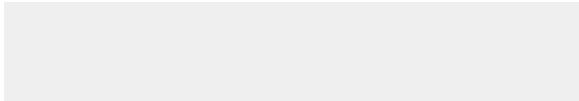
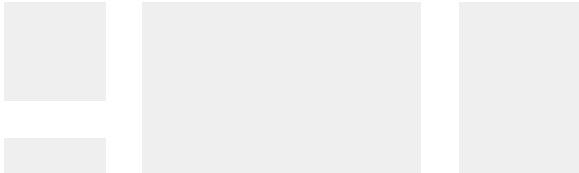


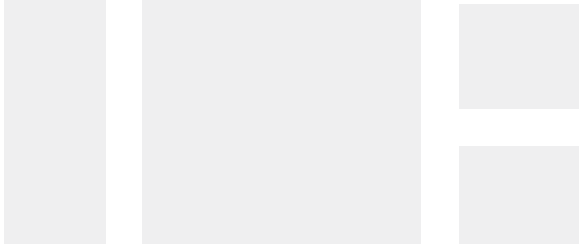
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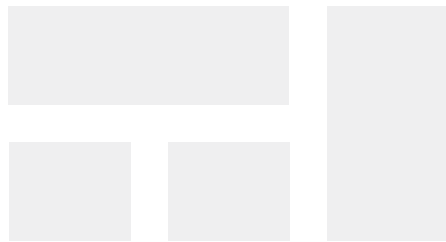
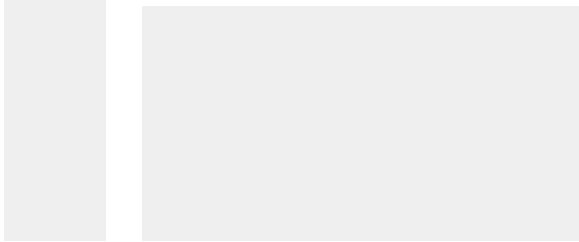
**Early Legal Advice and Assistance for
International Protection Applicants in
Ireland**



**Victoria Oluwatobi Isa
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February 2022



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EARLY LEGAL ADVICE AND ASSISTANCE FOR INTERNATIONAL PROTECTION APPLICANTS IN IRELAND

*Victoria Oluwatobi Isa Daniel**

Abstract:

International and EU law obligations require States to develop an asylum system that properly identifies and supports people in need of international protection. A critical component of a functional and human rights-compliant asylum system is providing international protection to applicants ('asylum seekers') with high-quality legal assistance. Although the EU's Asylum Procedures Directive provides that "every applicant should have the opportunity to consult a legal adviser", European studies on the provision of legal assistance in asylum proceedings express concerns about the effectiveness of the legal assistance afforded to asylum seekers. This apprehension is reflected in the current state of access to and quality of legal assistance for asylum seekers in Ireland as the system is more concentrated on providing legal advice rather than guaranteeing legal representation at the initial interview, therefore proving insufficient.

While the Irish direct provision and international protection determination systems have been the subject of sustained critique due to serious human rights deficiencies, yet this specific issue of access to legal assistance has been neglected in both the domestic and the international literature. The purpose of this Working Paper is to examine the importance of early legal advice and assistance for international protection applicants in Ireland and why the current provision for international protection applicants in Ireland does not meet the international standards. This study offers the first comprehensive and scholarly review of the existing law, policy, and practice in this area in Ireland. It critically analyses whether Irish law, policy and practice comply with regional and international legal obligations. The study puts forward a case as to the benefits and importance of frontloading legal provisions for asylum seekers and hence the reasons why Ireland should convert its current inadequate system.

Key words: international protection, Ireland, legal advice

A. INTRODUCTION

1. Overview

International and EU law obligations require States to develop an asylum system that properly identifies and supports people in need of international protection.² A critical component of a functional and human rights-compliant asylum system is providing international protection to applicants ('asylum seekers') with high-

* Victoria Oluwatobi Isa Daniel is currently undertaking PhD research at the NUI Maynooth on the topic of legal representation for international protection applicants in Ireland. This research was submitted as an LLM dissertation for the UCC School of Law in September 2021, under the supervision of Dr Dug Cubie, and has been lightly edited and updated to reflect recent developments up to February 2022.

² Consolidated Version of the Treaty on European Union [2008] OJ C115/13; Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) 19(1) *Indiana Journal of Global Legal Studies* 257-303.

quality legal assistance.³ Although the EU's Asylum Procedures Directive provides that "every applicant should have the opportunity to consult a legal adviser",⁴ European studies on the provision of legal assistance in asylum proceedings express concerns about the effectiveness of the legal assistance afforded to asylum seekers.⁵ This apprehension is reflected in the current state of access to and quality of legal assistance for asylum seekers in Ireland as the system is more concentrated on providing legal advice rather than guaranteeing legal representation at the initial interview, therefore proving insufficient.⁶

While the Irish direct provision and international protection determination systems have been the subject of sustained critique due to serious human rights deficiencies,⁷ yet this specific issue of access to legal assistance has been neglected in both the domestic and the international literature. The purpose of this Working Paper is to examine the importance of early legal advice and assistance for international protection applicants in Ireland and why the current provision for international protection applicants in Ireland does not meet the international standards. This study offers the first comprehensive and scholarly review of the existing law, policy, and practice in this area in Ireland. It critically analyses whether Irish law, policy and practice comply with regional and international legal obligations. The study puts forward a case as to the benefits and importance of frontloading legal provisions for asylum seekers and hence the reasons why Ireland should convert its current inadequate system.

2. Methodology

The research method employed for this Working Paper is a socio-legal approach with elements of a law reform research project. To satisfy the aim of the research project it was important to first identify and analyse the current position in law and policy in Ireland on the provision of legal advice and assistance for asylum seekers using existing case laws, legislation, books, articles, and other authorities' material on the topic. Hence, I undertook doctrinal desk-based research of the available literature on the Irish asylum system. I did not undertake direct empirical research, I believe it is important to include first-hand accounts of individuals affected by the subject matter of this research thus, I drew on the accounts of asylum seekers as reported in other pieces of published research. Whilst I did not undertake a comparative research methodology given that the asylum systems in each state are unique, I did draw on the right to legal advice and assistance as found in Irish criminal law and the United Kingdom (UK) asylum system. This methodology

³ United Nations High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (March 2010) pp.87-88.

⁴ Asylum Procedures Directive (2005/85/EC) 13.

⁵ European Commission, *Report from the Commission to the European Parliament and Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status* (September 2010) COM 465 final, Brussels. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0465&from=EN>> accessed 11 February 2022; ECRE/ELENA *Survey on Legal Aid for Asylum Seekers in Europe, European Council on Refugees and Exiles and the European Legal Network on Asylum* (November 2017) Brussels. Available at: <<https://www.ecre.org/wp-content/uploads/2017/11/Legal-Note-2.pdf>> accessed 11 February 2022.

⁶ ECRE/ELENA *ibid* 5.

⁷ Claire Breen, 'The policy of direct provision in Ireland: a violation of asylum seekers' right to an adequate standard of housing' (2008) 20(4) *International Journal of Refugee Law* 611-636; Liam Thornton, "'Upon the Limits of Rights Regimes": Reception Conditions of Asylum Seekers in the Republic of Ireland' (2007) 24(2) *Canadian Periodical on Refugees* 58-73; Clíodhna Murphy and Desmond Ryan, 'Work, Dignity and Non-Citizens: Reflections from the Irish Constitutional Order' (2020) 1 *Public Law* 30-40; Catherine Day *Report of the Advisory Group on the Provision of Support including Accommodation to Persons in the International Protection Process*, (September 2020). Dublin: Department of Justice [herein Catherine Day Report] <http://www.justice.ie/en/JELR/Catherine_Day_Group_Report.pdf/Files/Catherine_Day_Group_Report.pdf> accessed 11 February 2022.

delivered a wider view of the need for early legal advice and assistance despite the lack of literature surrounding this topic.

3. Limitations

Refugee law is a rapidly expanding field of academic study, reflecting its increasing global and societal importance.⁸ In Ireland, the asylum system and direct provision system have been continually analysed from a scholarly and a policy perspective.⁹ However, one challenge identified throughout the course of this research was an absence of scholarly commentary on the provision of early legal advice and assistance for asylum seekers in Ireland and internationally.

Additionally, whilst this Working Paper is based on non-government organisation reports and practitioner opinion, and some academic commentary from other countries, this field of study would benefit from further academic analysis. The element of empirical interviews would be vital for this project as it would offer a first-hand account from asylum seekers and perhaps other stakeholders of their experiences of the provision and potential benefits of legal advice and assistance. However, empirical interviews were not conducted for the purpose of this Working Paper due to the limited time constraints and the impracticalities of conducting interviews during a pandemic.

4. Structure of the Working Paper

Part B will outline the current Irish international protection determination procedure in accordance with the International Protection Act 2015 (herein IPA).¹⁰ Part C will discuss the importance and benefits of early legal advice and assistance for asylum seekers using the example of two successful UK pilot projects. The Part will also draw on criminal law literature to reasoning as to why legal advice and assistance at the onset of a case is critical for the outcome. Part D focuses on the barriers to providing early legal advice and assistance and how these difficulties can be elevated. The Working Paper ends by outlining the conclusions of the research and discussing the findings of the research, offering potential methods which can be implemented to achieve an asylum system which truly supports those who apply for international protection. For a list of terminology used in this Working Paper, see Annex I.

B. BRIEF OVERVIEW OF THE IRISH ASYLUM DETERMINATION PROCEDURE

This Part will focus on an overview of the Irish asylum determination procedure. Firstly, the development of the international protection determination process in Ireland will be discussed. Secondly, the six stages of the Irish international protection determination procedure will be explained and analysed. These stages include (i) Application to the International Protection Office, (ii) Preliminary Interview, (iii) Questionnaire, (iv) Personal Interview, (v) First instance status determination, (vi) Appeal. Thirdly, the existing legal provision on

⁸ See Bruce Burson, 'Refugee status Determination' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021); Rosemary Byrne, Gregor Noll, and Jens Vedsted-Hansen, 'Understanding the Crisis of Refugee Law: Legal Scholarship and the EU Asylum System' (2020) 33(4) *Leiden Journal of International Law* 871-892.

