Pensions (No. 2) Act 2009, clearly excludes the Applicants from qualifying for social welfare payments/ benefits/allowances (other than payments under sections 201 and 202 of the Act with respect to exceptional and urgent needs). The Direct Provision scheme has been established and is maintained by cabinet/government/ government departments (with no parliamentary input or scrutiny), inter-departmental correspondence (between the Departments of the first and second named Respondents) and internal circulars of the Department of the second named Respondent (see in particular Circulars Nos. 04/00, 05/00, and 02/03 as exhibited at "UOB19" of the affidavit of the Applicants' solicitor). There is no, and never has been, any parliamentary or Oireachtas approval or oversight of the system and the rates for the direct provision allowance are not set or determined in the same or similar manner to other State payments such as child benefit, unemployment assistance or retirement pension. The direct provision weekly allowance rates have not been subject to increase since their installation. With respect to the ultra vires nature of the payment of the direct provision allowance under the direct provision scheme operated by the first and second named Respondent, we refer in particular to the documentation, communications and memoranda obtained pursuant to Freedom of Information (FOI) requests exhibited in the affidavit of the Applicants solicitor. We refer in particular to those documents obtained pursuant to a FOI request numbered 16, 28, 69, 83, 87 and 90 and to a document also obtained pursuant to a FOI request from an unknown source setting out a draft proposed amendment to the Social Welfare Legislative code. It is clear from the above referred to documents that very significant concerns and doubts have been entertained and harboured over a significant period of time at a high level within the Department of the second named Respondent regarding the vires and validity of the direct provision allowances and system.

The first and/or second named Respondent, by virtue of the direct provision scheme arrangement and environment, is exercising considerable control and power over integral aspects of the private and family lives of the Applicants. Such control manifests in terms of housing and accommodation arrangements, food and diet, freedom of movement and choice and social interaction, financial support and in respect of fundamental matters of personal welfare, social, career development, health, education, well-being and with respect to the nurture, care and upbringing of the child Applicant herein. We refer in this regard to RIA Rules and Procedures as exhibited in the affidavit of the Applicants solicitor. The Direct Provision scheme, and the consequent controls exercised over the Applicants' lives, is operated outside of any legislative guidance or policies and principles set by the legislator and without any statutory basis or scrutiny. RIA itself and the contracting out by RIA to private companies of the provision of services in the direct provision scheme has been established and operates without any statutory basis.

The blanket exclusion from social welfare benefits to protection applicants (and /or those seeking leave to remain) arises in circumstances where the first named Applicant is, and has been denied the right to work/ seek work and/ or enter the labour market as a subsidiary protection applicant (or as a leave to remain applicant) and arises in circumstances where there is an absence of any, or any adequate, alternative legislative basis for the provision to such persons of the necessary means and allowances to safeguard and provide for their well-being and social protection. This arises and operates in circumstances where the Applicants have suffered the impact and consequences of their exclusion from the social welfare system for a protracted and prolonged period of time whilst being confined to live within the direct provision system and without permission for the first named Applicant to work/ seek work.

Ground (v)

The first named Respondent's refusal (by letter dated 12th September 2013) and/or failure to consider and process and/or properly consider and process the application made in respect of the first named Applicant for permission to reside in the State with right to work/seek work pending the outcome of her and her child's subsidiary protection applications, is unlawful and amounts to the application, in respect of the first named Applicant, of a fixed and rigid policy by the first named Respondent with respect to the right to work/ seek work for protection applicants regardless of their circumstances. The first named Respondent has the power and authority to grant the first named Applicant temporary permission to reside with right to work/ seek work, but did not in fact consider, process or determine the substance of the application made to him in this regard and failed to exercise discretion in a lawful manner in respect of the applications made.

