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Overturned on Appeal: Why Well-Founded Asylum Applications Fail in First Instance

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OVERTURNED ON APPEAL: WHY WELL-FOUNDED ASYLUM APPLICATIONS FAIL IN FIRST INSTANCE

Katie Coyle*

Abstract:

Significant changes have been introduced to the Irish asylum determination system within the last decade. The International Protection Act 2015 heralded the modification of the bodies determining asylum decisions. Prior to this, responsible bodies received criticism in a landmark working group report chaired by Justice Bryan MacMahon and from organisations such as the Irish Refugee Council. The purpose of this paper is to provide both a historical perspective on the evolution of the Irish asylum determination process and a modern insight to the current process. The current rate of asylum cases successfully overturned on appeal stands at 30.43%. This Working Paper draws on historical literature to highlight perceived issues in the asylum determination process. These issues involve an inconsistent application of credibility analysis, unreasonable plausibility findings, poor application of country of origin information, and a lack of access to legal representation at the earlier stages of the asylum determination process. The paper questions whether recent welcome reforms to the Irish asylum determination process have eliminated the presence of these concerns. Through observing a small sample of cases recently overturned on appeal by the Irish Protection Appeals Tribunal, it can be established that despite significant improvements to the Irish asylum determination process, a worrying margin of error still exists at the earliest stages of the process.

Keywords: asylum, refugee law, international protection, human rights

A. INTRODUCTION

In 2012, the Irish Refugee Council (IRC) published a report titled *'Difficult to Believe',*[2] the purpose of which was to highlight issues with the procedure invoked to determine refugee status with regards to credibility analysis. Four years after this report was released, the legislative framework for refugee status determination was altered with the introduction of the *International Protection Act 2015* (IPA). Along with the introduction of a single application procedure, the act also signalled the abolishment of the Office of the Refugee Applications Commissioner (ORAC) and the Refugee Appeals Tribunal (RAT), the administrative bodies determining asylum procedures, and their replacement with the International Protection Office (IPO) and International Protection Appeals Tribunal (IPAT). Recent statistics released indicated that a rejection rate at first instance of approximately 70.3%,[3] while statistics from the IPAT also indicate that the amount of decisions set aside (for both refugee status and subsidiary protection) was 30.43% for 2018.[4]

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[2] Sue Conlan, *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2015) Irish Refugee Council [Hereinafter Conlan].

[3] European Council for Refugees and Exiles (ECRE), 'Republic of Ireland Statistics', Asylum Information Database. Available at: www.asylumineurope.org/reports/country/republic-ireland/statistics (last accessed: 8 May 2020).

[4] International Protection Appeals Tribunal, *Annual Report* 2018, 54.

The purpose of this Working Paper is to assess a qualitative sample of cases overturned on appeal in 2018 to determine whether issues raised by the IRC continue to present within the current system. Chapter 1 will outline the evolution of the current Irish determination procedure and review reports and discussions. Chapter 2 will take a qualitative view of recent cases and address reasons for refusal therein. Chapter 3 will conclude these findings and outline any potential recommendations for reform.

One obstacle encountered over the course of this study was a lack of academic commentary which had been published on the status determination of asylum applications at first instance in Ireland. While this Working Paper draws on NGO reports and practitioner commentary – as well as academic commentary based on other jurisdictions – this area of research would benefit from further academic analysis and commentary.

B. THE IRISH ASYLUM DETERMINATION SYSTEM

1. The Evolution of the Irish Asylum Determination System

The international definition for who constitutes a refugee is recognised under the *1951 Convention and the 1967 Protocol Relating to the Status of Refugees*.[5] Ireland has been a party to this Convention since the 29th November 1956 and to the Optional Protocol since 1968. Nonetheless, it was not until 1996 that Ireland would introduce an act that formally incorporated the definition into Irish law. This was due to the fact that 1980's Ireland received very few asylum applications.[6] Prior to this, Ireland relied on the *1935 Aliens Act* and a 1985 letter[7] which had been sent by the Department of Justice to the UNHCR Representative for the UK and Ireland in London, Ruprecht von Arnim.[8] In the 1990's due to an increase in asylum applications, the Department wrote another letter to the UNHCR Representative for the UK and Ireland in London, Hope Hanlon in December 1997.[9] This letter was to outline the new asylum procedures to be followed. While the *1996 Refugee Act* remained unimplemented for a number of years, the *1999 Immigration Act* would subsequently legislate for how deportations would take place and make amendments to the Act. In 2000, the Office of the Refugee Applications Commissioner (ORAC) was established.[10]

Despite requirements in the *UNHCR Handbook*[11] and the EU *Directive on Minimum Guarantees for Asylum Procedures*,[12] there were not specific training requirements and ORAC officers were appointed with the requirement of a Leaving Certificate education as a minimum.[13]

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[5] UN High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, September 2011.

[6] Laura Almirall and Ned Lawton, *Asylum in Ireland: A summary of a report on the fairness and sustainability of asylum determinations at first instance* (2000) Irish Refugee Council, 1 [Hereinafter Almirall].

[7] Dated 13th December 1985.

[8] Ursula Fraser, 'Sanctuary in Ireland, Perspectives on Asylum Law and Policy' (2003) *Institute of Public Administration,* 116.

[9] Department of Justice, 'Procedures for Processing Asylum Claims in Ireland', 10 December 1997.

[10] Almirall, *supra* note 6, 1.

[11] UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV, 3, para 190 [Hereinafter UNHCR Handbook].

[12] Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)* [29 June 2013] OJ L. 180/60-180/95; 29.6.2013, 2013/32/EU.

[13] Almirall, *supra* note 6, 28.

The year 2000 also saw the provision of a Refugee Legal Service under the Legal Aid Board. The Law Society of Ireland criticised the legal provisions, however, on the basis that "It was found that a panel had been compiled of seven solicitors to provide services to 12,352 asylum applicants within the year."[14] On the 5th July 2000, the Minister for Justice, Equality and Law Reform John Donoghue announced that there would be the recruitment of 370 additional staff "increasing processing capacity … to deliver more speedy decisions"; although no reference was made to the quality of decision making or that the appeal authority was overturning approximately 30% of ORAC's negative decisions. Criticisms of the initial system established shall now be assessed further.[15]

2. Criticism of the Irish Asylum Determination Procedure

In the same year, the Irish Refugee Council (IRC) conducted research into ORAC decisions and subsequently made 52 recommendations in order to ensure fair procedures were adhered to.[16] These recommendations covered the provision of early legal advice to applicants, the ways in which interviews were conducted as well as the way that application decisions were determined. The report further found that country of origin information (COI) evidence had been poorly applied which often disqualified the applicant. The report also disclosed an inconsistent application of criteria such as agent of persecution, third safe country, internal flight alternative and definitions as to what amounts to persecution. It was also disclosed that the majority of applications focused on past rather than on future threats of persecution. This was observed as a tendency to equate persecution with evidence of physical harm and amounted to a misinterpretation of the law surrounding refugee status.

Following this, in 2001 the Irish Refugee Council published another report which assessed how poor quality decision making in first instance raised serious issues with regards to accelerated procedures.[17] They argued that the newly adopted procedures reflected how "in the tension between a rights-based refugee regime and a control-based immigration policy, the desire for security and control won out."[18] The report argued that urgent procedural and substantive reforms were required to bring Ireland into compliance with international legal standards. Among issues detected was the fact that unfairly applied credibility analysis put applicants at a risk of erroneously applied accelerated procedures.[19] Safeguards recommended included that decision-makers should be required to send a list of further questions to the applicant and his / her legal representative following an interview. They also recommended that decision-makers would be suitably qualified in either law or a relevant social science and that they should be informed of country of origin information prior to the interview stage.[20] Another notable recommendation was that "The existing legal aid programme needs to be expanded to ensure that all asylum seekers have effective access to legal services and to enable solicitors to represent clients at the first instance stage."[21]

Provoked by criticisms such as these, the Minister for Justice, Equality and Law Reform Michael McDowell released a statement in 2005 arguing that a "small but well-placed minority of commentators have sought to create the impression that Ireland's treatment of asylum seekers is harsh and unfair. They refuse to address

[14] Ibid.
[15] Ibid, 26.
[16] Ibid, vii.
[17] Siobhán Mullally, *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations* (2001) Irish Refugee Council, 2001, 6 [Hereinafter Mullally].
[18] Rosemary Byrne, 'Expediency in Refugee Determination Procedures' (2000) XXXV *Irish Jurist*, 149.
[19] Mullally, *supra* note 17, 43.
[20] Mullally, *supra* note 17, 10.
[21] Ibid, 11.

the very large abuse of asylum protection in Ireland."[22] Within this statement the Minister argued that Ireland's refusal rate was in line with other EU states and he further argued on behalf of the quality and standard of procedures. He stated "the staff of our asylum agencies are trained by the UNHCR on an ongoing basis and their determination procedures are fully in compliance with UNHCR standards. Comprehensive legal advice and assistance is provided by the Refugee Legal Service (RLS) at all stages in the asylum process, with over Euro 9m allocated to the RLS in 2005."[23]

Despite this defence from the Minister, in the years that followed a number of cases were taken through judicial review which questioned the fairness of procedures. This was evident in cases such as *AMT*[24] where the decision of the RAT had contained a mistake as to evidence provided in an earlier interview.[25] In *PPA*[26] it was held that further transparency was required in the way that decisions were made. It was held "if relevant previous decisions of the tribunal were not available to an appellant, he or she had no way of knowing whether or not there was such consistency. Such a secret system was manifestly unfair."[27] Subsequent to this, a database of decisions was established in October 2006. The database publishes redacted decisions of the tribunal and can be accessed by any person (as of 2014)[28] through making an email application.