⁹ Liam Thornton, 'International Protection System & Direct Provision in Ireland' In Palais Wilson, *United Nations Committee on the Elimination of Racial Discrimination*, Geneva, 04 December 2019 (United Nations 2019); also see Liam Thornton, 'Clashing Interpretations of EU Rights in Domestic Courts' (2020) 26 *European Public Law* 243-263.

¹⁰ International Protection Act 2015 (herein IPA).

legal advice and legal assistance within European and International Law will be examined. This Part will conclude by considering the government efforts in providing legal aid for international protection applicants.

Ireland acceded to the Refugee Convention in 1956, thus the definition of a refugee (as stated in Article 1A) was integrated into Irish legislation, namely section 2 of the Refugee Act 1996.¹¹ The act created two independent bodies: the Office of the Refugee Applications Commissioner (ORAC) (now called the International Protection Office [herein IPO]), and the Refugee's Appeals Tribunal (RAT) (now called the International Protection Appeals Tribunal [IPAT herein tribunal]).¹² In 2015, the Refugee Act was repealed by the commencement of the IPA.¹³ The 2015 Act introduced a single procedure international status determination process where the applicant is considered for either refugee status and subsidiary protection first and if this fails on appeal the applicant will automatically be considered for a leave to remain status.¹⁴

The international protection determination procedure is still primarily characterized by delay though it has been reformed by the IPA.¹⁵ In general, individuals whose circumstances did not meet the prioritised requirements should expect to wait 8 to 10 months for their substantive interview, and a first instance decision within 15 months of applying for international protection.¹⁶ Whereas those who successfully achieved priority were interviewed within 4 to 5 months of their initial application, and a first instance decision within 10 months.¹⁷ However, due to the Covid-19 pandemic, the IPO discontinued conducting international protection interviews for the most part of 2020 subsequently, the entire process was temporarily halted.¹⁸ Individuals whose circumstances did not meet the prioritising requirements had to wait approximately 18 months for case review as of December 2020.¹⁹ Conversely, those who successfully obtained prioritising had to wait around 14 months for an application decision. There has also been a 67% decrease in the number of international protection applicants in 2020 compared to 2019 due to the pandemic.²⁰

1. The Six Stages

a. Application to the International Protection Office

Applicants apply for international protection pursuant to section 15 IPA.²¹ An individual who would like to apply for international protection can do so at the port of entry to Ireland either at an Airport, ferry port and

¹¹ UN High Commissioner for Refugees (UNHCR), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention), article 1A; The Refugee Act 1996, section 2; The Refugee Act came into effect following subsequent amendments in November 2000.

¹² The Refugee Act 1999, ss.6 & 16.

¹³ IPA 2015 (n.10).

¹⁴ Ibid, s.35.

¹⁵ Ciara M. Smyth, 'Chronicle of a Reform Process: The Irish Working Group on Protection' (2015) 29(3) *Journal of Refugee Studies* 390.

¹⁶ IPA 2015 (n.10), s.73; IPO Customer Service Liaison Panel (CSLP) Meeting, December 2019; 4.

¹⁷ IPO *ibid*.

¹⁸ Ciara Ni Bhroin, 'Granting of Refugee Status Delayed due to Covid-19' *RTE News* (Dublin, 8 May 2020) <<https://www.rte.ie/news/ireland/2020/0507/1137159-asylum-applications/>> accessed 11 February 2022.

¹⁹ Minister for Justice Charles Flanagan, Response to Parliamentary Question No.384, 16 June 2020 <<http://www.justice.ie/en/JELR/Pages/PQ-16-06-2020-384>> accessed 12 January 2022.

²⁰ International Protection Office, *Statistics 2020: December* <<http://www.ipo.gov.ie/en/ipo/pages/statistics>> accessed 11 February 2022.

²¹ IPA 2015 (n.10), s.15.

subsequently at the IPO in Dublin within 5 working days of your entry into Ireland.²² Any unnecessary delay in launching their application could jeopardise the application.²³

b. Preliminary interview

Preliminary interview is conducted by an international protection officer or immigrant official pursuant to section 13(2) of the IPA.²⁴ This interview is conducted to ascertain information from the applicant relating to their identity, origins, method of transport to Ireland, reasons for their claim and their immigration history in Ireland. The IPO takes the applicant's photograph and fingerprints to share with the EURODAC database, which will inform the officer of any application for international protection in another state, leading to the applicant being processed under the Dublin III regulations.²⁵ For this reason the application for international protection may be considered inadmissible under section 21 of the IPA, and an international protection officer may make a recommendation to the Minister to that effect.²⁶

Inadmissibility rulings are taken on the basis that the applicant has been given refugee or subsidiary protection status by another Member State, or that a nation other than a Member State is considered the person's "first country of asylum".²⁷ The inadmissibility ruling can be appealed to the tribunal.

At the preliminary interview, the applicant is not required to mention the key elements of their application in detail, the purpose of the interview is to give a brief overview of your claim.²⁸ Therefore, it is unfair to begrudge the applicant for something they did not mention in the preliminary interview as soon as they arrived in the IPO.

c. Questionnaire

The questionnaire is a very detailed (a 60 paged booklet) yet the applicant only begins to outline details of their claim on question 62.²⁹ There are efforts to shorten this questionnaire which are still in progress. Although non statutory, a deadline of 20 working days is attached to the submission of this questionnaire.³⁰ It is an important document in the context of examining someone's claim. This document is also important in cases of an appeal to show consistency across the application itself. It is only at this point that applicants are given an information booklet which details all the key terms and processes connected to the Irish international protection status determination process and the services of the Legal Aid Board (the state

²² *ibid*, s.13.

²³ *ibid*, s.28(7)(d).

²⁴ *ibid*, s.13(2).

²⁵ The Dublin III Regulations will not be discussed in this Working Paper. For further information, see: Regulation EU No. 604/2013 of the European Parliament and of the Council of 26 June 2013.

²⁶ IPA 2015 (n.10), s.21.

²⁷ *ibid*, s.21(15); European Union (Dublin System) Regulations 2018.

²⁸ UNHCR Ireland, 'Apply for Asylum' (UNHCR) <<https://help.unhcr.org/ireland/applying-for-asylum/>> accessed 11 February 2022.

²⁹ IPA 2015 (n.10), s.15(5) also referred to as IPO 2; The questionnaire is not available in the public domain; International Protection Office, 'Application Process' (IPO) <http://www.ipo.gov.ie/en/IPO/Pages/Assessment_of_Application> accessed 11 February 2022.

³⁰ International Protection Office, 'Clarification re: deadline for return of the Application for International Protection Questionnaire (IPO 2)' (IPO, June 2021) <http://www.ipo.gov.ie/en/IPO/Pages/IPO_Questionnaire_IPO_2> accessed 11 February 2022.

funded legal aid for applicants).³¹ According to section 15(5) IPA, the application questionnaire must contain all necessary details relating to the reasons for the application, and useful details referring to the applicant's permission to remain, family reunification, and right to reside for family members already present in the State.³² Due to the importance of the details contained in this questionnaire in deciding the result of a person's application, the IPO advises applicants to obtain legal advice before completing the questionnaire.³³

d. Personal interview

The personal interview is a detailed interview pursuant to section 35 of the IPA.³⁴ It may take between 8 and 10 months for an applicant to sit a personal interview.³⁵ This is where the applicant has the first real opportunity to tell their story and establish their claim for international protection. Unfortunately, applicants are generally not legally represented at this stage. Hence, the personnel present at the interview are usually the applicant themselves, an interpreter (if necessary) and an international protection officer. At appeal issues may arise from the personal interview such as the applicant not understanding the interpreter, and no legal representative present to question the evidence being translated or presented to the officer thus, the applicants may feel as though they did not have the full opportunity to develop their case.³⁶ Therefore, the aim of the IPO is to attain the claim from the applicant and investigate the claim.

e. First instance status determination

In the first instance status determination, two decisions will be issued yet, there are no time limits within the statute as to dictate first instance decision delivery.³⁷ If the decision cannot be made within 6 months of the application being lodged, the applicant can ask for an estimated time as per section 39(5) of IPA but this date does not have to be strictly adhered to.³⁸ The first instance decision will be a written report in relation to their international protection application pursuant to section 39 of IPA concerning their status determination, clarifying the applicant entitlement to refugee status, subsidiary protection or neither.³⁹ The second decision at this stage also considers whether the applicant is entitled to permission to remain pursuant to section 49 of the IPA.⁴⁰ The permission to remain application is suspended at this stage. If the applicant was unsuccessful in the international protection claim, they have a right of appeal to the tribunal. However, there is no right of appeal in relation to the permission to remain application, but it is resurrected at a later stage if the applicant is unsuccessful in front of the appeals tribunal.

³¹ International Protection Office, 'Information Booklet for Applicants for International Protection' (IPO, January 2017) <<http://www.ipo.gov.ie/en/IPO/InfoBookletNew.pdf/Files/InfoBookletNew.pdf>> accessed 11 February 2022.

³² IPA 2015 (n.10), s.15(5).

³³ IPO (n.30), para.3.7.2.

³⁴ IPA 2015 (n.10), s.35.

³⁵ Minister for Justice and Equality Charlie Flanagan, Response to Parliamentary Question No.531, 12 June 2018 <<https://www.oireachtas.ie/en/debates/question/2018-06-12/531/#pq-answers-531>> accessed 11 February 2022.

³⁶ See Femi Daniyan, 'Interpretation in Irish Asylum Law: Practical Problems—Real Solutions' (2010) *Translation Ireland* 127.

³⁷ Minister for Justice and Equality, Response to Parliamentary Question No.374, 5 March 2020 <<https://www.kildarestreet.com/wrans/?id=2020-03-05a.1101>> accessed 11 February 2022.

³⁸ IPA 2015 (n.10), s.39(5).

³⁹ *Ibid*, s.39.