Ground (vi)

The first named Respondent was required in respect of the application made for permission to reside with right to work/ seek work in respect of the first named Applicant, to consider, process and determine the request/ application submitted having regard for the protections and rights of the Applicants pursuant to Articles 40.1, 40.3.1, 41 and 42 of the Constitution and Article 8 of the ECHR and/ or Article 8 in conjunction with Article 14. In considering the application, the first named Respondent should properly have taken into consideration the overall circumstances of the Applicants, the impact on the Applicants as a family unit (mother and child) of

continued denial over a protracted period of permission to work/ seek work for the first named Applicant, the failure and limitations of the State's bifurcated system for processing protection applications, the unacceptable delays to which the Applicants have been subjected in this regard, the exclusion of the Applicants from benefits and allowances under the social welfare code, and the Applicants' period of protracted living under the direct provision scheme, and the best interests of the second named Applicant. In failing to have regard to these matters, in refusing the application the first named Respondent has erred in law and failed to have regard to relevant factors and/or constitutional and fundamental rights and protections as referred to above.

Ground (vii)

The refusal of the application/ request made in respect of the first named Applicant with respect to the right to work/ seek work is unreasonable and/ or irrational having regard in particular to the failure by the first named Respondent to actually consider in accordance with law, the application as made.

Ground (viii)

By reason of the denial to the first named Applicant, over a protracted and prolonged length of time, of the right and opportunity to work and/or seek work the first named Applicant is denied the possibility of forming and fostering normal and positive interpersonal relations within a work environment which is an integral aspect and element of private and personal life. The denial of the right to work/ seek work to the first named Applicant over a protracted period of time and the lack of ability to provide and support her child arising therefrom (and in particular where the Applicants are also denied access to social welfare benefits and in receipt only of direct provision allowance) is a cause of anguish and distress and denial of dignity. Having regard to all the circumstances the refusal by the first named Respondent to the first named Applicant of temporary permission to reside with the right to work/ seek work and/or said refusal in combination with the operation of the direct provision scheme and system in which they live and the denial to them of access to social welfare benefits and allowances amounts to a disproportionate and unjustified interference with and a failure to protect and vindicate the constitutional and fundamental rights of the Applicants pursuant to Article 40.3.1 of the Constitution and Article 8 of the ECHR.

Facts supporting Ground 6 (v) to (viii)

The first named Applicant, by letter from her solicitor of 10th September 2013, sought and applied for temporary leave to remain with permission for her to work/ seek work in the state. The first named Respondent refused this application by letter dated 12th September 2013. The refusal letter outlined that the first named Applicant's request to be granted a right to work (or a right to access social welfare payments) while her case was pending could not be accommodated as successive Irish governments have decided that asylum (or protection) applicants cannot access paid employment and as such cannot access job-seeker based social welfare payments. The letter also referred to the number of people on the live register and Irish people emigrating to seek work and advised that it was difficult to see this position being changed. The application was refused on the basis of the application of a fixed, rigid an blanket policy adopted by the first named Respondent without any due or proper regard for the Applicants' personal ' circumstances and the overall circumstances prevailing for them as subsidiary protection applicants living under the direct provision scheme in this state and without regard to the relevant fundamental and constitutional rights of the Applicants. S.9(4)(b), Refugee Act 1996 (subject to the provision of s.9(11) thereof) excludes applicants for a declaration of refugee status from entering or seeking to enter employment, or carry on a business trade or profession in the state pending the final determination of their application for asylum. These provisions do not apply to applicants for subsidiary protection.

Ground (ix)

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

a) The impoverished conditions of direct provision living and the direct provision scheme, the loss of autonomy and dignity, and the Applicants existence under a system of controls and restrictions with isolation and denial of normal social interactions, all exacerbated by the significant and ongoing delays in the processing and determination of the Applicants' applications for international protection (and the denial to the first named Applicant of the right to work and the denial to the family of access to social welfare benefits and supports) amounts to inhuman and degrading treatment contrary to Article 40.3.1 of the Constitution and Article 3 of the ECHR having regard in particular to the circumstances of the Applicants living in direct provision over a prolonged and protracted period;