In *HR*,[29] Cooke J held that there had been a mistake that went to the course and content of the asylum procedure.[30] The Tribunal member in *HR* had also made a mistake as to the evidence which had been provided by the applicant in their earlier interview. Meanwhile, in *SK*[31] it was held that while an applicant had conveyed their medical condition on arrival in state, a breakdown in communication meant that the information was not conveyed in the applicant's questionnaire.[32]

Further litigation was taken on behalf of three asylum seekers with regards to a Tribunal member who had a rejection rate of over 95% amongst his cases. While the case and allegations were settled out of court, the Tribunal member concerned resigned a number of months later.[33]

Around this time, the IRC also published the report *'Difficult to Believe'* which focused on the issue of credibility assessment within asylum claims. In this report, the IRC assessed the case files of asylum applicants they had obtained from four solicitors in Dublin. The report drew attention to oversight within cases. One example involved a Tribunal member dismissing an applicant's account of rape as a "fabrication intended to enhance the asylum claim" and failing to notice that the incident had been referred to in an initial questionnaire.[34] In this report, the IRC argued that there had been a failure to have regard to evidence in

[22] Department of Justice and Equality, 'Statement by the Minister regarding the Real Facts about the Asylum and Deportation Systems', available at: www.inis.gov.ie/en/inis/pages/pr07000171 (last accessed: 8 May 2020).
[23] Ibid.
[24] *AMT v Refugee Appeals Tribunal* [2004] 2 IR 607.
[25] Ibid.
[26] *PPA v Refugee Appeals Tribunal* [2007] 4 IR 94.
[27] Ibid, para 3. Of note, the lack of access to asylum decisions was one of the motivating factors behind the publication of: Dug Cubie & Fergus Ryan, *Immigration, Refugee and Citizenship Law in Ireland: Cases & Materials* (Roundhall, 2004)
[28] Previously access was only granted to legal representatives.
[29] *HR v Refugee Appeals Tribunal* [2011] IEHC 151.
[30] Ibid, para 7.
[31] *SK v Refugee Appeals Tribunal & anor* [2014] IEHC 520.
[32] Ibid, para 19.
[33] Irish Independent, 'Lawyer Accused of Bias against Refugees Quits Appeals Tribunal' (4 March 2008), available at: www.independent.ie/sport/golf/lawyer-accused-of-bias-against-refugees-quits-appeal-tribunal-26427734.html (last accessed: 8 May 2020).
[34] Conlan, *supra* note 2, 28.

cases, the report also criticised findings of inconsistency or contradictory evidence which failed to afford reason of doubt to the applicant. This was particularly evident in cases where traumatic accounts of rape were revealed at later stages of the application process.[35]

Criticism was also directed to instances where asylum claims were negatively assessed on the basis that there had been a failure to claim asylum en route to or on arrival in Ireland. The demeanour of applicants was regularly assessed as a means to find adverse credibility findings. The report concluded that the system put asylum seekers at a disadvantage from the outset, that the burden of proof applied was too high for asylum cases and that there was a lack of fairness and transparency.[36] The IRC provided a number of recommendations such as further training, availability of legal advice at earlier stages for asylum seekers and greater transparency among Tribunal members.[37]

Despite such recommendations, issues continued to present in the High Court. *AAMO*[38] served as another strong example of criticism of the determination procedure. The judgment begins with the following dicta, "Sometimes the Court is called upon to review a decision which is so unfair and irrational and contains so many errors that judicial review seems an inadequate remedy to redress the wrong perpetrated on an applicant … This is such a case."[39] An example of errors within the case included the initial decision-maker determining that the Sudanese applicant could relocate to the newly-founded South Sudan when this was a state which the applicant had no ties with. The case affirmed allegations of bias, "Personal dislike is not a valid reason for any legal decision and certainly not a reason for ignoring numerous documents relevant to a claim which appear to emanate from reliable sources."[40] Judge Harding Clark further criticised the ORAC as having "failed the refugee assessment process abysmally."[41]

One of the greatest causes of concern for the asylum determination procedure occurred in 2013, however, when a new procedure was introduced whereby applicants were sent back to the beginning of the process to reapply for subsidiary protection in addition to refugee status. The *Asylum Procedures Directive*[42] and case law such as *HN*[43] established that a single application process should be introduced. Other international attention was drawn to this procedure by the UN Human Rights Committee in 2014 and from the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg who pointed out that Ireland was unique among the 27 EU member states to have a dual procedure.[44]

[35] Ibid, 37.
[36] Ibid, 49.
[37] Ibid, 54.
[38] *AAMO (Sudan) v Refugee Appeals Tribunal & anor* [2014] IEHC 49 [Hereinafter AAMO].
[39] Ibid, para 1
[40] *AAMO*, *supra* note 38, para 24.
[41] Ibid, para 6.
[42] Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60-180/95.
[43] Case C-604/12, Judgment of 8 May 2014.
[44] *Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers Final Report* (June 2015), para 1.44 [Hereinafter McMahon Report]. Available at: www.justice.ie/en/JELR/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf/Files/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf (last accessed: 8 May 2020).

In response to criticisms, in 2015 a Working Group was established under Justice Bryan MacMahon to assess Ireland's asylum reception conditions. A section of the report was chaired by the former head of office of UNHCR Dublin, Sophie Magennis and focused on the determination procedure. A large focus of the report discussed the need for a single application procedure. The report also focused on problems with the judicial review mechanism whereby both delays and training of judges came into question. The 2015 report also highlighted the fact that a very small number of applicants received early legal advice or other assistance in contacting ORAC. Attention was drawn to the fact that often legal advice is provided just prior to the appeal stage and that "it can be challenging for applicants to resolve issues in the negative first instance decision that arose due to a lack of early legal advice."[45] It was also discussed that while the Legal Aid Board may provide assistance in completing questionnaires, that this was often not the case.

Attention was also drawn to the fact that the "status determination procedure was itself working in a way which made it more likely that protection applications would be refused rather than accepted."[46] A consequence of this was noted to be costly judicial review proceedings: "For the period 2009-2014 the costs arising out of judicial reviews against the State were in excess of €33m."[47] To address the standard of decision-making, recommendations within the report focused on the determination process,[48] training[49] and the provision of early legal advice.[50]

In 2011, the UNHCR had began a quality initiative with the authorities regarding the asylum determination process. This was acknowledged in the Working Group Report (McMahon Report) in 2015. This initiative was a continuation of the output of three UNHCR projects which analysed Credibility Assessment. One such project, the CREDO project was created in response to a study *'Beyond Proof: Credibility in EU Asylum Systems.'* This study noted a lack of understanding of and approach to credibility assessment among EU member states.[51] The *CREDO* project was launched in Ireland in 2013 in order to ensure a structured approach to credibility assessment in decisions. The project noted factors that can have an impact on an applicant's ability to recount experiences such as individual experiences, temperaments and attitudes. The report recounted problems with the perception of 'normal memory' and that traumatic experiences can have an impact on how one recounts memories.[52] The report also listed a number of credibility indicators under the EU's *Asylum Procedures Directive* such as internal and external consistency, sufficiency of detail, plausibility and the demeanor of the applicant. The result of considerations was that the UNHCR EU office compiled a six-step approach to ensure credibility assessment as follows:

i. Gather all the facts – facts must be individually assessed
ii. Determine the material facts
iii. Assess the credibility of each material fact
iv. Categorise the material facts – application of the standard of proof

[45] Ibid, para 3.45.
[46] Conlan, *supra* note 2, 40.
[47] McMahon Report, *supra* note 44, para 3.99.
[48] Members of the Working Group noted the need to provide decision-makers with quality tools, training resources, and more involvement from bodies such as the UNHCR and other NGOs.
[49] Such as formalising requirements in legislation for sufficient training, closer ties between protection agencies and NGOS, adequate funding provided to training legal support staff.
[50] McMahon Report, *supra* note 44, pp.192-3.
[51] United Nations High Commissioner for Refugees (UNHCR), *Beyond Proof: Credibility Assessment in EU Asylum Systems* (May 2013). Available at: www.unhcr.org/51a8a08a9.pdf (last accessed: 8 May 2020).
[52] Sarah Parle, 'Assessing Credibility in a Practical Context' (2014) 9(1) *The Researcher*, Refugee Documentation Centre, Legal Aid Board, 2 [Hereinafter Parle]. Available at: www.legalaidboard.ie/en/about-the-board/press-publications/newsletters/the-researcher-april-2014-vol-9-issue-1.pdf (last accessed: 8 May 2020).