⁴⁰ *Ibid*, s.49.

f. Appeal

If an applicant is unsuccessful in the international protection application process, there are mechanisms to appeal the decision to the tribunal under section 39 of the IPA.⁴¹ There are time limits which are prescribed by the Minister in consultation with the chairperson of the tribunal within when the notice of appeal must be filed, additionally there are statutory formalities for the notice of appeal.⁴² Between 10-15 working days are given before the minister may take the file and make their final decision on the permission to remain application.⁴³ The tribunal cannot extend the time limits to file the notice of appeal, nor accept an appeal once the minister has made the final decision. The applicant will need to ask the minister to set aside their final decision to allow the appeal to be accepted to the tribunal.

The notice of appeal is an important document as it allows the tribunal to assess the parameters of the case and its issues. Once the notice of appeal is received, the applicant's file is sent from the IPO to the tribunal. The case is assigned to a tribunal member and the matter will be scheduled for a de-novo hearing. Under the 2015 Act there must be 20 working days' notice of an oral hearing, however if both parties agree there can be a shorter notice period.⁴⁴ When the oral hearing is conducted then a decision will be issued, if positive, the tribunal will set aside the first instance determination and the minister is bound by the decision. If the decision is negative and the tribunal is affirming the first instance determination, the case goes back to the IPO who has 5 days to update their permission to remain representations. The minister then makes a decision on the applicant's permission to remain under section 49(9) IPA.⁴⁵ Furthermore, an unsuccessful applicant may be subject to a deportation order under section 51 IPA.⁴⁶

2. Existing EU and International Legal Provisions

The following section details the existing legal provisions in both International and EU law on an individual's right to legal advice and assistance. These individuals include asylum seekers, who should be treated equally before the law.⁴⁷

Article 8 of the Universal declaration of Human Right (herein UDHR) grants individuals the right to effective remedy which entails asking for legal help if he/she is treated unfairly within a state.⁴⁸ The article therefore applies if an individual were claiming asylum, as per article 14 UDHR.⁴⁹

Article 16 of the 1951 Refugee Convention, ensures that refugees be treated equally with natives in areas relevant to access to the courts, including legal assistance.⁵⁰ Ireland acceded to this convention in 1956.

⁴¹ Ibid, s.39.

⁴² Ibid, s.41(2)(a) & 77.

⁴³ Ibid.

⁴⁴ Ibid, s.6(1).

⁴⁵ Ibid, s.49(9).

⁴⁶ Ibid, s.51.

⁴⁷ See Universal Declaration of Human Rights 1948 (UDHR), art 7; Charter of the United Nations 1945, art 1(2) & (3); International Covenant on Civil and Political Rights 1966 (ICCPR), art 2(1), 14(1), 20 (2), 25, 26, 27; International Covenant on Economic, Social and Cultural Rights 1966, art 2(2) & 3.

⁴⁸ UDHR *ibid*, art 8.

⁴⁹ *Ibid*, art 14.

⁵⁰ Refugee Convention (n.11), art 16.

Article 6 of the European Convention on Human Rights (herein ECHR) states the right to a fair trial and contains the minimal right “to defend himself, through legal assistance, to be given for free when the interests of justice so require”.⁵¹ Although article 6 does not specifically apply to asylum claims, the European Court of Human Rights has read Article 6 as influencing article 47 of the EU charter of Fundamental Rights.⁵²

Article 47 of the EU Charter of Fundamental Rights pertains to issues of EU law, such as migration and asylum, establishing the right to an effective remedy and to a fair trial.⁵³ The wording of the provision extends to the right of “being advised, defended and represented” through legal assistance and “in so far as is necessary to ensure effective access to justice”.⁵⁴ The Charter directly applies to asylum matters with article 18 guaranteeing the right to asylum, and article 19 establishing the principle of non-refoulement, hence parallels can be drawn from both provisions.⁵⁵

In relation to the implementation of Article 6 ECHR, the European Court of Human Rights has ruled that the state may be required to “provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court”.⁵⁶ This is determined by three factors: (i) The significance of the issue for the applicant,⁵⁷ (ii) the complexity of the applicable legislation or procedure,⁵⁸ and (iii) the applicant’s ability to properly represent his/her self.⁵⁹ Asylum seekers often meet all these requirements as asylum seekers fundamental rights (including the right to life, liberty and non-refoulement) are at risk during the proceedings. Secondly, the EU asylum acquis and the corresponding national law can be quite complicated. Thirdly, asylum seekers frequently lack the necessary language skills, will be in a foreign setting and may experience technical and psychological challenges in presenting their case.⁶⁰

Article 18 of the EU Charter of Fundamental Rights ensures the right to claim asylum through the implementation of its several legislative measures.⁶¹ The article outlines the minimum requirements that member states must apply and follow throughout the asylum procedure.

Article 13 of the ECHR (the right to effective remedy) is relevant in asylum procedures when combined with article 2 ECHR (the right to life).⁶² In the case of *Abdolkhani and Karimnia v. Turkey*, the European Court of Human Rights determined that the refusal of asylum seekers requested legal assistance was ruled to be a breach of Article 13.⁶³ In order to fulfil Article 13, the court specifically mentioned the requirement for a remedy to be effective in both practice and law.⁶⁴ Additionally, in the case of *Hirsi Jamaa v. Italy*, Judge Pinto de Albuquerque submitted that “[f]or the refugee status determination procedure to be individual, fair and effective, it must necessarily have at least the following features: free legal advice and representation and, if

⁵¹ The European Convention on Human Rights 1950 (ECHR), art 6.

⁵² EU Charter of Fundamental Rights (2007/c), art 47.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, art 18-19.

⁵⁶ *Airey v Ireland* (ARTICLE 50) – 6289/73 – Chamber Judgment [1979] ECHR 3 (09 October 1979), para. 26.

⁵⁷ *Steel v United Kingdom* – 68416/01 – Chamber Judgment [1979] ECHR (15 February 2006), para. 61

⁵⁸ *Airey v Ireland* (n.56), para 24.

⁵⁹ *McVicar v United Kingdom* – 46311/99 – Chamber Judgment [2002] ECHR (7 May 2002), paras. 48-62; *Steel v United Kingdom* (n.57), para. 61

⁶⁰ UNHCR, *Access to Legal Aid for asylum seekers in Estonia* (July 2019) p.9 <<https://www.refworld.org/docid/5d4bedea4.html>> accessed 11 February 2022.

⁶¹ EU Charter of Fundamental Rights (n.52), art 18.

⁶² ECHR (n.51), art 13.

⁶³ *Abdolkhani v. Turkey* – 30471/08 – Chamber Judgment [2009] ECHR (22 September 2009) paras. 113-14.

⁶⁴ *Ibid.*, para. 115.

necessary, free linguistic assistance at both first and second instance, and unrestricted access to the United Nations High Commissioner of Refugees (herein UNHCR) or any other organization working on behalf of UNHCR.”⁶⁵

The EU approved the Asylums Procedures Directive to “decrease discrepancies between national asylum systems while allowing states to maintain their own procedures”.⁶⁶ The directive establishes essential requirements for asylum processes and includes the main provisions on legal advice and assistance for international protection applicants. Article 15(1) of the directive requires governments to provide legal advice to asylum seekers, however it is specified that this can be at the asylum seekers own expense.⁶⁷ Further, article 19 (1) guarantees the right to legal and procedural information at first instance free of charge.⁶⁸ The provision was incorporated into national law by December 2007, with the legal assistant provision was incorporated a year later. Even though the right to consult a legal adviser is officially recognised throughout the EU, national governments differ in their approach to providing free legal assistance.⁶⁹ The Commissioner 2010 evaluation report of the Asylums Procedures directive, highlighted variations in asylum policy and practice that remained in the area of legal assistance.⁷⁰

The Recast Asylum Procedures Directive provides for ‘frontloading’, which involves investing “adequate resources into the quality of decision making at first instance to make procedures fairer and more efficient”.⁷¹ Additionally, article 19 of the recast directive provides that in first instance procedures, national governments must guarantee that, upon request, applicants receive free legal and procedural information, including at minimum, information relating to the applicant’s specific circumstances.⁷² Unfortunately, Ireland is not subject to the recast directive, this topic will be expanded in the legal barriers within the international protection system in Part D of this Working Paper.

3. Government Efforts through Legal Aid

Legal aid is extremely important for the provision of legal advice as most asylum seekers cannot afford legal assistance as it “gives full effect to the right to asylum”.⁷³ Legal aid for international protection applicants is provided by an independent statutory body called The Legal Aid Board (herein LAB) who are funded by the state.⁷⁴ To qualify for legal aid through LAB, the applicant’s income cannot exceed €18,000 per annum.⁷⁵ There is a small contribution fee of €10 for legal aid and €40 for legal representation for applicants who qualify for legal aid.⁷⁶ The European Court of Human Rights have held that asylum-seekers are “particularly underprivileged and vulnerable”, this should be highlighted during financial considerations for legal aid.⁷⁷

⁶⁵ *Hirsi Jamaa and Other v. Italy* – 27765/09 – Chamber Judgment [2012] ECHR (23 February 2012) p.73.

⁶⁶ The Recast Asylum Procedures Directive (2013/32/EU).

⁶⁷ *Ibid*, art 15(1)

⁶⁸ *Ibid*, art 19(1)

⁶⁹ ECRE/ELENA (n.5).

⁷⁰ European Commission, Reports from the commission to the European parliament and council, Com (2010) 465 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0465:FIN:EN:PDF>> accessed 11 February 2022.

⁷¹ Asylum Procedures Directive (n.66).

⁷² *Ibid*, art 19.

⁷³ Elspeth Guild, ‘The Asylum Seekers Right to Free Legal Assistance and/or Representation in EU Law’ in Sir Richard Plender (eds), *Issues in International Migration Law* (Brill Nijhoff 2011) p.271.

⁷⁴ The Legal Aid Board was established by the Civil Legal Act 1995, s.3.

