

# The Working Group and the time factor: a missed opportunity



## Introduction

*“National and international commentary on the Irish protection system has been focused on the conditions in Direct Provision. It is, however, universally acknowledged that the biggest single issue facing protection applicants is the length of time that they have to wait for a final decision on their claim. This is a result of structural faults in the protection determination process. These faults arise from the State’s two-stage sequential procedure where qualification for refugee status is assessed first, and qualification for subsidiary protection is assessed only when a negative refugee decision has been issued.”<sup>1</sup>*

In the introduction to its report, published on 30 June 2015, the Working Group on the Protection Process laid out the central issue which was to dominate its deliberations, namely the length of time that it takes to decide on an application for protection. The Working Group also set out its explanation for delays in the Irish asylum system, namely structural faults arising from a split protection application procedure. Its choice of central issue and its explanation for it led to two key recommendations, the introduction of a single application procedure and a final decision within six months for those in the system for more than five years. The rest of the report and its recommendations are dependent upon an acceptance that the central issue is in fact the length of time and that the explanation for the delays lies in the absence of a single application procedure.

But what if the length of time it takes to determine an application is not simply the result of structural faults in the determination process? What if the length of time is partly the result of, for example, a failure to properly support a person claiming to be a refugee early in their application process leading to a greater possibility of refusals and the need to appeal? What if the lack of a fair and transparent appeals system leads to a backlog of applications in the High Court which, even when successful, simply sees them being returned to the same process? Where would that leave the assertion that a single application procedure will remedy the situation? And how does a single procedure provide an answer to the people who are stuck in or have already been through a ‘structurally faulty’ process?

This article asks why the Working Group focused on the length of time. It examines the documents which preceded the first meeting of the Working Group and the development of the

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<sup>1</sup> Paragraph 15, page 14 of the Report of the Working Group on the Protection Process, June 2015

arguments as seen in the deliberations of the Working Group and draft reports which informed the final report. It asks if the explanation of structural faults is sufficient to justify a conclusion, pre-determined by the Government, that a single application procedure is all that is needed as a remedy that will prevent such delays building up again. In doing so, we draw only on the evidence that the Working Group decided to focus upon and therefore seek to show that it had the potential to identify causes but chose not to do so.

### **Framing the Working Group's focus**

The terms of reference for the Working Group, set up by Frances Fitzgerald TD and Aodhán Ó Ríordáin TD, Minister for Justice and Minister of State at the Department of Justice respectively, required the Working Group to “recommend to the Government what improvements should be made to the State’s existing Direct Provision and protection process and the various supports provided for protection applicants.” More specifically, in relation to the application process, the Working Group was asked to “indicate what actions could be taken in the short and longer term which are directed towards: (i) improving existing arrangements in the processing of protection applications.” Given that the Government was committed to introducing a single procedure, it was presumably looking for an endorsement of that commitment but something more as well.

The first meeting of the Working Group took place on 10<sup>th</sup> November 2014, almost one month after the announcement about its establishment. In the intervening period, the Chair appointed by the Ministers, Dr. Bryan McMahon, had commenced work and a secretariat, made up of civil servants from the Department of Justice, was established, with a working base in the Office of the Refugee Applications Commissioner.

In advance of the first meeting, a ‘Draft Work Programme’ was circulated to members of the Working Group, “prepared in accordance with the terms of reference...and taking account of the Ministerial Roundtable Consultations with NGOs held on 18 September 2014.”<sup>2</sup> The proposed programme divided the work into three ‘themes’, the first two of which related to the system of Direct Provision and the supports and services which went with it; the third was set out as:

*“Improvements to existing arrangements for the processing of protection applications with particular regard to the length of the process”*

Elaborating upon the theme, the document, after again repeating that the Government was committed to legislating for a single application procedure, listed topics that “have been identified for consideration by the Working Group”, including: quality decision-making; improved processing times; the early conclusion of judicial review applications; the efficient operation of the deportation process; and communications to applicants at all stages of the process.