v. Consider the benefit of the doubt
vi. Clearly determine the facts of the claim[53]

It is of note that training on these issues has been and is provided by UNHCR Dublin to Irish decision-makers on an ongoing basis.[54]

3. Post-2015 Reforms and the Current Irish Asylum Determination Procedure

Following the 2015 Working Group Report, changes were incorporated via the *International Protection Act.*[55] A number of submissions were made from NGOs such as the IRC during the bill drafting process. Among recommendations regarding the determination procedure, the IRC advocated that provisions would be made for training, qualification and skills of personnel engaged at first instance. Such training recommendations included that Ireland would make reference to *Regulation (EU) no. 439/2010 establishing the European Asylum Support Office (EASO)*.[56]

Prior to the commencement of the current *International Protection Act* (IPA), the Irish Refugee Council left the McMahon consultation process due to disagreements surrounding the bill. An example of such criticism surrounded the fact that ninety modifications were made by the Department of Justice and Equality within a week of the bill being published. This provoked condemnation from both the Seanad and NGOs. Calls were made from Doras Luimní, the Irish Refugee Council, Migrant Rights Centre Ireland and Nasc to withdraw the bill. Sue Conlan stated that:

> "A single procedure will not cure the problems in the Irish asylum system unless there are proper safeguards in place which protect asylum seekers from cursory examination of their applications and a swift move towards deportation. The outcome of passage of the Bill, as it stands, will lead to people being at risk of being returned to persecution or serious harm and refugees separated from family members."[57]

Meanwhile Fiona Finn, CEO of Nasc stated that, "With the exception of the single procedure, the Minister has cherry picked a handful of the more conservative recommendations and ignored any positive recommendations."[58]

Despite criticisms, the IPA was adopted into law in 2016 as the governing legislation over asylum determination procedures and asylum reception in Ireland. International law remains the most influential source on how asylum status determinations must be processed. While the 1951 Convention was quiet on the issue of status determination, the *UNHCR Handbook* has attempted to fill this gap by issuing various guidelines since 1979. Nonetheless, it is the EU that has paved the way by establishing *minimum standards*

[53] Ibid, 6.
[54] Ibid, 7.
[55] The drafting of the bill was incorporated as opposed to the earlier residence and protection bill which had been suggested and represented an opportunity for legislation in Ireland to focus solely on protection applicants.
[56] Irish Refugee Council, *Recommendations on the International Protection Bill* (November 2015), 2. Available at: www.irishrefugeecouncil.ie/recommendations-on-the-international-protection-bill-2015 (last accessed: 8 May 2020).
[57] Doras Liumní, Irish Refugee Council, Migrant Rights Centre Ireland & Nasc, 'NGOs call for the International Protection Bill to be withdrawn and reconsidered' (4 December 2015). Available at: www.doras.org/wp-content/uploads/2014/05/4-12-2015-Joint-Statement_NGOs-call-for-International-Protection-Bill-to-be-withdrawn.pdf (last accessed: 8 May 2020).
[58] Ibid.

for protection procedures[59] which provides a much greater level of detail than the *UNHCR Handbook.*[60] It is of note that the EU are also currently considering a proposal for a new *Asylum Procedure Regulation*.[61] EU law is more influential in shaping Irish asylum determination procedures than the soft law observed with the *UNHCR Handbook Guidelines*. Nonetheless, it can be argued that issues remain even in the presence of these procedural guarantees.

When asylum applicants arrive in Ireland, s.13 of the IPA indicates that applicants may engage in a preliminary interview upon arrival in the state. In addition to this, as per s.35 IPA, a further interview will be held with an IPO officer for the purpose of establishing full details of the claim. An applicant will also submit a questionnaire as part of their claim, and is provided with ten days from when a claim is lodged to complete their questionnaire. In assessing claims, a criteria framework has been adopted based on UNHCR recommendations and Hathaway's analysis of the refugee definition.[62] The criterion assessed include 'alienage,'[63] 'genuine risk,' 'serious harm,' 'failure of state protection,' 'nexus to civil and political status,'[64] and 'needs and deserves protection.'[65]

Applicants are currently entitled to assistance from the Refugee Legal Service and are entitled to apply to for such services through the Legal Aid Board. The majority of applicants will only receive assistance from a caseworker for their initial application and then a solicitor during the appeals period. While applicants will typically have their questionnaire reviewed by a caseworker, applicants usually do not have a caseworker present when their initial interview is completed. [66]

Upon an unsuccessful determination at first instance, an appeal may be submitted to the IPAT within 15 working days of receiving a negative decision. Applicants can request an oral hearing on appeal pursuant to s.42(1)(a) of the IPA. Typically present at the hearings will be a Tribunal Member, the applicant, their solicitor, an interpreter and an Officer of the Minister, or a 'Presenting Officer.' Currently, pursuant to s.42(6)(f) of the IPA, the Tribunal is obliged to allow the examination and cross examination of any witness.[67] IPAT appeals are also heard *de novo* and thus, they use the initial decision-maker's record, but they review the evidence and the law without yielding to the original ruling. According to the latest available data, the IPAT received a total of 1,760 appeals in 2018 and during that period a total of 917 decisions were issued.[68] If a negative response is affirmed by the IPAT, then per s.49(7) IPA, an applicant may appeal to the Minister to reassess permission to remain.

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[59] *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection*.

[60] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (2010) Council of Europe Publishing, ISBN 978-92-871-6818-4.

[61] *Proposal for a regulation of the European parliament and of the council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM/2016/0467*

[62] James C. Hathaway, *The Law of Refugee Status* (Cambirgde University Press 2014) pp.17, 91, 183, 288 [Hereinafter Hathaway].

[63] An applicant must be outside their country of origin: Hathaway, ibid, 17.

[64] Applicants must prove their entitlements to protection under one of the grounds of race, religion, nationality, membership of a particular social group and political opinion: Hathaway, ibid, 362.

[65] "Cessation clauses" are considered as areas where one may be excluded from their protection status. Examples of this are seen in sub-sections D, E and F of Article 1 of the 1951 Geneva Convention which outlines cases where certain persons are excluded from status: Hathaway, ibid, 288.

[66] European Council for Refugees and Exiles (ECRE), 'Country Report on the Regular Procedure in Ireland'. Available at: www.asylumineurope.org/sites/default/files/report-download/aida_ie_2018update.pdf (last accessed: 8 May 2020).

[67] ECRE, *supra* note 3.

[68] Ibid.

Alternatively, applicants may appeal decisions to the High Court under judicial review. In 2017 for example, "497 judicial review applications were submitted to the High Court on the 'Asylum List.' Despite efforts to reduce the number of judicial reviews submitted, figures for 2017 represent an increase on the 458 applications submitted in 2016."[69]

Following the evolution of the Irish protection determination system and historical criticisms as outlined above, this Working Paper will now assess a sample of recent cases which have been processed by the IPAT since the adoption of the *International Protection Act* to observe commonalities within cases where the original negative IPO decision has been overturned on appeal.

C. EMPIRICAL ANALYSIS OF INITIAL DECISION-MAKING

As access to initial International Protection Office (IPO) decisions that form the basis of the IPAT appeals is beyond the scope of this research, this study will focus on the substance of appeal determinations issued by the International Protection Appeals Tribunal (IPAT). Sections 1-6 below outline the demographic of the representative sample which has been selected based on their country of origin, gender, age and application grounds, as well as the length of time each case had been pending final determination from IPAT. Following this, sections 7-9 undertake a more qualitative approach to grounds for refusal at first instance and the impact of evidence which had been submitted by the applicant.

1. Study Sample and Methodology

The study commenced by gaining access to the IPAT Database. Access is granted through requesting permission from the Tribunal via email. Once initial access had been gained to the database, an overview was made of all the 2018 cases which had been published. Categories could be distinguished such as:

i. Granted / set aside subsidiary protection: 37
ii. Granted / set aside asylum: 243
iii. Affirmed decision – asylum: 2
iv. Affirmed decision – subsidiary protection: 35
v. Affirmed decision – asylum and subsidiary protection: 250[70]

The focus of this Working Paper was on the reasons why initial negative decisions on refugee status (i.e. asylum) were overturned on appeal and thus a selection was made from the category of 'granted / set aside – asylum.' Within this category there were 243 cases. A further selection was made based on the country of origin (COI) of the applications to reflect the most common countries of origin.

Following this, thirty cases were randomly selected and assessed as to the reasons provided by the IPAT for why the initial negative IPO decision was overturned on appeal. Cases in the database are represented by their country of origin and a reference code e.g. 1781931-IPAP-16. This ensured that an objectivity was

[69] ECRE, *supra* note 66. See also: Courts Service, *Annual Report 2017*. Available at: www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/8000F0BA4F127EE7802582CD00338311/$FILE/Courts%20Service%20Annual%20Report%202017.pdf (last accessed: 8 May 2020).