⁷⁵ Legal Aid Board, ‘Financial Eligibility & Contributions’ (LAB) <<https://www.legalaidboard.ie/en/our-services/legal-aid-services/do-i-qualify-financial-eligibility-contributions.html>> accessed 11 February 2022.

⁷⁶ This fee can be waived in certain circumstances at the discretion of the Legal Aid Board.

⁷⁷ *M.S.S v Belgium* – 30696/09 – Chamber Judgment [2011] ECHR (21 January 2011), paras 232 & 251.

Alternatively, asylum seekers with financial resources can seek legal advice and assistance from a variety of organisations and charities in either the private or public sector.

There are three branches of the LAB dedicated to international protection; these include the Cork, Galway, and Dublin city branches. LAB usually provides a strong service at the appeal stage rather than prior to the first instance decision. This shortcoming is explored within the barriers to providing legal advice and assistance at Part D of this Working Paper. According to the latest figures from the LAB in 2020, 1,174 applicants were made for the Board's services in international protection cases, a decrease of 1,365 from the previous year – perhaps due to the global pandemic.⁷⁸ LAB reports that 356 international protection cases were completed in 2020, however only 49 (4.2%) of these were opened in 2020 and the other 93.8% of completed cases had been open for 1-3+ years.⁷⁹ Within these completed cases, 34% of cases taken by the LAB received a positive decision on first instance determination, while a further 13% of applicants received either refugee status, subsidiary protection, or permission to remain after the appeal stage.⁸⁰ The data for 2021 has yet to be made available.

In 2011, the Irish Refugee Council law centre introduced a free early legal advice service, offering intense legal assistance to applicants at the very beginning of the asylum process.⁸¹ This service includes an initial advisory consultation with a solicitor (ideally before filing an asylum application), assistance in application completion, guidance with completing the in-depth questionnaire and composing a personal statement based on the applicant's instructions, attendance at the personal interview, and submission of representations. In 2018, the law centre held 138 early legal advice consultations, assisted 61 new early legal advice cases, and spent 400 hours assisting those completing international protection questionnaires, resulting in an 80% success rate.⁸² The Irish Refugee Council drop-in centre obtained grant funds from the states 'Scheme to Support National Organisations', alongside another state grant worth €300,000 between 2016-2020, to provide legal and casework assistance to international protection applicants.⁸³ However, these government efforts are inadequate compared to the growing demand for legal advice and assistance through legal aid, which the government has not responded to with additional resources. This resource barrier will be further discussed in the first section within Part D of this Working Paper.

This Part primarily focused on the development of the international protection determination procedure from when Ireland acceded the Refugee Convention in 1956 to the governing legislation of IPA. Each of the six stages of the international protection determination procedure are vital to the international protection applicant's application thus contributions at each stage are investigated, cutinised, and critiqued and a decision is made based on strength of the applicant's case. The Refugee Convention, European Convention of Human Rights, European Charter of Fundamental Rights, European Court of Human Rights, Asylum Procedures Directive and Recast Asylum Procedures Directive are a collection of existing EU and international

⁷⁸ Legal Aid Board, *Annual Report 2020*, Table 12, p.37.

⁷⁹ Ibid.

⁸⁰ Ibid, Chart 7, p.37.

⁸¹ For further information see The Researcher, 'Early Recognition of People in Need of International Protection: The Irish Refugee Council Independent Law Centre's Early Legal Advice and Representation Project' October 2013 8(2) <<http://edepositireland.ie/bitstream/handle/2262/70429/The%20Researcher%20-%202013Oct%2C%20Vol%208%2C%20Issue%202.pdf?sequence=1&isAllowed=y>> accessed 11 February 2022.

⁸² Irish Refugee Council, *Impact Report 2018* <<https://irishrefugeecouncil.eu.r.it.org.uk/Handlers/GetImage.ashx?IDMF=64f7eb4b-5067-4d69-970c-06d08f59e3b4&h=1181&w=1689>> accessed 11 February 2022.

⁸³ Department of Justice and Equality, EU Funds Unit, *Asylum Migration and Integration Fund Ireland (AMIF) 2014-2020* (2016) p.7 <<https://www.gov.ie/en/publication/4ab75-amif-and-esf-funding/>> accessed 11 February 2022.

legal provisions which provide the entitlement of legal advice and assistance for international protection applicants. The government legal aid provision for asylum seekers is both invaluable and favourable, however the need for more resources within the legal aid system is essential due to the increasing demand from international protection applicants. Following the brief overview of the Irish international protection determination procedure, the next Part will explore the importance, benefits and impact of legal advice and assistance in all legal matters especially within refugee law.

C. IMPORTANCE OF LEGAL ADVICE AND ASSISTANCE

This Part will focus on the importance of legal advice and assistance for asylum seekers in the international protection system. The first section will discuss the experiences of international protection applicants in accessing legal advice or assistance in Ireland. The second section will draw on literature concerning legal advice and assistance in criminal law, inferring similarities and correlations between the criminal and immigration field. The subjects of self-representation, suspect interviews, the right to a fair trial and legal representation will be analysed and compared to the immigration field. The third section will highlight several benefits of early legal advice and assistance including its potential ability to improve the asylum system, build trust between asylum seekers and their legal representatives, advance better-quality decision making at first instance, decrease the number of appeals and encourage cooperation between stakeholders. The fourth section will examine first instance decisions overturned on appeal by the tribunal, and the impact additional legal advice and assistance at the appeal stage has on the case. The fifth section will look at the outcomes of two pilot projects; the Solihull Pilot and the Early Legal Advice project, which trailed the concept of ‘frontloading’ the asylum procedure in the UK, analysing its strengths and shortcomings.

International and European Union law obligations require States to develop an asylum system that properly identifies and supports people in need of international protection.⁸⁴ It has been argued that a critical component of a functional and human rights-compliant asylum system is providing international protection applicants (‘asylum seekers’) with high-quality legal assistance.⁸⁵ As the process for seeking international protection has been recognised as a legal procedure, everything stated by the applicant in their application or revealed throughout the process becomes part of their case.⁸⁶ This information is then examined by the relevant decision-makers for inconsistencies, gaps or mistakes which can undermine the applicant’s credibility, hence, the need for legal advice and assistance from the outset of the application to aid every applicant during the process.

Several procedural requirements for asylum applicants have been outlined in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.⁸⁷ These include the right to a fair hearing, representation, appropriate judicial guidance and training, and impartiality.⁸⁸ UNHCR emphasises that

⁸⁴ Cathryn Costello (n.2).

⁸⁵ UNHCR (n.11).

⁸⁶ Movement of Asylum Seekers in Ireland (MASI), *Submission to Justice and Equality Joint Committee* (27 May 2019) <<http://www.masi.ie/wp-content/uploads/2019/09/MASI-SUBMISSION-final-original-copy-29.05.2019.pdf>> accessed 11 February 2022.

⁸⁷ Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR 2019).

⁸⁸ *Ibid*, 46.

asylum seekers have the right to legal assistance at "all phases of the process".⁸⁹ The Handbook is a non-binding guideline that allows domestic legal systems discretion and, as such, does not specify the exact form of these criteria, which can lead to misunderstanding and misapplication.⁹⁰ UNHCR expects states will follow the procedural fairness criteria whenever an asylum claim is submitted, however, it is unclear how successful this is in reality.⁹¹

Legal representation is crucial to the international protection process, in terms of substantive fairness, access to justice and, more broadly, the asylum seeker's capacity to communicate productively during the process.⁹² Effective legal representation has been shown in research to have a favourable impact on the outcome of asylum applications at all stages of the asylum system in the UK.⁹³ Studies have also shown that asylum seekers with legal assistance were five times more likely to be granted international protection than those with no assistance.⁹⁴

The Council of Europe's Committee of Ministers guidelines on human rights protections recognised the right to access legal advice and assistance during asylum procedures.⁹⁵ Similarly, community advocates emphasise the correlation between asylum seekers' access to legal assistance and obtaining a positive decision.⁹⁶ Although the EU's Asylum Procedures Directive provides that "every applicant should have the opportunity to consult a legal adviser",⁹⁷ European studies have pointed to several advantages in affording legal advice and assistance at first instance; yet it also highlights that the majority of European countries do not provide effective services to international protection applicants.⁹⁸

Elsbeth Guild believes there are five main stages during the asylum procedure where legal assistance and/or representation is essential, one being the preparation and submission of the asylum claim.⁹⁹ This would lead to asylum applicants being better educated and assisted, and they would be less likely to feel alone as they navigate a difficult and unfamiliar legal process. Similarly, in most cases where language barriers arise quality legal assistance can minimise confusion, making it possible for the applicant to grasp the typically complicated and swiftly executed procedures. However, asylum seekers are not only impeded by language barriers but also by the lack of knowledge they have of the international protection process and

⁸⁹ European Union Agency for Fundamental Rights, *Access to Effective Remedies: The Asylum-Seeker Perspective* (Publications Office, 2010); UNHCR, *Asylum Processes: Fair and Efficient Asylum Procedures* (UNHCR, 2001) EC/GC/01/12 para. 50.

⁹⁰ Nick Gill and Anthony Good, 'Introduction' in Nick Gill and Anthony Good (eds.), *Asylum Determination in Europe* (Palgrave 2019) p.10.

⁹¹ Nick Gill, Rebecca Rotter, Andrew BurrIDGE, Melanie Griffiths and Jennifer Allsopp, 'Inconsistency in Asylum Appeal Adjudication' (2005) *Forced Migration Review* 52.

⁹² As exemplified by Hazel Genn and Yvette Genn, 'The Effectiveness of Representation at Tribunals' (Lord Chancellor's Department, 1989).

⁹³ See for example Deborah James and Evan Killick, 'Empathy and Expertise: Case Workers and Immigration/Asylum Applicants in London' (2012) 37 *Law and Social Inquiry* 430-455.

⁹⁴ Transactional Records Access Clearinghouse, 'Asylum denial rate reaches all-time low: FY 2010 results, a twenty-five-year perspective' *Transactional Records Access Clearinghouse* (21 March 2010); Stacy Caplow *et al*, 'Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report' (2011) 33(2) *Cardozo Law Review* 357.