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<sup>2</sup> The document is dated 7 November 2014

At its first meeting on 10 November 2014, the minutes record the Chair's introductory remarks in which he:

*"expressed the view that improvements to the existing process with particular reference to its length was the most important work area facing the group as so many of the difficulties that people experience flow from it."*

The first meeting of Theme 3 sub-group took place on 25 November 2014. Under 'Prioritisation', the first comment recorded in the minutes was:

*"The length of time is the biggest single issue facing asylum seekers in Direct Provision....It was agreed it should be a priority focus for the Sub Group to identify solutions for cohorts longest in the system."*

At its second meeting on 5 December 2014, the following statement is recorded in the minutes (as corrected on 9 December) with reference to 'Prioritisation by Duration':

*"It was agreed that 5 years was a duration after which a systematic grant of status would not **represent** a **significant** 'pull' factor."* (Emphasis in the original)

The Chair of the sub-group stressed that "no decisions were taken in previous meetings with respect to qualifying durations for any possible scheme aimed at longstayers."

From the outset, however, the Working Group was encouraged to focus on the length of time that people spend in the application process (and often in Direct Provision as well) and to find a solution for 'longstayers'. In the end, the recommendation came back to five years as a determining factor.<sup>3</sup> It heavily influenced its deliberations and therefore the final report. But that did not mean that it intended to look at the reasons that people were in the system for so long. That was considered "beyond the scope" of the Working Group.

No one would doubt that the length of time that people spend in the asylum process is far too long and that the introduction of a single protection procedure would be of potential benefit to anyone who claims asylum after a single procedure is introduced. But this leads to a number of questions: Why have so many people been refused asylum necessitating the need to appeal or make subsequent applications? What about people who have been through the system as it exists to date and have been failed by it because they were assumed to be undeserving of protection and refused accordingly? If people have been refused in a flawed system but have been resident in Ireland for less than five years, what is the Working Group's solution for them? And, as we have asked above, what value is a single application procedure to someone in the system now?

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<sup>3</sup> Five years was also a key factor in the recommendation relating to access to Third Level education by young people who have been in the Irish secondary school system

The Working Group report does not attempt to answer these questions. It does, however, provide numbers, dates and some comments which provide an opportunity to start to put the framework of the puzzle together.

### Another elephant in the room

On 23 February 2015, the sub-group considered the second draft of a report which was being prepared to present to the full Working Group. The minutes state as follows:

*“The draft report seeks to set out a comprehensive problem analysis of ‘the system’ ... in an objective evidenced based manner based on the eight meetings to date and documents submitted.”*

All the regional consultations had been held by then. Written submissions from asylum seekers had been received and summarised for the consideration of the Working Group. But the opinions of asylum seekers did not inform the “comprehensive problem analysis”. We have analysed the comments made by asylum seekers set out in Appendix 3 of the Working Group report in a separate article.<sup>4</sup> That article clearly shows the asylum seekers’ grievance for the manner in which their applications for asylum had been dealt with, and how lengthy delays spent in ‘the system’ had consequences for their dignity, health and well-being.<sup>5</sup>

In initial drafts of the report from the sub-group, it was proposed that section 4 should focus on a ‘Detailed Problem Analysis’. There was a footnote in the index which read:

*“To include reference to voices of asylum seekers received to date and specific situation of children and vulnerable groups.”*

Section 4.2 of the index was headed:

*“Length of time – cause analysis by stage in the process.”*

By the time the report had been further edited, the title of section 4 was modified to read:

#### **4. ~~Detailed Length of time~~ Problem Analysis of the system ~~Description~~** 17

So why did an ‘analysis’ become a ‘description’? And how do you provide solutions when you have failed to carry out an analysis of what has led to the ‘biggest single issue’ in the very system that the Working Group was set up to examine?

<sup>4</sup> For further information, see the IRC article headed ‘What asylum seekers told the Working Group about the length of time and the decision making system’

<sup>5</sup> Paragraph 2.13 of the Working Group report lists the impact of the lengthy process on asylum seekers but does so only with reference to their living conditions

Part of the explanation can be seen in the minutes of the sub-group of 23 February 2015 which read:

*“There was a request [from members of the sub-group] for a more comprehensive historical analysis of system problems that led to lengthy delays to be included [in the report]. It was felt that this was beyond the scope of the Sub-Group who by necessity have to examine the current system as it is and the problems that exist at the present time.”*

*“It was stated that there is a need for academics, NGOs and others to review and evaluate the system overall and a comprehensive historical analysis of the factors that led to the present situation. The Working Group could aid such work in the future.”<sup>6</sup>*

The Working Group was therefore making recommendations without an analysis of the circumstances that had brought the system to a point where five years in the asylum process was normal.