[70] This indicates that the applicant had appealed on both the grounds of refugee status and subsidiary protection. It can be noted that as a result some of these figures were subject to duplication in the IPAT database.

observed in sample selection. This Working Paper will reference selected cases as Case 1-30 in order to maintain the anonymity of applicants.

Nonetheless, the potential for bias within the study must be acknowledged. In research, bias occurs when "systematic error [is] introduced into sampling or testing by selecting or encouraging one outcome or answer over others."[71] While a degree of bias is nearly always present in a published study, readers thus must consider the ways in which bias may influence the conclusion and findings. Firstly, it can be acknowledged that not all cases unsuccessful at first instance are appealed to the IPAT. For example, the IPAT received a total of 887 appeals[72] in 2017, while 2,926[73] applications for international protection were made. Therefore, bias can be established from the types of cases which chose to appeal, particularly if appeals are warranted on the probability of success. Further bias can occur through the means by which cases are qualitatively assessed. The aims of this study were to review the criticisms of decision-making prior to 2015 and detect whether issues remain following the introduction of the new decision-making structures via the International Protection Act. Corresponding with the limitations of this study, the intention is not to assert that inadequate decision-making practices occur on a significant scale or across all protection interviews. What can be deducted from research findings is whether there is a potential for such issues to present within the current system.

2. Country Profile

From the sample of 243 cases, the three countries which appeared most frequently were:

- Zimbabwe, Pakistan and Albania.
- This was followed by Nigeria, Malawi, South Africa, Bangladesh and Georgia.[74]

The focus of this empirical analysis is going to be on the granted appeals of cases from Zimbabwe, Pakistan, Albania, and Nigeria to ensure similarity across the sample.[75]

In order to ensure further consistency across the sample, cases were eliminated which had been fully processed by the ORAC prior to the introduction of the International Protection Office. Nonetheless, a number of transitional cases were selected which had completed s.70 questionnaires with regard to an application for subsidiary protection. These cases received notification that they had succeeded for neither refugee status nor subsidiary protection from the International Protection Office. It was following this that the sample was randomly selected of thirty anonymised cases which had been published on the database, as set out in figure 1 below.

[71] C.J. Pannucci & E.G. Wilkins, 'Identifying and Avoiding Bias in Research' (2010) 126(2) *Plastic & Reconstructive Surgery* 619-25.
[72] ECRE, *supra* note 3.
[73] Department of Justice and Equality, *Immigration in Ireland Annual Review* (2017). Available at: www.justice.ie/en/JELR/Immigration_in_Ireland_Annual_Review_2017.pdf/Files/Immigration_in_Ireland_Annual_Review_2017.pdf (last accessed: 8 May 2020).
[74] This is generally indicative of the main countries which had lodged applications for asylum. Countries which had the most applications in 2017 were Syria, Georgia, Albania, Zimbabwe and Pakistan.
[75] Jan Shaw & Mike Kaye, *A Question of Credibility: Why so many initial asylum decisions are overturned on appeal in the UK* (April 2013) Amnesty International & Still Human Still Here. Available at: www.amnesty.org.uk/resources/question-credibility-why-so-many-initial-asylum-decisions-are-overturned (last accessed: 8 May 2020).

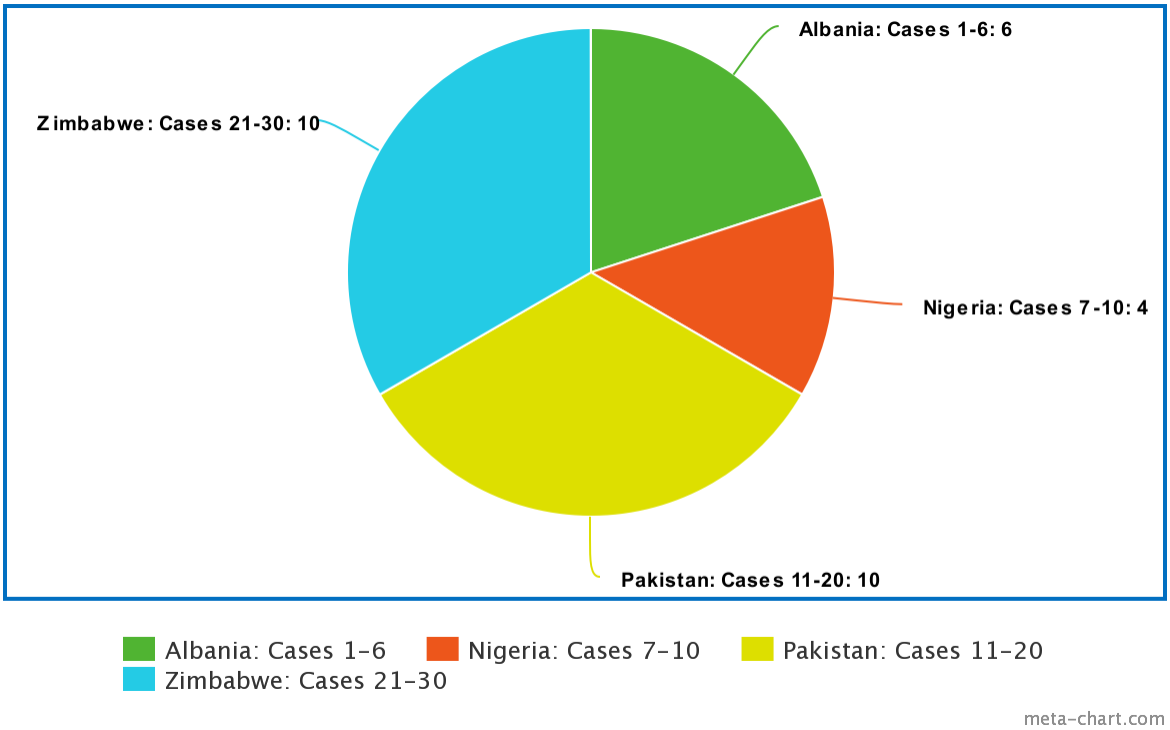

Figure 1: Case Sample Country of Origin

3. Length of Application

The initial factor observed was how long each case had been pending determination.[76] The Irish Refugee Council and UNHCR Ireland have recommended that measures must be taken to decrease the length of processing for asylum applications.[77] While it is recommended that asylum applications take no more than a processing time of 6 months for an initial determination, it is evident from the observed sample that Ireland still falls outside this recommendation.[78] From the selected sample, over 50% of the cases had been in the system for 2 years or more, as set out in figure 2 below.

[76] This is not indicative of broader figures as this study focuses on cases processed more recently within the remit of the IPO.

[77] Irish Refugee Council, 'Refugee decision making waiting times at crisis point' (13 December 2017). Available at: www.irishrefugeecouncil.ie/News/refugee-decision-making-waiting-times-at-crisis-point (last accessed: 8 May 2020).

[78] European Council for Refugees and Exiles (ECRE), *The Length of Asylum Procedures in Europe*, AIDA Asylum Information Database (October 2016). Available at: www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf (last accessed: 8 May 2020).

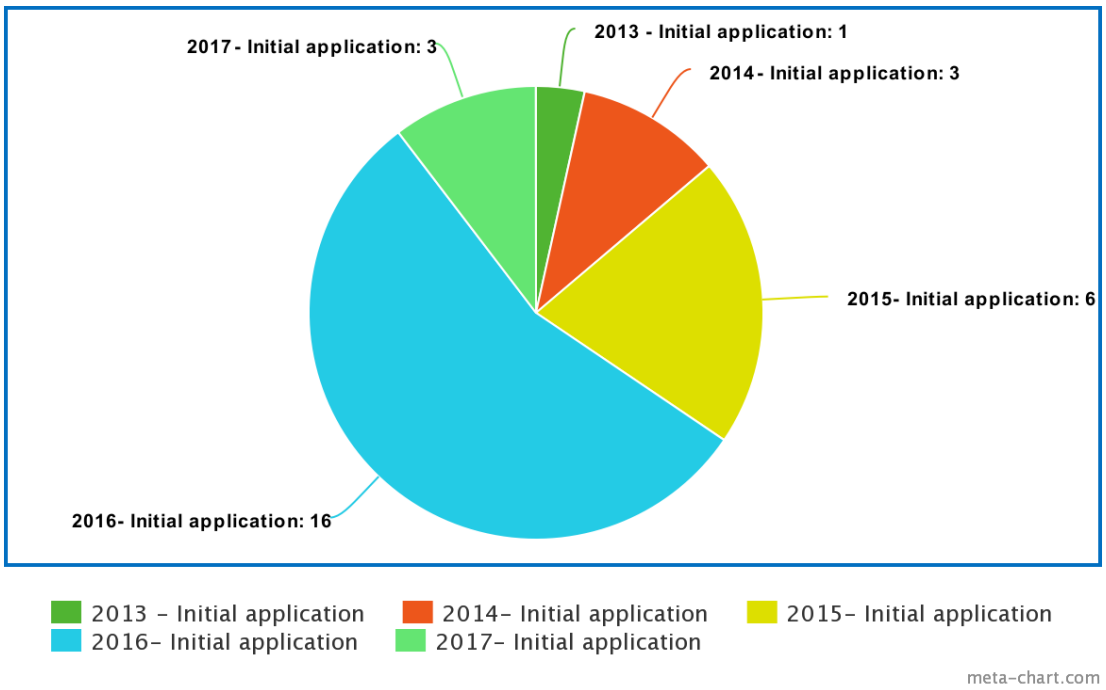

Figure 2: Year of Initial Application

4. Gender and Age of the Applicant

Out of the 30 sample cases, in 12 the primary applicant was female, and in 18 the primary applicant was male. The gender breakdown referenced below refers to the primary applicants in the cases as opposed to any children or family connected with the applications. The main focus of the IPO and IPAT decisions assessed was the persecution relevant to the primary applicant and therefore connected children or family have been excluded from the following analysis of gender and age in the sample cases.