⁹⁵ The Committee of Ministers, 'Human Rights Protection in the context of accelerated asylum procedures' (2009) IV (f) 8 <<https://rm.coe.int/16806aff8b>> accessed 11 February 2022.

⁹⁶ MASI (n.86).

⁹⁷ Asylum Procedures Directive (n.4).

⁹⁸ ECRE/ELENA (n.5).

⁹⁹ Elsbeth Guild (n.73), 262.

procedures.¹⁰⁰ Deciphering what is significant to include in the application requires a thorough grasp of several legal principles, including the definition of a refugee which applicants typically overlook.¹⁰¹ Thus, early assistance is critical in determining the significant and relevant parts of an applicant's claim.

1. Experience of Asylum Seekers

This Working Paper's scope did not extend to gaining first-hand data through empirical interviews from international protection applicants and their experiences of accessing legal advice or assistance in Ireland. However, it is important to include the first-hand voice of individuals affected by the subject matter of this research, and so the case studies and interviews from asylum seekers below are drawn from a piece written by Elizabeth O'Rourke in 2009 on providing legal resources at the early stages of the Irish asylum process.¹⁰²

Barat from Afghanistan was from an ethnic group fleeing the Taliban.¹⁰³ He attempted to escape but was arrested, imprisoned, and tortured by the Taliban. Barat arrived in Ireland and applied for asylum and applied for a solicitor in the Refugee Legal Services (herein RLS). However, he only met with a caseworker before his substantive interview and later met his solicitor on appeal at the Refugee Appeals Tribunal case. In his interview with O'Rourke, Barat portrays the difficulties in accessing legal services for assistance early in the asylum application process.

"I came to the Justice and they told me to fill out a form ... You never get to talk to the solicitor ... always the reception take your number and say 'I'll get back to you' ... I haven't met him [the solicitor] till I was refused ... I say to him 'why I haven't seen you before?'"

"When [I went] to the Legal Aid, the person I got wasn't a solicitor, it was a caseworker ... Maybe a solicitor would help you but the caseworker can't do anything; they just write down what you say ... I didn't know what the questionnaire was ... I didn't even know I needed to go to court – I was, like, 'Why do I need to go to court? I haven't done anything wrong'".¹⁰⁴

Reem came to Ireland from the Middle East due to the war that broke out and the atrocities taking place in her country.¹⁰⁵ Her father obtained asylum status nine years earlier in Ireland, however, he was not eligible for family reunification. Reem spoke about the confusion surrounding the asylum procedure with all the legal concepts and terms. She found it hard to figure out what was relevant to disclose in the questionnaire and interview. Similar to Barats' case above, Reem only met her solicitor after her initial asylum application was rejected and her case was pending before the Refugees Appeals Tribunal.

"Even though my father was here we were still confused ... What about the people in the hostel who have no-one? ..."

¹⁰⁰ Nick Gill, Rebecca Rotter, Andrew Burrigge and Jennifer Allsopp, 'The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals' (2017) 27 *Social & Legal Studies* 49-78.

¹⁰¹ See UNHCR (n.11).

¹⁰² Elizabeth O'Rourke, 'Frontloading: The case for legal resources at the early stages of the asylum process' (2009) Working Notes 62 <<https://www.jcfj.ie/article/frontloading-the-case-for-legal-resources-at-the-early-stages-of-the-asylum-process/>> accessed 11 February 2022.

¹⁰³ Ibid, case Study 1.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid, case study 2.

*"If the solicitor helped you ... would've been very good ... If your solicitor was with you he can say don't write that ..."*¹⁰⁶

Both these case studies portray why the current provision of legal advice and assistance in Ireland is not sufficient and the need for a legal professional involvement from the onset of the international protection application procedure. This does not necessarily mean it has to be a legal professional, but an individual who knows the legal process and has experience in immigration law. These legal professionals can render quality assistance to applicants and effectively inform them of the international protection procedure.

2. Legal Advice and Assistance in Criminal Law

This section will draw on the criminal law literature and infer similarities and correlations from this sphere that relate to the immigration law field. It must be stated however, that the purpose of relying on the criminal law literature is not to propose the idea that there might be a correlation between individuals seeking international protection and criminality. The objective is simply to add depth to our understanding of the role of early legal advice in legal processes by examining the precedence which has already been set in the criminal field, and discussion by Irish courts on the importance of legal advice and assistance.

a. The difficulties of self-representation

The literature surrounding the topic of self-representation in court, also called 'pro se legal representation,' has flagged the difficulties for individuals who do not have access to legal representatives as it raises continuous legal challenges to initial court decisions and "impose a burden on courts".¹⁰⁷ In Evans Bell's article discussing self-representation, he points out the common characteristics of self-represented 'litigants' and how this impacts the trial process.¹⁰⁸ Often these litigants lack legal knowledge and may not understand procedural or technical rules.¹⁰⁹ Additionally, they may lack objectivity and may not see the rational point of view but blame a defeat on bias or injustice against them. Furthermore, litigants may have difficulty appreciating the relevance or irrelevance of legal issues raised depending on the evidence given. Unrepresented litigants are typically at a severe disadvantage compared to those who are represented unless the available legal representation is of poor quality.¹¹⁰ Unrepresented appellants voiced emotions of intimidation and great vulnerability.¹¹¹ They viewed themselves being at a disadvantage and believed the court would deem their case unworthy or easily dismissed.

A strong similarity can be drawn from the experiences of self-represented litigants to those of international protection applicants at first instance, as within the current inadequate system, most applicants are compelled to self-represent themselves throughout the process and crucially during the personal interview. This research conveys the downfalls of not having legal assistance and representation in matters which in many cases could mean life or death.¹¹²

¹⁰⁶ Ibid.

¹⁰⁷ *Williams v. Lemas and Anor* [2009] E.W.C.A Civ. 360 (UK); Evan Bell, 'Judges, Fairness and Litigants in Person' (2010) *Judicial Studies Institute Journal* 1.

¹⁰⁸ Evan Bell (ibid), 2-4.

¹⁰⁹ Ibid, 3.

¹¹⁰ Andrew L. Schoenholtz and Jonathan Jacobs, 'The State of Asylum Representation: Ideas for Change. Georgetown University Law Center' (2001) 16 *Immigration Law Journal* 739-772.

¹¹¹ Nick Gill et al, *Public Law Project Experiencing Asylum Appeal Hearings* (2020) p.27.

¹¹² Peter William Walsh, 'Asylum and refugee resettlement in the UK' (2020) *The Migration Observatory* 4 <www.migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/> accessed 11 February 2022.

b. Suspect interviews

In Ireland, the right to legal advice if requested by the accused was established in *People (DPP) v Madden*,¹¹³ with the right confirmed as constitutional in nature by the Supreme Court in *DPP v Healy*.¹¹⁴ Following the case of *DPP v Gormley and White*, solicitors were permitted to attend a suspect's garda station interviews rather than just consulting with their client.¹¹⁵ However, having legal representatives present at the interview is not a constitutional right as decided in the Supreme Court case of *DPP v Doyle*.¹¹⁶ Both the European Court of Human Rights and practitioners recognise that attending interviews serves a variety of functions, including constructing the defence, assisting clients in extremely stressful situations, offering advice, and ensuring that rights are safeguarded while in custody.¹¹⁷

Legal advice involves recognising the legal relevance of the scenario, explaining applicable legislation and legal concepts, and advising the client on what strategy could be appropriate in their specific circumstances.¹¹⁸ Legal representatives undoubtedly ensure that the rights of their clients are protected, not allowing them to be ill-treated, misled or asked oppressive questions.¹¹⁹ Representatives also inhibit miscarriages of justice by preventing false confessions under oppressive circumstances, spotting if the client is deviating substantially from what was said previously to the representative. Consequently, the legal representative's presence increases the legitimacy of the evidence-gathering process and the reliability of evidence.¹²⁰ Further, they provide support to clients, showing sympathy and compassion for their situation while also advising them on the law.

This recognised role of the legal representative also holds in all scenarios concerning the law including the asylum procedure yet having legal representation in the personal interview is not a constitutional right for any applicant in the asylum system. The current system for the provision of legal advice and assistance for asylum seekers in Ireland is deficient.¹²¹ It is important to note that the role of caseworker in asylum cases is crucial, their function cannot be compared to the role of legal representatives.¹²² While a legal representative would carry out the several roles mentioned previously, a LAB caseworker could only provide information about the international protection procedure and assist the applicant with filling out the questionnaire.¹²³ Those additional protections afforded to individuals in criminal law by having legal representation at the suspect interview, are absent within the current Irish international protection system, thus leaving asylum seekers more vulnerable and susceptible to injustice.

¹¹³ [1977] IR 336 (CCA).

¹¹⁴ [1990] 2 IR 73 (SC).

¹¹⁵ [2014] 2 IR 591 (SC); Ruadhan Mac Cormaic, 'Solicitors May attend garda interviews' *The Irish Times* (Dublin, 19 May 2014).

¹¹⁶ [2017] IESC 1.

¹¹⁷ Vicky Conway and Yvonne Marie Daly, 'From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station' (2019) 1 *Irish Judicial Studies Journal* 103; *Dayanan v Tukey* – 7377/03 – Chamber Judgement [2009] ECHR 2278; *Aras v Turkey (No.2)* – 15065/07 – (ECtHR, 18 November 2014), para 40.

¹¹⁸ Vicky Conway and Yvonne Marie Daly (ibid), 113.

¹¹⁹ Fiona Leverick, 'The Right to Legal Assistance during Detention' (2011) 15(3) *Edinburgh Law Review* 364.

¹²⁰ See J. Colton, 'R v McLaughlin' [2018] NICC 10, 289 (NI).

¹²¹ ECRE/ELENA (n.5), 5.

¹²² Catherine Day Report (n.7), para 3.3.