We can gather insights into the problems that have led to people being stuck in the asylum system for years by looking at various pieces of information, including statistics, included in the report.

### **What does the report suggest are reasons for delays in the system?**

*“The outcome of the detailed examination conducted by the Working Group of those in the system reveals that of the estimated 7,937 people in the system on 16 February 2015, 55% have been in the system for over five years. Of the 7,937 people in the system: • 49% are in the protection process. Almost a third of them have been in the protection process for more than five years.” (para 3.8, p. 65)*

The report shows that nearly 1200 people had been waiting for the final outcome of either a refugee or a subsidiary protection application or appeal for more than five years. We can safely assume that the delays were, by and large, not of their own making or their own wish.<sup>7</sup> We can assert a number of reasons for people still waiting five years for a final decision on their application which do not relate solely or even at all to the absence of a single procedure.

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<sup>6</sup> The Working Group is no longer in existence and there was no recommendation that any such ‘review and evaluation’ should be carried out.

<sup>7</sup> Asylum seekers are not allowed to work, adults are limited to FETAC Level 4 education, accommodation for most is in former hotels, hostels, etc. with no ability to cook for themselves and their allowance has remained at €19.10 per adult p.w., €9.60 per child p.w. since April 2000. The idea that someone would deliberately act in a way that would keep them in this situation defies common sense

Firstly, due to refusals of applications at the first stage (refugee status) by the Office of the Refugee Applications Commissioner which, in 2010, were the lowest in the EU, namely 1.3% of applications decided that year<sup>8</sup>, leading to the need to appeal or to pursue a second protection application:

*“A low rate of recognition of persons eligible for refugee status and subsidiary protection in the past, combined with the effect of the two-step procedure, led to some cases which were in need of refugee or subsidiary protection status not being identified at the earliest stage in the protection process. These cases then progressed to other stages in the system, with a consequent negative impact of delay on the persons concerned.” (para. 3.47)*

Applications at the refugee stage were sometimes viewed differently when a new system for subsidiary protection was introduced in November 2013, despite the similarities in the issues to be considered. Some of those granted subsidiary protection would have been recognised as refugees if the trend had not been to refuse their applications when first considered. In 2011 UNHCR introduced a quality initiative with the Office of the Refugee Applications Commissioner.<sup>9</sup> It was late 2013 that the Commissioner was able to recruit a panel to assist with consideration of subsidiary protection claims<sup>10</sup> with a requirement - for the first time - that people applying to be decision-makers on protection claims should have a knowledge of Irish, EU and international refugee law.<sup>11</sup>

Secondly, the opportunity to succeed at the first stage was undermined by the absence of independent legal advice and assistance at the earliest stage, leading to people going largely unaided through a complex process, sometimes in a language which was not their own and some after experiencing torture or other severe trauma. Early legal advice for people at the first stage is still not widely available<sup>12</sup> and it has only been in place since early 2014<sup>13</sup> for those applying for subsidiary protection.

A third factor contributing to delay is the use of unqualified interpreters in the decision-making process. High quality interpretation is vital to the gathering of sometimes very sensitive information and therefore to accurate and sustainable decisions at the earliest opportunity. If it is not present, misunderstandings can occur and when it does, fault is often attributed to the asylum seeker, leading to their credibility and therefore their claim for protection being undermined.