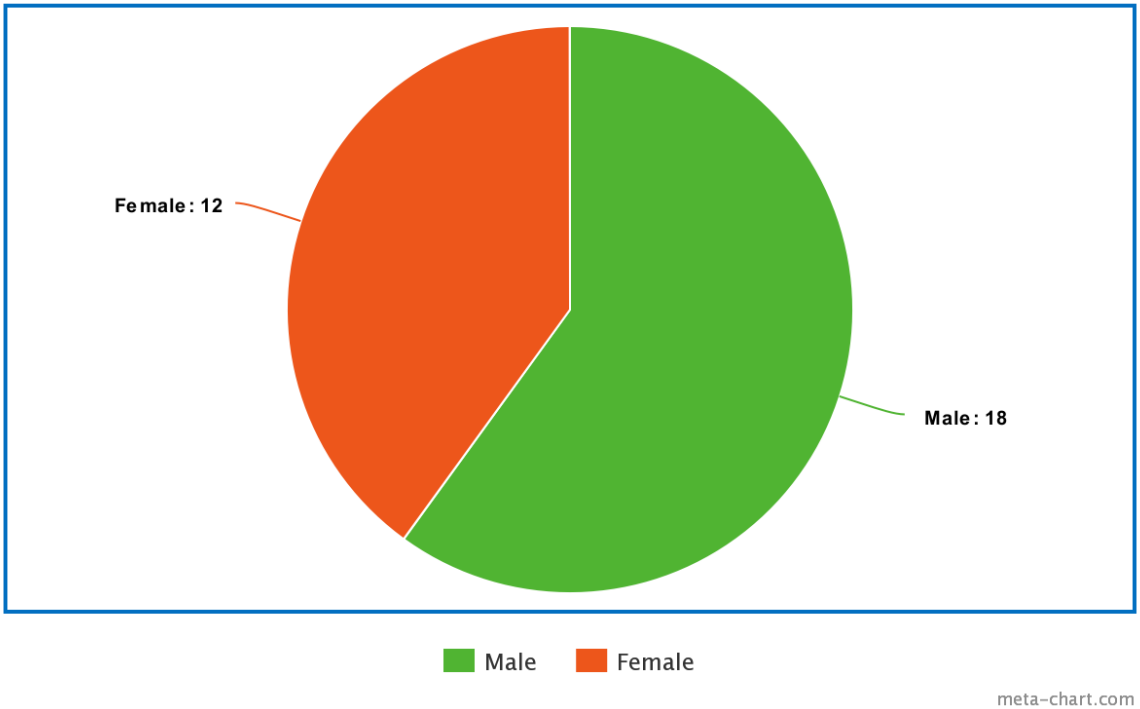

Figure 3: Gender of Applicant

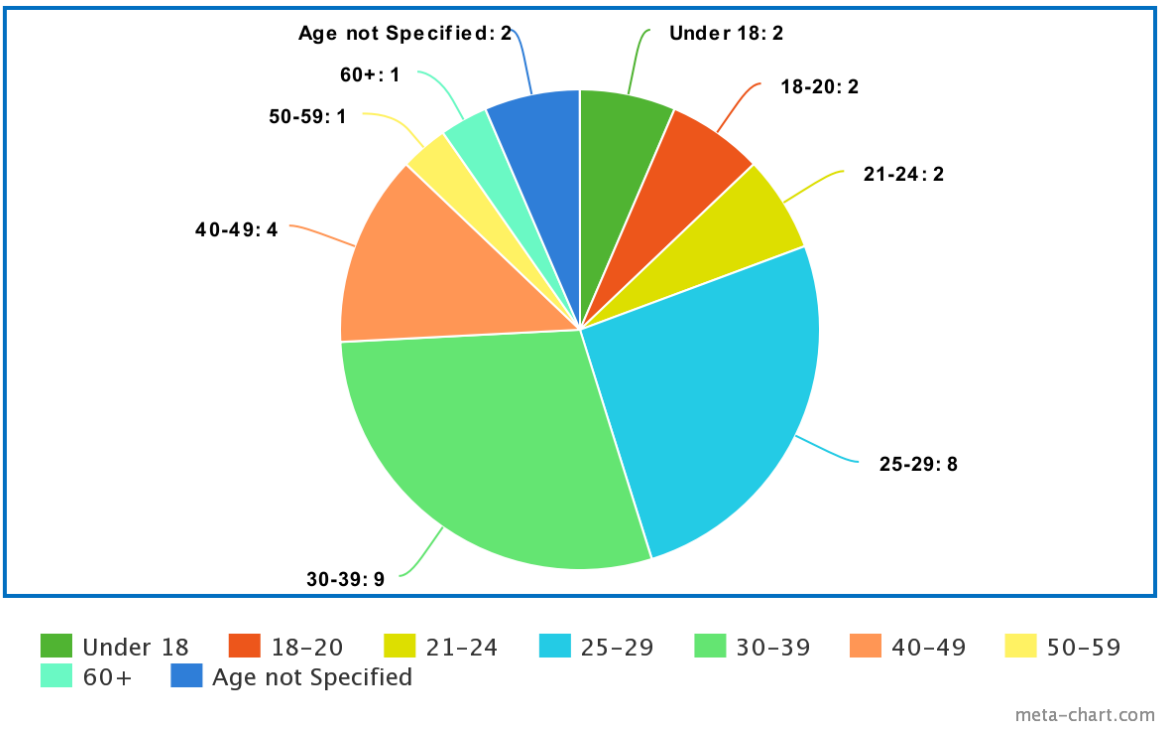

Figure 4: Age of Applicant

* It can be further noted that while the age was not specified, one of the applications was made on behalf of an Irish born child.[79]

5. Grounds of Application

As discussed in section B.3 above, the grounds for recognition of refugee status are that the applicant must have a "well-founded fear of persecution based on race, religion, nationality, political opinion or membership of a particular social group."[80] Within the grounds of social group, certain forms of discrimination such as persecution based on gender, sexual orientation and membership of a particular family unit have been formally recognised in case law. The main application grounds within the sample can be observed as:

[79] It can be further noted that a number of applicants also included dependent children within their applications.
[80] UN High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Article 1A(2).

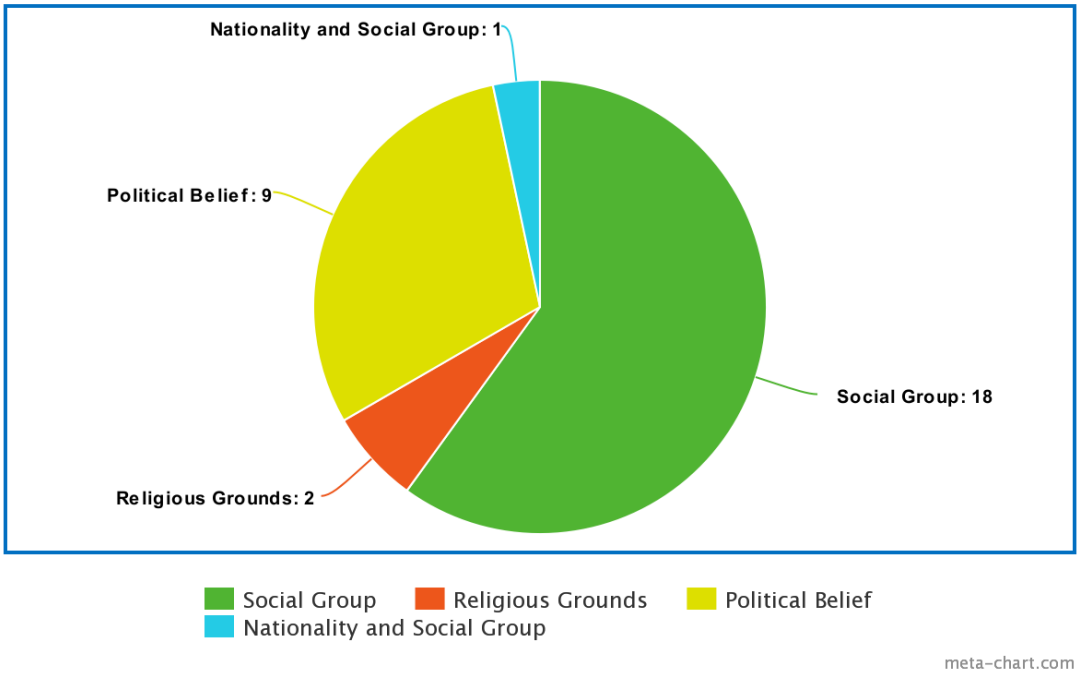

Figure 5: Application Grounds

Within the category of social group, the main forms of social grouping were due to family relationships with respect of issues such as tribal feuds, domestic abuse and forced marriage. The social grouping category also included LGBTI applicants, those persecuted based on gender and individuals targeted as victims of human trafficking. One of the applicants also faced persecution under the social grouping as a playwright.