¹²³ Samantha Arnold, Conor Ryan and Emma Quinn, 'Ireland's Response to Recent Trends in International Protection Applications' (2018) 72 *ESRI Research Series*, para. 3.2.

c. Right to a fair trial and legal representation

The right to a fair trial and to legal representation are complementary to one another as without appropriate or quality legal representation the right to a fair trial is threatened.¹²⁴ As discussed earlier, self-representation can distort the balance of the scales of justice, affecting the right to a fair trial.¹²⁵

The right to a fair trial is set out in the International Covenant on Civil and Political Rights (ICCPR) where it refers to core principles including ‘the presumption of innocence’, ‘right to know the nature of the accusation’ and ‘the ability to challenge accusations effectively in a fair and public hearing by an independent and impartial tribunal’.¹²⁶ In this context, legal representation is central to the right to a fair trial.¹²⁷ Access to legal representation at trial can be found in the UDHR, the ECHR and the ICCPR, as discussed previously.¹²⁸ Under the ICCPR and the ECHR, the right to instruct representatives includes the accused right to have free legal assistance “in any case where the interests of justice so require it.”¹²⁹ Moreover, the guarantee of legal assistance is also outlined in the UN Human Rights Committee, General Comment No.32 on article 14: Right to equality before courts and tribunals and to a fair trial as, “the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the ICCPR”¹³⁰

The provisions for the right to legal representation in the criminal sphere stems from both the European Union and the European Court of Human Rights and more nationally implied in the Irish constitution indicating it is fundamental to human rights and needs to be defended and regulated.¹³¹ Article 6(3)(c) of the ECHR gives an individual charged with a criminal offence the right “to defend himself in person or through legal assistance of his choosing or ... to be given it free when the interests of justice so require”.¹³² The provision was further interpreted in the *Salduz v Turkey* case, which formed ‘the Salduz Principles’ where the accused should be granted access to a lawyer from the first interrogation unless there is a compelling reason to be denied access.¹³³ Additionally, the case of *Dayanan v Turkey* demonstrated that the lack of access to legal representation, even where the accused is silent in the interview, is a breach of the right to a fair trial.¹³⁴ Furthermore, in *Borg v Malta* the court held that the right to legal assistance should be available to all suspects, not just suspects deemed vulnerable.¹³⁵ Right of Access to lawyer/ legal representation was introduced in the 2013 EU directive which allows the accused “to exercise their right of defence practically and effectively” by giving them access to a lawyer without undue delay and having legal representation

¹²⁴ Grainne McKeever, Lucy Royal-Dawson, Eleanor Kirk and John McCord, ‘Litigants in person in Northern Ireland: Barriers to legal participation-Summary report’ (2018) 16 Available at SSRN 3523915.

¹²⁵ Anne-Marie Langan, ‘Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario’ (2004) 30 *Queen’s Law Journal* 825-938.

¹²⁶ ICCPR (n.47), art 14(2) & 14(3).

¹²⁷ Asher Flynn, Asher, Jacqueline Hodgson, Jude McCulloch and Bronwyn Naylor, ‘Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial’ (2016) 40 *Melbourne University Law Review* 209.

¹²⁸ UDHR (n.47) arts 8 & 10; ICCPR (n.47), art 14; ECHR (n.51) 1950, art 6.

¹²⁹ ICCPR (ibid), art 14(3)(d); ECHR (ibid), art 6(3)(C).

¹³⁰ Human Rights Committee, General Comments No.32 Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) 3 [10]

¹³¹ See interpretation of Irish Constitution, Article 40.1 in *McMahon v Leahy* [1994] IR 525; also see *Decision of State (Healy) v Donoghue* [1976] IR 325 p.354.

¹³² ECHR (n.51), art 6(3)(c).

¹³³ [2008] ECHR 1542.

¹³⁴ [2009] ECHR 2278

¹³⁵ [2016] ECHR 367.

throughout the process.¹³⁶ Ireland did not opt into this directive, this will be discussed further in Part D examining the legal barriers to providing legal advice and assistance.

The right to a fair trial and representation also holds relevance in the international protection system, as all applicants must undergo the same legal process.¹³⁷ This right is not confined to matters affecting civil rights and obligations or criminal accusations, hence the rights developed from case law under article 6 apply to asylum proceedings as well.¹³⁸ However within the current Irish system, the right to a fair hearing is not granted to international protection applicants at the personal interview prior to the first instance decision, as they do not have a guaranteed right to legal representation therefore, there is a breach to this right to a fair hearing in the Irish international protection process which needs addressed. International protection applicants have stated how the procedure of seeking protection can be compared to that of standing trial, as some are often treated like criminals rather than victims.¹³⁹ Further, the process applies extra pressure on the applicant, as everything they reveal or fail to reveal can be used to question their character and credibility such as in a criminal trial. Additionally, inequality may arise within asylum seekers, as some asylum seekers are better equipped for a trial. However, most asylum seekers are unlikely to have the funds to engage private legal practitioners, and therefore rely on state Legal Aid.¹⁴⁰

A previous UK study has demonstrated that legal representation has a major influence on asylum seekers' access to justice, therefore it is difficult to claim that asylum seekers obtain a fair hearing without legal assistance.¹⁴¹ Applicants often struggle to present a cohesive case due to lack of expertise or comprehension of the language or legal system.¹⁴² This misunderstanding makes it tough for appellants to communicate effectively, reducing their chances of receiving a fair hearing. As per the Migration Observatory, legal representation may be the difference between life and death for an asylum seeker since it gives impartial, informative advice on the elements of their cases and the likelihood of successful applications or appeals.¹⁴³ Further, it would also minimise the possibility of unfounded and improper claims, and would assist asylum seekers in gathering the information and evidence required to support and validate their claims. According to Ramji-Nogales et al, legal representation is the single most critical element influencing asylum proceedings in the United States, and recommends the use of early, high-quality legal advice to expedite, higher-quality asylum determinations, a resource currently lacking in the Irish international protection process.¹⁴⁴

¹³⁶ Directive 2013/48/EU, Article 3 of the European Parliament, and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and the European Arrest Warrant proceedings.

¹³⁷ MASI (n.86).

¹³⁸ ECHR (n.51), art 6; also see ECRE 'The application of the EU Charter of Fundamental Rights to asylum procedural law' (2014) Section 2.2.6 <<https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf>> accessed 11 February 2022.

¹³⁹ Nancy Grey Postero, 'On Trial in the Promised Land: Seeking Asylum' (1992) 13(1-2) *Women & Therapy* 155-172.

¹⁴⁰ Caroline Slocock, 'End this 'inhumane and expensive' asylum system', *The Guardian* (London, 3 June 2010) <<https://www.theguardian.com/law/2010/jun/03/inhumane-expensive-asylum-system>> accessed 11 February 2022.

¹⁴¹ Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Bloomsbury, 2011).

¹⁴² Gillian McFadyen, 'Memory, Language and Silence: Barriers to Refuge within the British Asylum System' (2019) 17(2) *Journal of Immigrant & Refugee Studies* 168-184.

¹⁴³ Peter William Walsh, 'Asylum and refugee resettlement in the UK' (2020) *The Migration Observatory* <www.migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/> accessed 11 February 2022.

¹⁴⁴ Jaya Ramji-Nogales, Andrew Schoenholtz and Phillip Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2010) 60 *Stanford Law Review* 295.

3. Benefits of Early Legal Advice and Assistance

a. Improved asylum system

As the European Council for Refugees and Exiles (ECRE) has argued, access to high-quality legal advice and assistance in filling out the questionnaire would aid data collection that might form the foundation, if any, for a protection claim. The engagement of legal professionals at this point means that they will be able to advise whether the applicant's circumstances are likely to fulfil any of the requirements for granting protection. Legal assistance would also be required to ensure that the applicants do not eliminate details that are pertinent to supplementary types of protection outside the 1951 Refugee Convention claim. A properly filled and factual questionnaire should give higher quality information, allowing for faster and more equitable decisions in the first instance enabling improved asylum system efficiency.¹⁴⁵

The substantive interview is a critical stage in the asylum procedure.¹⁴⁶ These interviews have been critiqued since candidates who are distressed, exhausted, or confused may be unprepared to offer comprehensive, unambiguous explanations of their experiences.¹⁴⁷ Access to legal representation should be offered at this point to guarantee fairness and to preserve the applicants' rights. Moreover, the provision of legal services should reduce the need for judicial review proceedings, as most of the claimed flaws in the process that are subsequently contested may be addressed by legal representation as they emerge. Therefore, early access to legal representation would encourage fairness in the asylum process.

Legal advice and assistance from the outset of the application would allow proper explanation of complex legal and technical terms or theories.¹⁴⁸ The applicant may therefore be more able to provide key details in the questionnaire, during the substantive interview and throughout the entire application process. However, other factors such as mental health or trauma due to torture or abuse, could influence whether or not an applicant will provide details.¹⁴⁹ The provision of early legal advice and assistance will indicate that the applicants are well-informed regarding the asylum procedure and each stages requirements, promoting an asylum system with improved communication and understanding.¹⁵⁰

b. Building trust

Research indicates that asylum seekers believe the lack of quality advice, assistance and/or representation given to applicants does not encourage or maintain their trust in the asylum system.¹⁵¹ Consequently, this sometimes leads to applicants' paranoia that the entire asylum system, including the IPO and staff, their

¹⁴⁵ European Council for Refugees and Exiles (ECRE), *National Country Report – Ireland Asylum Information Database (AIDA)*, (September 2013) p.15.

¹⁴⁶ Muireann Ní Raghallaigh, 'The Causes of Mistrust amongst Asylum Seekers and Refugees: Insights from Research with Unaccompanied Asylum-seeking Minors living in the Republic of Ireland' (2014) 27(1) *Journal of Refugee Studies* 82-100.

¹⁴⁷ Katrin Schock, Rita Rosner and Christine Knaevelsrud, 'Impact of Asylum Interviews on the Mental Health of Traumatized Asylum Seekers' (2015) 6 *European Journal of Psychotraumatology* 1.

¹⁴⁸ Carol Bohmer and Amy Schuman, *Political Asylum Deceptions: The Culture of Suspicion* (Palgrave 2018).