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<sup>8</sup> Paragraph 3.48 of the report

<sup>9</sup> Paragraph 3.220 of the report

<sup>10</sup> Paragraph 3.230 of the report

<sup>11</sup> Paragraph 3.231 of the report. The recognition rate for subsidiary protection rose from 0.6% in 2010 to 32% in 2014 (paragraph 3.48)

<sup>12</sup> Paragraphs 3.252 and 3.253 of the report

<sup>13</sup> Paragraph 3.251 of the report

*“It must be acknowledged, however, that there is no legislation regulating translators or interpreters in Ireland, nor is there any national professional qualification on foot of statute, or a practice direction from the Courts. This lack of regulation means essentially that anyone who speaks English and another language can call themselves a translator or an interpreter.”*  
(para 3.271)

Fourthly, the system lacked a truly independent Refugee Appeals Tribunal. There was a complete absence of transparency in the appointment of the Chair and Members of the Tribunal or oversight of their work.<sup>14</sup> Public appointments of members of the Tribunal did not commence until December 2012.<sup>15</sup> It was not until August 2013 that a new Chairperson of the Tribunal was appointed through a public recruitment process for the first time.<sup>16</sup> New measures were then introduced to try to ensure that earlier problems would not be repeated.

*“Under this newly constituted Tribunal there has been a great deal of collaboration between UNCHR and the Tribunal on training and the development of quality tools and mechanisms. In particular, new decision-making templates were developed to assist members in identifying persons in need of protection and producing legally robust decisions. In addition, a number of chairperson’s guidelines have been utilised to bring clarity and transparency to particular aspects of the work of the Tribunal.”*  
(para. 3.238)

Finally there were delays in dealing with applications in the High Court<sup>17</sup> and, even if successful, cases being returned to the same Tribunal for a new decision.<sup>18</sup>

## Conclusions

Given the opening quote of this article you could be forgiven for thinking that the reason people spend years in the asylum system is simply because Ireland does not have a single application procedure. ‘Length of time’ is certainly the party line of those in Government. It enables the Government to say that a single procedure will be the panacea for the ills of the system. It might even strengthen an argument to rush the new International Protection Bill through the Oireachtas when published. It also suggests that we do not need to end institutionalised living in the form of

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<sup>14</sup> For further information, see the IRC article headed ‘What asylum seekers told the Working Group about the length of time and the decision making system’

<sup>15</sup> Paragraph 3.227 of the report

<sup>16</sup> Paragraph 3.238 of the report

<sup>17</sup> Paragraphs 3.57 and 3.102 of the report

<sup>18</sup> Applications to the High Court are for a review of the process and, if the judge finds errors, the case is returned to the Tribunal. They are not appeals and therefore the judge has no power to substitute a new decision for the one before them, only indicate the reasons for overturning the decision for the Tribunal to start again.



Direct Provision because we will be able to process people within months and therefore only reforms are needed, not a completely new reception system.<sup>19</sup>

But, even on the basis of the limited evidence that the Working Group was willing or able to take into account, there are hints that the reasons behind the length of time that people spend in the system are more than ‘structural faults’ that can be rectified by the introduction of a new single procedure.

Even the Working Group had its doubts about whether the introduction of a single procedure would end the problems in the Irish international protection system:

*“When the single procedure is implemented, and **assuming** that adequate resources are allocated to its operation **and** the quality measures recommended in this report are implemented, final quality decisions on eligibility for protection or, in the alternative, leave to remain **should** issue to applicants within a 12 month timeframe.”* (para. 30; emphasis added).

People are, to use a now popular term, languishing in Direct Provision. The report gives very little hope that anything much will change, not least because it glosses over the reasons why they end up spending so long in the system. It could be said that the Working Group, rather than offend past or present actors in the protection system, considered it better to fail to do justice to those who go through it. The Working Group report contains some very positive recommendations for the protection application process. However, they are undermined by the absence of comprehensive explanations for the lengthy time that people spend in the asylum system and failure to respect those who have the lived experience.

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<sup>19</sup> This argument has already been made in relation to the new ‘Emergency Reception and Orientation Centre’ for asylum seekers being relocated from Italy and Greece. The first such centre, Hazel Hotel in Monasterevin, Co. Kildare, is run by the owners of Direct Provision centres and is run on the same basis as Direct Provision. The Government argues that it is different to Direct Provision, partly because people will, in theory at least, be processed “within weeks”. See, for example, Frances Fitzgerald TD, speaking in the Dáil on 1 October 2015 in the debate on the Motion: EU Council Decisions on Measures in the Area of International Protection