6. First Instance Decisions

As a de novo appeal, there were varying degrees of reference made to initial IPO determinations in the case sample. One common trend was evident, 25 out of thirty cases were cited as unsuccessful in first instance because the IPO had found issues of credibility within the application and the applicant was not believed. Overall, 83% of the cases cited an adverse credibility finding as the main reason that the case had been unsuccessful at first instance.

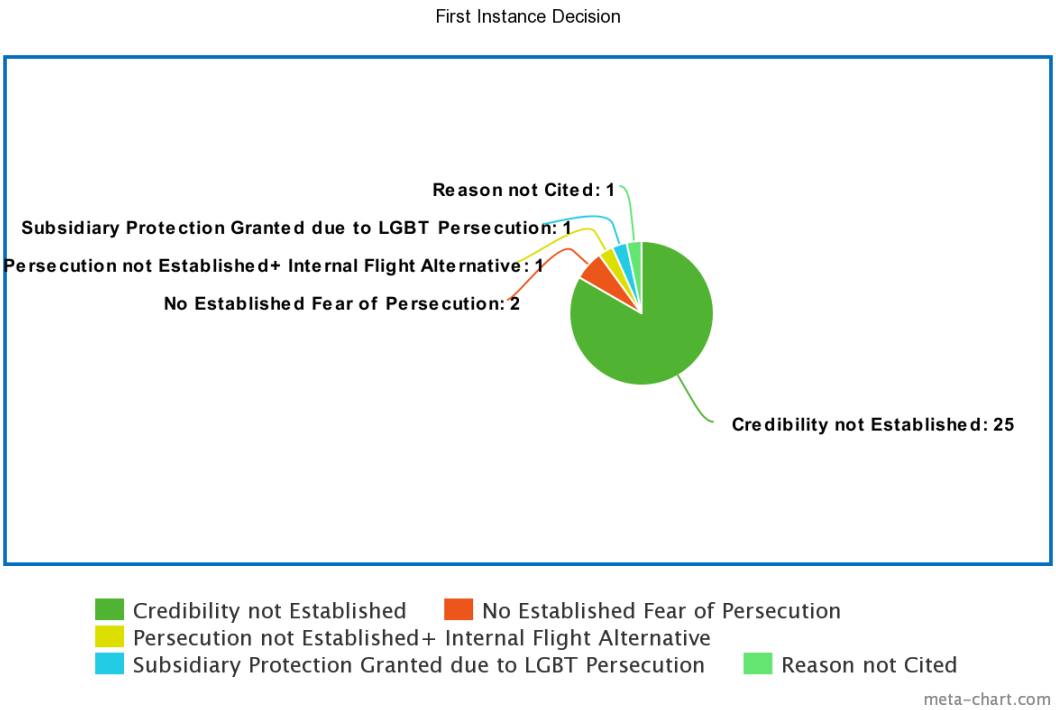

Figure 6: First Instance Decision

The main reasons that applications had been unsuccessful on a credibility basis were:

i. Inconsistent and contradictory narratives[81]
ii. Material elements of the applicant's claim were deemed as incredible on the balance of probabilities
iii. Lack of detail in material facts[82]

There are a number of grounds under which an asylum application may be denied on first instance. Section 28(4) IPA lists a number of factors which the IPO officer must consider in assessing a claim, and s.28(4)(f) includes that the IPO must have consideration of the general credibility of the applicant. Section 28(7)[83] states "where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation where," and lists a number of factors which may be satisfied. Among these factors, the officer may consider whether "(e) the general credibility of the applicant has been established."[84] So while Irish legislation states that regard must be had for credibility,[85] it does not legislate for how such is to be assessed. Nonetheless, there are a number of principles that can be deducted from case law and the *UNHCR Handbook.* The following sections will therefore analyse the qualitative nature of the initial decision-making processes, as could be determined from the sample appeal decisions.

7. Credibility Assessments

a. Principles in Credibility Assessment

The *UNHCR Handbook* indicates that there is a process of shared responsibility between the applicant and the person deciding the claim. It also indicates that "independent research may not, however, always be

[81] Case 19, Case 20, Case 22.
[82] Case 1.
[83] *International Protection Act 2015* [Hereinafter IPA].
[84] Ibid.
[85] IPA, s.28.7(e).

successful and there may also be statements that are not susceptible to proof. In such cases, if the applicant's account appears credible, he should unless there are good reason to the contrary be given the benefit of the doubt."[86] Gregor Noll also argues that "the law on credibility gives applicants the benefit of the doubt by allowing the admission of evidence which would normally be suppressed."[87] In Irish law, a similar concept has been endorsed in *IR*,[88] with Cooke J outlining ten principles that must be followed.[89] Sweeny and Kagan[90] argue that since credibility is an element of an alleviating evidential rule, it is anathema to ask an asylum seeker to prove credibility. Proving credibility is not the same as proving truth.

The *UNHCR Handbook* notes that "[i]t is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognised. It is therefore frequently necessary to give the applicant the benefit of the doubt."[91] In the US case of *INS v Cardoza-Fonseca*[92] it was established that a 'reasonable possibility' was enough to consider an asylum claim valid. A broader margin of appreciation must be afforded to events with a 'reasonable possibility' consideration rather than a 'probability consideration.'[93]

It is also worth noting that studies have shown that instances of PTSD can have an impact on the memory of the applicant.[94] While memories and abilities to recount detail varies greatly, victims of trauma can furthermore experience dissociative memory loss.[95] Interviews ought to be conducted in an inquisitorial manner that affords the applicant an opportunity to explain any inconsistencies in their account. The *UNHCR Handbook* acknowledges this fact and further states that the examiner must "(i) Ensure that the applicant presents his case as fully as possible and with all available evidence. (ii) Assess the applicant's credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the objective and the subjective elements of the case."[96]

Another important principle regarding credibility assessment is that individual claims are assessed separately. This principle was endorsed in the EU case of *MM*[97] which affirmed that procedural requirements may not be disposed of where a separate claim has concluded. This was also evident in the Irish case of *RKS*[98] where Justice Peart stated that "a negative credibility finding in relation to one fact cannot be used as a basis for denying credibility generally."[99] Likewise, in the *IR*[100] case it was noted how "assessment of credibility must

[86] *UNCHR Handbook* para 196, See also: James A. Sweeney, *Credibility, Proof and Refugee Law* (Oxford University Press 2009) 711 [Hereinafter Sweeney].
[87] Gregor Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive' (2006) 12 *European Public Law* 295-317, 310.
[88] *I.R. v Minister for Justice, Equality and Law Reform and Refugee Appeals Tribunal* [2009] IEHC 353.
[89] Mark de Blácam, 'Judicial Review of Credibility Assessments' (2009) Bar Council CPD Asylum & Immigration Conference.
[90] Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) *Georgetown Immigration Law Journal* 367-415, 367.
[91] *UNHCR Handbook*, para 203.
[92] *INS v Cardoza-Fonseca* 480 U.S. 421 (1987).
[93] Parle, *supra* note 52, 5.
[94] Juliet Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2001) 13(3) *International Journal of Refugee Law* 293-309.
[95] Jane Herlihy & Stuart W. Turner, 'The Psychology of Seeking Protection' (2009) 21(2) *International Journal of Refugee Law* 171-192, 178.
[96] *UNHCR Handbook*, para 205.
[97] C-277/11, Judgment of 22 November 2012.
[98] *R.K.S v Refugee Appeals Tribunal* [2004] IEHC 436.
[99] Ibid.
[100] *IR v Minister for Justice, Equality and Law Reform and Refugee Appeals Tribunal* [2009] IEHC 353.

be made by reference to the full picture that emerges – it must not be based on perceived correct instinct or gut feeling."[101]

Considering these legal principles and applying them to the case sample, issues were detected with regards to: [i] the method of interview conducted; and [ii] unreasonable plausibility findings held against the applicants.

b. Issues in Conducting Credibility Analysis

[i] Method of Interview/ Cross Examination Conducted

Samples from case 9, case 30 and case 21 below all bring into question the method of questioning which had been adopted by the International Protection Officer (IPO). The main issues observed are an adversarial questioning style (case 9), applicants not being afforded an opportunity to explain inconsistencies (cases 15, 21, 30), and evidence of an applicant experiencing confusion and fear during the interview process (case 21).