¹⁴⁹ Mary Kenny, Nicholas Procter and Carol Grech, 'Mental Health and Legal Representation for Asylum Seekers in the Legacy Caseload' (2016) 8(2) *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 84-103.

¹⁵⁰ European Union Agency for Fundamental Rights 'The duty to inform applicants about asylum procedures: The asylum-seeker perspective' (2011) ISBN 978-92-9192-640-4 DOI: 10.2811/8599.

¹⁵¹ Eveliina Lyytinen, 'Refugees' "Journeys of Trust": Creating an Analytical Framework to Examine Refugees' Exilic Journeys with a Focus on Trust' (2017) 30 *Journal of Refugee Studies* 489.

interpreter and perhaps their legal representatives, are against their case and may be prohibiting their status.¹⁵² An example can be found in the case of LGBTQ+ international protection applicants, who have indicated that while completing their application without trusted legal advice or assistance, they were hesitant to divulge details regarding their detention or persecution because of their sexual orientation, fearing it would jeopardise their case.¹⁵³

Receiving legal advice and assistance early in an asylum seeker's application will establish and empower the relationship between the legal professional and the international protection applicant from the beginning.¹⁵⁴ It would also assist in making the applicant feel less apprehensive about divulging details of their case to the legal professional over time and alleviate any uncertainties, enhancing as the legal professionals provide substantive guidance. International protection applicants with positive reviews on receiving legal advice and assistance stated their legal professionals were highly meticulous, meeting with them regularly to prepare them before their interviews or hearing date.¹⁵⁵ This approach "boosted the applicant's confidence, knowledge of the process and quality of responses".¹⁵⁶

Communication is therefore a crucial component of efficiency, with less satisfied clients feeling alienated when they had no obvious means to contact their representative, and where they believed that their representative had more important obligations to attend to.¹⁵⁷ Some clients felt that their case was being managed by someone who was uninterested in their case toking hopelessness.¹⁵⁸

Applicants could find the interview less daunting and terrifying if they were accompanied by a legal representative to depict the facts of their case. The role of the legal representative, therefore, requires more than simply having legal representation during the process; it also needs someone who is dedicated with the skills and experiences in the applicable legal field.¹⁵⁹ This would signal a better, more non-adversarial approach to the asylum system.

c. Better decisions

Early legal advice and assistance would allow applicants to be better informed and prepared for all aspects of the asylum process, resulting in lodged asylum claims being more focused and coherent, thus making refusals based on credibility (or apparent lack thereof) less probable.¹⁶⁰ Essentially, this would lead to better

¹⁵² Lauren Cooper, 'Effective Communication in the Asylum Appeals Process – the Role of Legal Representation' (2021) 35 *Journal of Immigration, Asylum and Nationality Law* 161-162.

¹⁵³ Jacki Kelly, (2013), 'Early Recognition of People in Need of International Protection: The Irish Refugee Council Independent Law Centre's Early Legal Advice and Representation Project' (The Researcher, October 2013) 8:2 <<http://edepositireland.ie/bitstream/handle/2262/70429/The%20Researcher%20-%202013Oct%2C%20Vol%208%2C%20Issue%202.pdf?sequence=1&isAllowed=y>> accessed 11 February 2022.

¹⁵⁴ Mike Lane et al, 'Evaluation of the Early Legal Advice Project – Final Report' (Home Office Research Report, 2013) 70:6.

¹⁵⁵ Nick Gill et al (n.100) 7.

¹⁵⁶ Ibid, 27

¹⁵⁷ Helen MacIntyre, 'Imposed dependency: client perspectives of legal representation in asylum claims' (2009) 23(2) *Journal of Immigration, Asylum and Nationality Law* 181; JUSTICE, 'Immigration and Asylum Appeals – a Fresh Look' [2018] <<https://justice.org.uk/our-work/administrative-justice-system/immigration-asylum-determination-reform/>> accessed 11 February 2022.

¹⁵⁸ Nick Gill et al (n.100).

¹⁵⁹ Vicky Conway and Yvonne Marie Daly (n.117), 113.

¹⁶⁰ John R Campbell, 'The Role of Lawyers, Judges, Country Experts and Officials in British Asylum and Immigration Law' (2020) 16 *International Journal of Law in Context* 1-16.

quality decision-making at first instance with more sustained and better reasoned negative decisions.¹⁶¹ Hence, early legal advice and assistance in the form of pre-interview preparation would be both beneficial and effective, as it minimises the risks of appeals.¹⁶² It also provides an extra level of “care and patience which goes into ensuring that no stone is left unturned”.¹⁶³ The lack of preparation before appeal cases could lead to the representative drawing their perceptions and assumptions about the clients from the little information gathered on paper.

Though tribunal appeals are said to be adversarial versus traditional courtroom litigation, the inequalities in knowledge and authority among the participants produced proceedings with an adversarial tone for the appellants.¹⁶⁴ The international protection system must shift away from the strict adversarial stance towards a more inquisitorial and collaborative process, as it is supposedly a ‘non-confrontational’ or ‘non-adversarial’ process.¹⁶⁵ However, that was not the typical experience of asylum seekers in Ireland, with applicants having reported feeling intimidated during the appeal hearings as though they were instantly disbelieved.¹⁶⁶

d. Decreased number of appeals

This Working Paper focuses on the possible effects of early legal advice and assistance before the first instance decision, therefore the appeal mechanism for negative decisions at the first instance is not considered. However, it is important to mention the potential effect early legal advice and representation can have at the appeal stage. Predominantly, early legal advice and assistance would allow for the legal practitioner to put a strong case forward at first instance, hence the appeal would focus on further strengthening a specific aspect of the applicant’s case which resulted in the refusal. The advantage being that practitioners already have a wealth of knowledge about the applicant and the facts of his/her case.

Early legal assistance has proven to be a favourable influence on the result of an international protection claims, which was an advantage to all who had an interest in the correct assessment of applications for any form of international protection.¹⁶⁷ Most studies on representation have concentrated on the significance of representation to the result or outcome of successful applications. For example, Genn and Genn concluded that representation improved the chance of a successful immigration application from 20% to 38%.¹⁶⁸ This statistic shows the tangible influence that representation may have on asylum proceedings.

¹⁶¹ UNHCR, Representation to the United Kingdom in London Quality Initiative Project – Key observations and Recommendations (UNHCR, April 2009) <<https://www.unhcr.org/en-ie/5760123d7.pdf>> accessed 11 February 2022; UNHCR Ireland, Fact sheet Ireland: Jan–Dec 2019 (UNCHR 2020) p.4 <<https://www.unhcr.org/en-ie/5f45084510.pdf>> accessed 11 February 2022.

¹⁶² Asher Flynn (n.127), 228.

¹⁶³ Mike McConville et al, *Standing Accused: The organisation and Practices of Criminal Differences Lawyers in Britain* (Clarendon Press, 1994) 48.

¹⁶⁴ Robert Thomas, ‘From “Adversarial v Inquisitorial” to “Active, Enabling, and Investigative”’: Developments in UK Tribunals’ in Laverne Jacobs and Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate Publishing 2013).

¹⁶⁵ Lauren Cooper (n.152), 172.

¹⁶⁶ Bridget Anderson and Sue Conlan, ‘Providing Protection – Access to early legal advice for asylum seekers’ (2014) Para 3.6.3 & 4.5.

¹⁶⁷ Robert Thomas (n.141).

¹⁶⁸ Genn and Genn’s study (n.92) on the outcome.

From the standpoint of the asylum system, the frontloading of legal services would result in fewer costly, time-consuming actions at the later stage of the application decision, such as appeals.¹⁶⁹ However, it has also been argued that early legal advice does not create a direct causal list for a decrease in the number of appeals, as yet, “it enables the appeals body to focus on what is central to the case and not to engage in speculation or be distracted by peripheral issues”.¹⁷⁰

e. Cooperation between stakeholders

A lack of communication and collaboration between legal representatives and decision-makers can significantly impact applicants.¹⁷¹ The Jesuit Refugee Service Report by Elizabeth O’Rourke suggests that ‘frontloading support’ or early legal advice should be supplied before an international protection application is filed.¹⁷² When applicants are informed of all circumstances, processes and possibilities and provided with comprehensive social and legal assistance, they may be more inclined to trust the authorities handling their case.¹⁷³

As it has been suggested that asylum case results varied greatly regardless of resemblance, discrepancies may weaken the sense of fairness and raise concerns amongst applicants.¹⁷⁴

Therefore, early legal advice plays a crucial role in instilling a sense of procedural justice by guaranteeing that the asylum seeker learns and participates in the process, thus exhibiting that all parties can cooperate to ensure that applicants are treated fairly. As stated in Murphy et al. article, “People and organisations are much more likely to obey the law and accept decisions made by authorities when they feel that the decision-making procedures are fair, respectful and impartial”.¹⁷⁵

4. Decisions Overturned on Appeal

In Ireland, the detailed reasoning relating to overturned decisions on appeal cannot be accessed by the public and requires special authorisation by the tribunal. Further, within the statistics which are publicly available, the common reasons as to why the first instance decision being overturned are not mentioned.¹⁷⁶ Katie Coyle’s working paper focused on the reasons why initial negative decisions on refugee status (i.e. asylum) were overturned on appeal.¹⁷⁷ Coyle’s working paper selected and assessed 30 cases where a negative

¹⁶⁹ Mark Henderson, Rowena Moffatt and Alison Pickup, ‘Analysing the Refusal Letter: Best Practice Guide’ (*Electronic Immigration Network*, 1 December 2019) <<https://www.ein.org.uk/bpg/chapter/1>> accessed 11 February 2022.

¹⁷⁰ Bridget Anderson and Sue Conlan (n.166), 29

¹⁷¹ Lauren Cooper (n.152), 161-162.

¹⁷² Elizabeth O’Rourke (n.102); also see Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (UNHCR April 2011) PPLA/2011/01.REV.1.

¹⁷³ Muireann Ní Raghallaigh (n 145).

¹⁷⁴ Robert Thomas, ‘Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom’ (2008) 20 *International Journal of Refugee Law* 489.