b) Such treatment as above outlined and the degree of control exercised over fundamental elements of the Applicants' lives in direct provision further amounts to an unwarranted and disproportionate interference with the private life rights of the Applicants (and is not in accordance with law). The direct provision scheme and environment significantly impairs the Applicant's capacity to develop and form normal personal relationships (including in respect of the first named Applicant in the work place) and is an unwarranted and unjustified interference in personal and private life by reason of the lack of autonomy and choice which the Applicants can exercise over their own lives and destiny. In this regard to direct provision scheme and system is in breach of and fails to respect and vindicate the constitutional rights of the Applicants pursuant to Article 40.3.1 of the Constitution and Article 8 of the ECHR and/or is in breach of their rights under Article 2 of the Fourth Protocol of the ECHR (and or said Article taken in conjunction with Article 8);

c) The above outlined conditions of direct provision are detrimental to and fail to protect or respect the Applicants' private and personal lives, and career development and prospects and are irreconcilable with the basic need for the first named Applicant in particular to have goals, motivations and a purpose in life which personal and private life rights are protected by Articles 40.3.1 of the Constitution and Article 8 of the ECHR;

d) Living and growing up in direct provision and the unnatural/ abnormal living and family environment that pertains therein, especially over a prolonged and protracted period, has a particularly adverse effect on the welfare, nurturing and development of the minor Applicant and on the capacity to form, develop, establish and enjoy normal family and private life and is contrary to the best interests of the minor Applicant and is in breach of Articles 40.3.1, 41 and 42 of the Constitution, Article 8 of the ECHR and fails to have any

due and proper regard for the requirement on the Respondents to afford primary consideration to the best interests of the child having regard to Article 3 of the UN Convention on the Rights of the Child;

e) Direct provision has a significant and severe impact on the rights and ability of the first named Applicant as a mother, to provide for the religious, moral, intellectual, physical and social education of her child in accordance with Article 42.1 of the Constitution and is manifestly not in the best interests of the second named Applicant. Being consigned to the direct provision system, with its attendant restrictions and loss of control and autonomy over the upbringing of the child, and the constraints with respect to providing an appropriate and nurturing environment for the second named Applicant (including in relation to his safety and welfare) amounts to a direct, unjustified and disproportionate interference by the State in the rights of and the protections afforded to the Applicants pursuant to Articles 41 and 42 of the Constitution and Article 8, ECHR;

f) In the course of this state's implementation of EU Directive 2004/83 insofar as it relates to subsidiary protection, and having regard to the Applicants' status as persons exercising their right to apply for subsidiary protection pursuant to that Directive, this state is obliged to ensure that the conditions, circumstances, supports and living arrangements in respect of the Applicants are in compliance with the protection afforded the Applicants and this state's obligations pursuant to the Charter of Fundamental Rights of the European Union (the Charter)and in particular Article 1, 3, 4, 7, 15, 20, 21, 24 and 41 thereof. The direct provision scheme and system (and/or that scheme taken in conjunction with the denial to the first named Applicant of the right to work/ seek work and the denial to the family unit of access to social welfare benefits and allowances) fails to respect and vindicate the rights mandated and protected in and by the Charter and is in breach of same. We refer in this regard in particular to respect and protection for human dignity and physical and mental integrity pursuant to Articles 1 and 3 of the Charter and the promotion and protection of the best interests of the child pursuant to Article 24 of the Charter.

g) The direct provision scheme and system as it is applied in respect of the Applicants and having regard to their circumstances living in direct provision for a prolonged period, amounts to an unlawful interference with family life pursuant to Article 8 ECHR and constitutes a failure to protect and vindicate the family life of the Applicants as warranted under Article 41 of the Constitution. The direct provision scheme, environment and arrangements and/ or said scheme coupled with denial of the right to work/ seek work for the first named Applicant and the denial of access to social welfare benefits and allowances for the Applicants constitutes an unlawful impairment in respect of the establishment and enjoyment of family life;