Case 9 includes a specific section with regards to cross examination. It can be argued that the implementation of a cross examination in itself is not appropriate in a protection setting. The purpose of a protection interview is to "ensure that the applicant presents his case as fully as possible and with all available evidence."[102] At para [4.10] it is stated *"It is unclear to the Tribunal how then it could be said that the appellant provided insufficient detail."* The report proceeds to refer to the first instance decision as "unfair and irrational" and specific reference is made to an incident where *"the appellant was asked in her s.11 interviews where the area of Biafra was. She answered South-Eastern Nigeria (which is correct). She was not asked a follow-up question. The decision maker in the s.13 report characterised her answer as 'generic' and held the matter against her, i.e. her failure to be specific as to the names of states in the region."* The decision-maker further states that, "*The unfairness was then compounded during the second interview. The appellant was not given an opportunity to provide further detail."* It is notable that the Tribunal member also states:

> *"This is an example of an adversarial, cross-examination style of question that does not accord with the investigative duty of the respondent to fully ventilate claims of this kind, nor their shared burden in this context. No questions were asked to draw out any knowledge that the appellant may have had on the topic."*[103]

The importance of affording vulnerable applicants a fair opportunity to explain inconsistencies is evident in case 30. At para [4.4] the applicant explains their inability to provide a full account of assault suffered in their initial interview:

> *"Under questioning from the Presenting Officer in relation to this omission, the appellant stated that it was difficult for her to talk about the rapes and that she wanted to forget about them. She said she only felt able to talk about the rapes after she received support and counselling in Ireland."*[104]

Case 21 was an example of a case which questions the circumstances and conditions under which applicants are interviewed. The IPO questioned the credibility of the applicant on the basis that they had not referred

[101] Ibid, para 4.
[102] *UNHCR Handbook,* para 205.
[103] Case 9, para 4.11.
[104] Case 30, para 4.4.

to social media aspects of her political movement in her s.11 interview. The IPO in their s.39 report also declared that the applicant's account of police beatings was incredible as they had failed to previously mention them in their s.11 interview. The IPAT Tribunal member cited the following passage from the interview:

> *"Honestly when I did my first interview I was so confused, that's why I didn't ask anyone to interpret for me. That was my first interview in my whole life. I was so shocked and traumatised. I did not know I was going to go through a process like this, I was never prepared for it. Everything was just new for me. Also, I was still traumatised from the incident that happened to me especially the one that I had to have sex with people I don't know."*[105]

The Tribunal member subsequently held that it was plausible that the applicant had failed to recount certain details in their initial interview as a result of trauma and a lack of awareness of the amount of detail necessary in conducting the interview. This indicates that para 192(ii) of the *UNHCR Handbook* was not effectively observed.[106]

In case 15, it was held in the s.39 report by the IPO that an inconsistency could be established from the fact that the applicant referred to the fact that police were carrying pistols in a 2012 incident while this was not referred to by the applicant's brother in a police interview. The applicant was also questioned regarding the fact that their niece had died as a result of trauma four years previously despite this not being directly connected to their fears of persecution. Nonetheless, these issues were not raised by the IPO officer in the applicant's IPAT appeal hearing. The IPO officer in the appeal hearing rather made a recommendation that the applicant should not be returned to their country of origin. This occurred in light of new medical evidence and legal assistance to the applicant which indicated that they had in fact suffered physical violence and sexual assault.[107] This occurrence indicates the limitations of credibility assessment undertaken at first instance in the absence of legal advice for the applicant.

In case 18 at [4.2], reference is made to a described event regarding the appellant's father borrowing money from a lender. In this case:

> *"The IPO rejected the appellant's account of this aspect of his claim on the basis that he was unable to provide specific dates in relation to any of the events that caused him to leave Pakistan."*[108]

Nonetheless, the IPAT found the appellant's account credible on the basis that:

> *"The Tribunal finds that the appellant (having regard to the fact that he was a minor at the time and the events described took place over ten years ago) gave a broadly coherent account of his father taking a loan from a money lender – Mr. XXX."*[109]

Furthermore, the case drew on the fact that the applicant's account was highly corroborated by their family at separate hearings.

[105] Case 21, para 4.3.3.
[106] "(ii) The applicant should receive the necessary guidance as to the procedure to be followed."
[107] This cases also involved the admission of new evidence in the form of a medical report which will be discussed further in [2.9].
[108] Case 18, para 4.2.
[109] Ibid.

As can be observed from the qualitative sample above, asylum determination guidelines are not always fully observed with regards to ensuring a fair interview process, where examiners "Ensure that the applicant presents his case as fully as possible and with all available evidence."[110]

[ii] Unreasonable Plausibility Findings

A number of cases observed were also overturned as a result of an unreasonable plausibility finding. A number of cases did not have regard to COI information (case 18) or selectively applied COI information (case 22) while other cases made assumptions about issues such as the ability to forgive perpetrators of assault (case 24) or the LGBTI status of an applicant (case 27). This indicates that a 'reasonable possibility' test is not currently being observed.

In case 18, at para [4.3.4] reference is made to the fact that one of the applicant's accounts was not credible on the basis that the applicant was alleged to drive at fourteen years old, and that the applicant could not remember the length of their exact detention. The IPAT overturned this on the grounds that:

> *"The Appellant's evidence and of the customs of the area it is not unreasonable and/ or unusual for a fourteen-year-old male to be driving a car. The Tribunal finds that it is understandable that the Appellant did not know the exact duration of his captivity given the traumatic experiences he alleges he was subjected to."*[111]

In case 21, the IPO rejected the applicant's claim that they had been protesting as part of a political movement on the basis that they believed the movement was a "*digital/social media movement."* The applicant provided photos of herself at marches and digital links to such. At para [4.3.2], the IPAT overturned the IPO decision on the basis that the movement "*involved people posting on social media but it also involved protests in public which was totally opposed by the Government."*[112]

In case 22, which dealt with the forced marriage of the applicant to their uncle, there was further evidence of COI information being applied selectively by the IPO. They argued that *"although there was Country of Origin information dealing with nieces marrying Uncles whose wives were dead there was no Country of Origin information dealing with nieces marrying Uncles who had a wife that was alive."*[113] The IPO determined in the case therefore that an alleged forced marriage was incredible and went to the core of her claim. The presence of COI evidence with a slight difference in facts ought not automatically disqualify facts submitted by the applicant.

In case 23 at para [4.3.5], the IPO stated that a failure of the applicant to provide screenshots of WhatApp conversations adversely effected the credibility of the applicant. The IPAT overturned this inference from the IPO on the grounds that:

> *"His explanation for this is credible: he has left Zimbabwe, he does not have the Zimbabwean mobile phone on which the messages were sent and he is unable to get anyone who was in the group to send him the messages. There are many reasons for persons to be fearful of sending screenshots of WhatsApp messages to another person and it is not surprising that the Appellant was unable to*

[110] *UNHCR Handbook,* para 205.
[111] Case 18, para 4.3.4.
[112] Case 21, para 4.3.2.
[113] Case 22, para 2.14.

submit such screenshots."[114]

Case 24 also questioned the reasoning adopted by the IPO with regards to a negative credibility finding in relation to the applicant's past persecution and *"dismissed the credibility of the [Appellant's] averred sexual orientation on this basis"* and thus failed to apply a forward-looking test.[115] At para [4.5] it is stated, *"his sexual identity was disbelieved because his overall credibility in respect of acts of past persecution were disbelieved."*[116]

Similarly, in case 27, the sexuality of the applicant was called into question on the basis that they had a girlfriend when they were 14 years old. The IPO further called into question the applicant's sexuality on the basis that he did not express romantic feelings towards men prior to the age of 23. The applicant explained this at the appeal hearing *"I ignored the feeling before then, I used to feel it was wrong so I continued to ignore the feeling."*[117] At para [4.3], the IPO also called into question the activities of the applicant in walking in public holding hands with another male if it were unsafe to do so. Nonetheless, the IPAT afforded the applicant the benefit of the doubt with respect of this incident.

In case 26, at para [2.1] it is also stated that the IPO had erred in reaching a negative credibility finding regarding the applicant's arrest, rape and shooting in Zimbabwe (this was overturned in light of new evidence). The IPO also did not accept that the applicant would secretly travel back to Zimbabwe multiple times to see their children. It was held that *"The IPO erred in reaching a negative credibility finding in respect of the Appellant not applying for asylum in South Africa, in circumstances where she explained that her documents were not legal and she did not want anyone to know her true Zimbabwean identity."*[118] With regards to COI evidence, the IPAT on the contrary found it plausible that the applicant would not seek asylum in South Africa due to the treatment of asylum seekers there. The IPAT also overturned the IPO's assessment that due to a change in president, it would now be safe to return to Zimbabwe.