h) Being subjected to living in the direct provision system, with particular regard to the controls and restrictions on the Applicants (with particular regard to the first named Applicant) with respect to their place and choice of residence and the constraints on their movements and liberty, amounts to an unwarranted and disproportionate interference with the Applicants' private life rights as protected by Article 8 of the ECHR and/or the first named Applicant's right to freedom of movement and freedom to choose her and her child's residence as protected by Article 2, Protocol 4 of the ECHR in conjunction with Article 8 thereof and also amounts to a failure to adequately respect and vindicate the personal rights of the Applicants as protected under Article 40.3 of the Constitution;

i) The singling out of protection applicants for subjection and confinement to the direct provision scheme and regime with consequent severe and far-reaching restrictions on basic and fundamental rights is discriminatory and in breach of Article 40.1 of the Constitution and Articles 3 and/or 8 of the ECHR taken in conjunction with Article 14 thereof. The above outlined taken together with the denial to the first named Applicant of the right to work and seek work and the denial to the Applicants of access to social. welfare allowances and benefits amounts to unjustifiable and unwarranted discriminatory and unequal treatment, in breach of Article 40.1 of the Constitution and/ or amounts to a discriminatory interference with private and family life within the terms and meaning of Article 8 ECHR and/ or Article 14 ECHR taken in conjunction;

j) The direct provision arrangements and system fails to protect and respect the Applicants' rights under directly relevant international human rights protection including the ICCPR (Articles 2, 7, 12, 17, 22, 23, 24 and 26 thereof), ICESC (Articles 6, 9, 10, 11 and 12 in particular thereof), the UN Convention on the Elimination of All Forms of Racial Discrimination and in particular with respect to the children, the UNCRC (and in particular Articles 2, 3, 4, 5, 16, 19, 24, 26, 27, 31 and 37 thereof). This state by reason of the direct provision arrangements is failing to meet its obligations under international law. In particular, the direct provision scheme and living environment is a wholly unsuitable and in appropriate environment for the rearing and development of a young child, such as the second named Applicant herein and the direct provision scheme and system fails to respect and vindicate the rights of the child pursuant to UNCRC and is a system which manifestly fails to have due and proper regard for the best interests of the second named Applicant.

Facts supporting Ground 6 (ix)

The Applicants are deemed to have no permission to reside in the State. They are excluded from the social welfare system (for all but once off exceptional or urgent needs payments) and the first named Applicant has been denied the right or opportunity to work/seek work. The Applicants herein have been confined and required, for a very considerable period of time, to reside within the direct provision scheme with no alternative living arrangements or option available to them having regard to their personal and financial circumstances, lack of permission to work, exclusion from social welfare benefits/allowances including rent supplement and inability to travel abroad for the first named Applicant to seek work.

With respect to the specific circumstances and difficulties experienced by the Applicants in direct provision, and with regard to their living conditions in direct provision we refer in particular to the affidavit of the first named Applicant and correspondence from this office to the first and second named Respondents regarding same. As described therein, the situation and circumstances in which the Applicants are required to live are inhumane, demoralising and degrading and fail to respect their basic dignity as human beings, especially having regard to the prolonged and protracted period of time in which they have been confined to such conditions. The first named Applicant faces extremely harsh financial constraints (with an entirely insufficient direct provision allowance of €19.10 for the first named Applicant per week and €9.60 for her child per week, the rate of which has not changed during the Applicants' time in direct provision) and struggle on an ongoing basis to survive on such limited means with any sense of normality or dignity. The Applicants are also constrained and restricted in terms of living under a set of rules in direct provision which directly interferes with their freedom of movement and choice and control over their own lives and destiny, including in relation to their diet and food arrangements. Direct provision living for the Applicants, including with reference to the severe financial strain on the first named Applicant and the manner in which it exercises control over integral aspects of their daily lives, serves to significantly impair their enjoyment and establishment of normal family life.

A particularly adverse consequence of the living arrangements for the Applicants relate to the fact that the first named Applicant is not permitted to work/ seek work and so finds herself with no purpose or function in their own lives and the life of her family. This is a cause of considerable hardship and frustration for the first named Applicant, and gives rise to isolation and a monotonous existence and causes feelings in her of distress, lack of self worth and anxiety. Growing up in such an environment of poverty and constant

financial struggles and where the first named Applicant stays at home and does nothing to provide for her child is moreover of detriment to the minor Applicant and does not serve or promote his best interests. With respect to the very adverse and detrimental nature of direct provision living and its impact and with respect to the unacceptable living conditions in direct provision, we refer to the reports cited and referred to in the Applicants' solicitor's letter to the Respondents of 10`h September 2013 and in particular the following two reports - State Sanctioned Child Poverty and Exclusion, Irish Refugee Council, and One Size Doesn't Fit All, FLAC. A further feature of the direct provision scheme and system is the manner in which it significantly impairs the capacity to form and develop normal personal relationships and is a cause of significant disruption to personal and family life when residents are moved to different accommodation centres and where the development of relationships and friendships with other residents is severed or disrupted when residents leave the system or are moved within the system. In addition, the capacity and ability of a parent to ensure the wellbeing, welfare and safety of a child is impaired and restricted under the direct provision scheme and system.

Subsidiary Protection

Requirement for a functioning system for determining subsidiary protection applications with due and reasonable expedition in a fair, independent and transparent process / delay in putting in place a system and procedure for determining the Applicants' applications for subsidiary protection which meets the requirements of EU and national law and the principle of equivalence / Breach by this state of its obligation in respect of Subsidiary Protection

Ground (x)

(a) The current failure to have a functioning system and procedure in place which accords with EU and national law for determining, with due and reasonable expedition the Applicants' applications for subsidiary protection gives rise to a failure by this state to give effect to EU Council Directive 2004/83 insofar as it pertains to subsidiary protection. Where a Member State does not have, and has not had in place a functioning system and procedure for processing and determining subsidiary protection determinations, it cannot give proper effect to Article 18 and the Member State in question has failed to respect the right to an effective remedy pursuant to an EU measure as required by Article 47 of the Charter and Articles 4(3) and 19 of the Treaty on European Union (TEU).

(b) There is a duty on Member States to process applications for subsidiary protection with due and reasonable expedition in a system which provides an independent adjudication, an effective remedy, and meets the requirements of the principle of equivalence. The continued breakdown in the functioning of a subsidiary protection determination system in this state, and the continuing delay in the processing of the Applicants' subsidiary protection applications, leaving the Applicants (and in particular the first named Applicant) in a state of deep uncertainty and limbo, is in breach of the Applicants' right to have had a decision taken with due and reasonable expedition on their outstanding applications, and is in breach of their right to natural and constitutional justice and fair procedures, and their right to an effective remedy under EU law.

(c) The inordinate and unreasonable delay by the first named Respondent and this State in putting in place an appropriate system which accords with national and EU law and provides an effective remedy for determining the Applicants' outstanding applications for subsidiary protection and the current breakdown in the functioning of the subsidiary protection determination system amounts to an unwarranted and unjustified interference in the personal rights of the Applicants as protected under Article 40.3 of the Constitution and their private lives as protected under Article 8, ECHR. The interference is compounded where the Applicants are denied any formal recognition of any description to reside in the state pending the outcome of their subsidiary protection applications.

(d) Fair procedures and natural justice and the obligations on this state under EU law require and demand that the Applicants be afforded a subsidiary protection decision making process which is conducted and concluded on a wholly impartial and independent basis and by a decision maker who has not previously made a decision in respect of matters relevant to the Applicants' applications for subsidiary protection and in an assessment and determination system and process which is compliant with the principle of equivalence as between EU and national law.