As can be observed above, a number of IPO decisions were highly skeptical of applicant's accounts and applied strict plausibility findings that often did not correspond with COI information, nor with a 'reasonable possibility test.' This was compounded by the fact that applicants did not have an opportunity to explain issues in dispute (for example in case 23).

8. Cases Transferred Amongst IPO Officers

Another issue which presented within one case was the fact that it had been transferred amongst various IPO members for consideration. Case 14 made reference to the case being handled by three different officers subsequent to a first instance decision being reached:

[114] Case 23, para 4.3.5.
[115] Patricia Brazil, 'Applications for Asylum by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons,' paper presented at Refugee & Immigration Practitioner (RIPN) meeting (25 January 2011). Available at: www.legalaidboard.ie/en/about-the-board/press-publications/newsletters/applications-for-asylum-by-lesbian-gay-bisexual-transgender-and-intersex-lgbti-persons-.html (last accessed: 8 May 2020). See also: UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/0.
[116] Case 24, para 4.5.
[117] Case 27, para 4.2.
[118] Case 26, para 2.1.

> *"A different International Protection Officer considered the file relating to the Appellant and the draft report, and agreed with the findings contained therein. Another International Protection Officer considered the application and made a recommendation that the Appellant be given neither a refugee declaration nor a subsidiary protection declaration."*[119]

While it is unclear why this case was transferred amongst members or whether this is common practice, further research could be conducted into this practice within the International Protection Office. The transferal of cases subsequent to interview could adversely impact upon credibility findings for applicants. Case 14 was overturned by the IPAT on the grounds of a wrongful adverse credibility finding.

9. Impact of Evidence

A notable trend which could be observed was the impact of evidence on the applicant's claim. Within the cases observed reference was made to evidential weight not being afforded to documents provided, and difficulty in obtaining evidence for applicants. Furthermore, some cases were set aside on the basis of evidence newly submitted.

Case 29 argued that, *"insufficient evidential value was previously given to the original Republic of Zimbabwe ID produced by the Appellant. This document had been authenticated by the Garda Bureau and was confirmed to contain all of the security features that would be expected in such a document."*[120]

Case 19 on the other hand makes reference to the difficulty which the appellant encountered in obtaining evidence:

> *"On questioning the Appellant explained he is expected to have a Spirasi consultation and that he is on a waiting list but that he was unsure when his appointment would be. The Appellant's solicitor explained it may be up to a year before a Spirasi report is available and that the Appellant was happy to proceed with the hearing without the Tribunal having the benefit of same."*[121]

Case 25 also made reference to the difficulty which the applicant had experienced in attempting to obtain medical evidence. While Case 26 indicated that the production of medical evidence had an impact on the previous IPO decision:

> *"The IPO rejected the Appellant's claim with respect to the Appellant's assertion that she was shot seven times at an MDC rally in January 2006 on the basis that, if the Appellant had sustained gunshot wounds, she would have medical records in support of her claim. On the date of decision, the IPO did not have the benefit of the Spirasi Medico-Legal Report drafted by Dr [XX] and dated [XX]. Dr [XX] concludes her report by stating that the Appellant's 'physical findings are typical of her account of multiple gunshot wounds with prolonged hospital recovery.'"*

The most striking impact of the introduction of new evidence could be observed in case 15 where the applicant's account of assault had previously come into question for credibility. The IPO questioned the risk

[119] Case 14, para 2.3.
[120] Case 29, para 4.3.
[121] Case 19, para 4.3.1. Spirasi (Spiritan Asylum Services Initiative) is the national centre for the rehabilitation of victims of torture in Ireland. See: https://spirasi.ie/ (last accessed: 8 May 2020).

she would face if returned to Pakistan as a single woman. It is stated that the applicant had not had access to legal representation during their initial hearing. Upon the introduction of medical evidence, it became probable that the applicant had suffered sexual assault which she felt unable to recount.[122] Subsequently, the IPO expressed the view that the applicant should not be returned to their country of origin. While these cases highlight the importance of early legal advice and sufficient evidence, cases such as case 15 can also be argued to expose the limits of credibility assessment.

D. CONCLUSION

Considering the limitations of a small-scale study such as this, it is recommended that further research is carried into this area of Irish asylum law. Such additional research in this area would benefit from an assessment of cases within the current system following the *International Protection Act 2015* (IPA) through liaison with solicitors and practitioners in the field. Such studies could take a more detailed review of the type of legal assistance acquired at first instance and the introduction of new evidence subsequent to initial hearing. Furthermore, the main basis for the literature review of this dissertation focused on NGO reports and McMahon Working Group report, as well as foreign academic commentary in this area. This therefore highlights an area of legal study which would benefit from further scholarly analysis and academic commentary.

The purpose of this Working Paper was to assess recent cases overturned on appeal at the IPAT, in order to assess why the overturn rate has remained persistently high at 21%. The aim of this paper was also to assess previous criticisms of first instance asylum determinations[123] and qualitatively assess whether these issues have been resolved subsequent to the commencement of the IPA.

Certain issues, such as the importance placed on credibility assessments at first instance, correspond closely with previous reports such as the Irish Refugee Council's *'Difficult to Believe'* report, although it should be noted that Tribunal members are willing to disagree with negative credibility assessments made at first instance. Issues observed concerned the tendency of International Protection Officers to adopt adversarial interview techniques (case 9), a failure to afford applicant's the opportunity to explain inconsistencies (cases 6, 21), a failure to afford evidential weight to documents provided (case 29) or COI evidence (cases 18, 21), and the application of unreasonable plausibility findings (cases 18, 21, 22, 23, 24, 26, 27). These issues also indicate that elements of the *UNHCR Handbook*[124] are not effectively observed in at least some cases.

It can be observed from cases such as case 15 that early access to legal advice must be promoted and strengthened in order to improve an applicant's chance of success at first instance. Drawing on previous reports in this area, it is advisable that recommendations are also incorporated to ensure the strength and fairness of asylum determinations at first instance.[125]

Positive reform could see IPO training being placed on statutory footing and clear guidance of the decision-making process and guidelines, particularly with regards to credibility assessment. The introduction of an

[122] Case 15, para 2.5.
[123] Such as *Conlan, supra* note 2.
[124] *UNHCR Handbook,* para 205.
[125] Recommendations can be observed in above discussion of reports: Conlan, *supra* note 2; Almirall, *supra* note 6; Mullally, *supra* note 17; McMahon Report, *supra* note 44.

independent observational body in liaison with NGOs could also oversee and audit decision-making at first instance.

It has been observed that in the past twenty-five years, the asylum application process in Ireland has evolved and changed rapidly. This change has occurred in response to a substantial increase in applications, external influences via the EU and international law, and also internal criticisms and reform. While it can be argued that Ireland has come a long way with regards to the asylum determination procedure, it can further be argued that there is still a long way to go. While the focus on this Working Paper was the legal processes underpinning the Irish system of asylum determination process, it is important to mention other urgent areas which require reform. The Irish Refugee Council (IRC) have recently highlighted the implementation of unsuitable, emergency accommodation.[126] Meanwhile, the general reception system of direct provision has been referred to as inhumane and degrading, with little consistency between centres.[127] These issues are compounded by elongated waiting times resulting from a delay in the asylum determination process. In 2018, privately sourced firms received €72m for running direct provision centres.[128] Meanwhile, the implementation of Judicial Review in asylum cases amassed costs of €855,133 for the year 2018, which is a decrease from €1,580,537 in 2017.[129] While the system of asylum reception in Ireland requires reform in many aspects, better resourced and strengthened legal assistance at the earliest stages of the asylum determination process can in part alleviate the issues complained of at later stages. This may also result in lower financial costs at later stages in the system. The fact that 30.43% of cases are overturned on appeal is indicative of the fact that this is a potential area of reform worth exploring further.

[126] Sorcha Pollak, 'Emergency Accommodaion Unsuitable for Asylum Seeekers, Committee Told', *Irish Times* (22 May 2019). Available at: www.irishtimes.com/news/social-affairs/emergency-accommodation-unsuitable-for-asylum-seekers-committee-told-1.3901024 (last accessed: 8 May 2020).

[127] See for example various contributuions in: Nasc & CCJHR, *Beyond McMahon: Reflections on the Future of Asylum Reception in Ireland* (December 2018). Available at: www.ucc.ie/en/ccjhr/publications/ (last accessed: 8 May 2020).

[128] Gordon Deegan, 'Payments to Private Direct Provision Firms Rise to €72m after 18% Increase in Asylum Seekers', *TheJournal.ie* (22 March 2019). Available at: www.thejournal.ie/direct-provision-centre-e72-million-4556693-Mar2019/ (last accessed: 8 May 2020).

[129] International Protection Appeals Tribunal, *Annual Report* 2018, 22.