(e) Applicants for subsidiary protection and their legal representatives are at a disadvantage in pursuing and prosecuting applications for subsidiary protection in the absence of access to previous relevant subsidiary protection decisions and/ or the issuing of any guidelines in respect of the determination of subsidiary protection applications. Applicants for subsidiary protection status by virtue of denial of access to previous relevant decisions and/ or the issuing of guidelines in respect of subsidiary protection decision making are not best equipped to prosecute applications for subsidiary protection and this is a breach of fair procedures and natural justice. Applicants for refugee status by contrast and arising from the Supreme Court decision in Atanasov have access to previous relevant RAT decisions and the Refugee Act 1996 allows for the issuing of guidelines on the application and operation of the Act and developments in refugee law. The above outlined is in breach of the principle of equivalence under EU law, and in breach of fair procedures and natural justice

Facts supporting Ground 6 (x)

The first named Respondent/ this State is obliged, pursuant to EU Council Directive 2004/83 and in particular Article 18 thereof and having regard to the provisions of Article 47 of the Charter, to put and have in place a functioning system and procedure for the processing and determining of subsidiary protection applications with due and reasonable expedition by an independent and impartial decision maker in a process which is transparent, and fully respects the right of the Applicants to be heard and which provides and effective remedy. Whilst the first named Respondent indicated in correspondence to the Applicants' solicitors (of 12th September and 3rd October 2013), by a series of notices on its website posted since 5th July 2013, and by preliminary information notices issued to applicants with outstanding subsidiary protection applications that, arising from the judgment of this Court in M.M. of 23rd January 2013, that a new subsidiary protection system would be put in place within 3 months of the 5" July 2013, the position still remains that no revised system has been put in place, or is functioning/ operating, and no legislation with respect to such a revised system has been enacted or adopted. Despite the above outlined and the passage of almost 9 months since the decision of this Court in M.M. (and in circumstances where the first named Respondent has also appealed that decision to the Supreme Court) the first named Respondent and this State still does not have in place a functioning system and procedure for determining applications for subsidiary protection with due and reasonable expedition, in a process which is fair, transparent and with an independent adjudication system. The first named Applicants concerns with regard to the subsidiary protection system in this state and the failure to have in place a system which meets and accords with fair procedures and natural justice, EU law, the principle of equivalence, and the right to an effective remedy and the range and scope of these concerns have been set out in correspondence from the Applicants' solicitor to the Respondents (in particular the correspondence of 10th September 2013), and these concerns are significantly wider than the matters arising in and on foot of the judgement of this Court in M.M. As matters stand there is an ongoing failure by the State to meet its obligations with respect to subsidiary protection applicants and the processing and determining of their subsidiary protection applications.

Applicants for a declaration of refugee status have access to previous relevant decisions of the RAT which enables such applicants and their legal representatives to have information and an understanding of the criteria to be applied in making refugee status determinations and in applying the relevant legal principles to assessments conducted. Such access to previous relevant decisions is also of assistance to applicants and their legal representatives in understanding and establishing the approach adopted by refugee status decision makers (RAT) in respect of particular countries and the conditions in those countries. National law, on foot of the Atanasov decision of the Supreme Court requires that in accordance with fair procedures and natural justice the RAT have a system in place for the making available of previous relevant decisions. The RAT operates a database of previous decisions to ensure compliance with this requirement. Applicants and in particular their legal representative have access to this database. The Second Schedule to the Refugee Act 1996 also allows for the issuing by the Chairperson of the RAT of guidelines or guidance notes (paragraph 16 of Second Schedule) on the practical application and operation of the provisions of the Act and on developments in the law relating to refugees. In contrast to the above statutory scheme and law, applicants for subsidiary protection do not have any system for access to previous relevant decisions on subsidiary protection nor is there in place any statutory procedure or system for the making or issuing of guidelines or guidance notes on the application and operation of the relevant statutory scheme and provisions (S.I. 518 of 2006 and EU Directive 2004/83) pertaining to subsidiary protection.

Saul Woolfson B.L.

Eve Bourached B.L.

The Applicant's solicitor is Sinnott Solicitors, 10 Church Avenue, Rathmines, Dublin 6.

Dated this the 16th day of October 2013

Signed: _____

Sinnott Solicitors,

10 Church Avenue,

Dublin 6.

Schedule Four