¹⁷⁵ Kristina Murphy, Tom R. Tyler and Amy Curtis, ‘Nurturing Regulatory Compliance: Is Procedural Justice Effective when People Question the Legitimacy of the Law?’ (2009) 3(1) *Regulation and Governance* 2.

¹⁷⁶ International Protection Appeals Tribunal, *Annual Report 2020*, pp.49-53 <[http://www.protectionappeals.ie/website/rat/ratweb.nsf/page/MXKY-C3EEGK11374127-en/\\$File/International%20Protection%20Appeals%20Tribunal%20-%20Annual%20Report%202020.pdf](http://www.protectionappeals.ie/website/rat/ratweb.nsf/page/MXKY-C3EEGK11374127-en/$File/International%20Protection%20Appeals%20Tribunal%20-%20Annual%20Report%202020.pdf)> accessed 11 February 2022.

¹⁷⁷ Katie Coyle ‘Overturned on Appeal: Why Well-Founded Asylum Applications Fail in First Instance’, *CCJHR Working Paper No.11* (May 2020).

decision was overturned on appeal. One consistent pattern emerged with 25 of the 30 cases being rejected at first instance because the International Protection Officer cited concerns of credibility within the application hence, the applicant was not believed.¹⁷⁸ Overall, an unfavourable credibility judgment was identified as the primary cause for rejection at first instance in 83 per cent of the cases.

According to the most up-to-date data by the IPO, the rejection rate at first instance in 2020 was approximately 68.23 per cent, while figures from the tribunal show that the percentage of judgments set aside, for both refugee status and subsidiary protection, was 26.68 per cent.¹⁷⁹ From these figures, we can positively assume that each overturned case provided relevant additional information or evidence to strengthen their case. This would signify that the involvement of legal practitioners (which is lacking before the first instance decision) impacted the outcome of the case.

Early advice and assistance would assist applicants of international protection in putting forward the strongest possible case at first instance, thereby aiding the initial decision-maker in understanding the basis for the claim. The legal professional would aid in gathering reliable evidence to back up the applicant's claim whilst also eliminating unnecessary facts or clarifying statements that could cast doubt on the applicant's credibility.

5. Early Legal Advice and Assistance in the UK Asylum System

The approach of providing early legal advice and assistance for asylum seekers has been piloted in the UK. This section will focus on two of these pilot projects; the Solihull Pilot conducted in 2007-8 and the Early Legal Advice project, running 2010-12.¹⁸⁰ Both projects were created to test the concept that "frontloading" the asylum procedure results in stronger international protection applications and higher-quality first instance decisions. Frontloading enables international protection applicants to access legal advice and assistance from the outset of the process.¹⁸¹ It also allows the legal representative to interact with the decision-maker, therefore aiding in the decision-making process. This segment is intended to convey the extent to which early legal advice and assistance has been found to be beneficial in other jurisdictions; although it should be noted that, despite many similarities, the UK and Irish asylum systems differ in key respects. Therefore, a direct comparison of the UK and Ireland asylum systems is beyond the scope of this research.

a. The Solihull Pilot

In March 2006, the United Kingdom Border Agency (UKBA) and the Legal Services Commission (LSC) collaborated on a draft proposal document to improve the quality of asylum determinations called 'The Solihull Pilot Project'.¹⁸² The strategy enabled early access to competent legal representatives, supported by an interactive and flexible process before, during, and after the asylum interview, and increased decision-maker/legal representative interface, as well as NGO/UNHCR engagement in supervision and assessment. It

¹⁷⁸ Ibid, 14.

¹⁷⁹ European Council for Refugees and Exiles (ECRE), 'Republic of Ireland Statistics', Asylum Information Database <<https://asylumineurope.org/reports/country/republic-ireland/statistics>> accessed 11 February 2022; International Protection Office (IPO Statistics 2020) <<http://ipo.gov.ie/en/ipo/pages/statistics>> accessed 11 February 2022.

¹⁸⁰ Solihull Pilot 2007-2008; Early Legal Advice Pilot 2010-2012.

¹⁸¹ European Council on Refugees and Exiles (ECRE), *The way forward: Towards fair and efficient Asylum System in Europe* (Sep 2005) pg.5 <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-The-Way-Forward-Towards-Fair-and-Efficient-Asylum-Systems-in-Europe_September-2005.pdf> accessed 11 February 2022.

¹⁸² UK Border Agency and Legal Services Commission, 'Improving Asylum Decisions through Early and Interactive Advice and Representation' (2006).

aspired to transition to a so-called “new asylum model,” in which the function and relevance of legal representation for asylum seekers before, during, and after the substantive asylum interview, before the first instance decision, would be recognised.¹⁸³

This project was later evaluated by an independent evaluator, Jane Aspen, in October 2008, showcasing the advantages of frontloading in terms of efficiency and some indications of cost savings, as well as enhanced decision making and legal representative interactions.¹⁸⁴ Decision-makers indicated that having a statement of claim before the interview and all required evidence at first instance, aided the provision of a well-reasoned judgment on the claim.¹⁸⁵ More applications were granted status at the first decision as the project progressed.¹⁸⁶

Caseworkers and legal representatives both stated that they believed the applicant had a better grasp and acceptance of the grounds for a negative judgment.¹⁸⁷ Additionally, the applicants were more involved with their claims and had a better knowledge of the ongoings and procedures. There was, however, no structured integration in practice between the legal authorities and the UKBA. The system remained highly adversarial and the sample size of 450 made the findings limited.

b. Early Legal Advice Project

As a direct result of the favourable findings from Solihull, the Early Legal Advice Project (ELAP) was created to study the effects of giving asylum seekers access to free legal advice at the onset of the process.¹⁸⁸ The goals set in the project were to improve decision-making quality; decrease the number of appeals; generate savings across the government system; increase the effectiveness of the asylum system (by enhancing good relations and confidence in decision-making).¹⁸⁹ The project provided a referral to a legal representative on day 5 after an asylum claim was lodged.¹⁹⁰ It also included case management appointments, pre-interview discussion at least 36 hours before the interactive (substantive) interview, and subsequently a post-interview discussion within 24 hours.

The ELAP programme had no statistically significant effect on the rate of asylum approvals; however, there was a statistically significant increase of discretionary leave awards (equivalent to the Irish leave to remain status) and decreased rejection rate.¹⁹¹ Decision makers, applicants, and legal representatives stated that the procedure strengthens working relationships and enhanced trust in early choices as applicants felt more prepared for their substantive interview.¹⁹² The key success of the project according to legal practitioners

¹⁸³ Legal Services Commission, ‘Information for Applicants. New Asylum Model Early Legal Advice Pilot in Solihull’ (LSC 2006).

¹⁸⁴ Consonant (formerly Asylum Aid), ‘Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission’ (October 2008).

¹⁸⁵ *Ibid*, p11.

¹⁸⁶ *Ibid*, para XXXIV.

¹⁸⁷ *Ibid*, para XXXVIII.

¹⁸⁸ Home Office, UK Border Agency, ‘Asylum Improvement Project: Report on Progress’ (Home Office 2011).

¹⁸⁹ Minister of State for Immigration, Written Answers to Questions, Home Department (14 December 2010) <www.parliament.co.uk> accessed 12 January 2022.

¹⁹⁰ UK Visas and Immigration Asylum, ‘Early Legal Advice Project Guidance’ (1 November 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/726744/elap-midland-and-east.pdf> accessed 11 February 2022.

¹⁹¹ Mike Lane *et al* (n.153), 19-20.

¹⁹² *Ibid*, 6.

and applicants was the mandatory submission of witness statements, allowing applicants to introduce more evidence while also aiding decision-makers to make a well-reasoned decision.¹⁹³

A downfall highlighted in the evaluation was the time increase in reaching an asylum decision, which occurred due to “evidence not being presented at the earliest opportunity, late witness statements, cancelled substantive interviews and time taken to engage applicants in the process”.¹⁹⁴ Another drawback in the project came in the form of costs, the evaluation pointed to an increase of 5-13% of government spending even when the lower number of appeals are considered.¹⁹⁵

Although both the UK and Ireland are common law jurisdictions and their asylum procedures differ, the UK has successfully piloted the potential for early legal advice. The Solihull Pilot and the Early Legal Advice Project both demonstrated that ‘frontloading’ the asylum process (by providing international protection applicants access to legal representatives at the process onset), leads to high quality, initial decision making, improved decision maker/ legal representative/ applicants relationships, and improved overall system efficiency.¹⁹⁶ It also highlighted that the provision of early legal advice and assistance may increase the time taken to reach an asylum decision and that more work is needed for the provision to be cost saving. The projects enable other jurisdictions, such as Ireland, to see the potential benefits of introducing early legal advice and assistance within their national international protection system, whilst the shortcomings noted allows jurisdictions to learn, adapt and improve the structure of their schemes. The final section of this Part will review the importance of legal advice and assistance in overturning decisions on appeal.

This Part concentrated on the importance of legal advice and assistance for asylum seekers in the international protection system and why the current provision of legal advice and assistance for asylum seekers in Ireland is inadequate. Asylum seekers through first-hand interviews expressed how the caseworker assigned to their case did not benefit them but on appeal having a legal professional made a substantial difference. The criminal law sphere drew compelling similarities to the asylum system. Self-representation is harmful for any litigant or applicant, legal advice and assistance provides safeguards to the accused and applicants and the current Irish asylum system breaches the right to a fair trial. Early legal advice and assistance will improve the efficiency of the entire international protection system, straighten the relationship between applicant and legal professional, develop higher quality first instance decisions thus decreasing the number of appeals and encourage cooperation and communication between stakeholders. Additionally, the suggested impact from the involvement of legal practitioners at the appeal stage, signifies the importance of engaging legal professionals from the onset of the application. Finally, the analysis on the UK pilot projects demonstrated the success of ‘frontloading’ the asylum process and the further need for the provision of early legal advice and assistance. Following the exploration of the importance, benefits and impact of legal advice and assistance in all legal matters especially refugee law, this Working Paper will now discuss the several barriers to providing early legal advice and assistance in Ireland.

¹⁹³ Ibid,43.

¹⁹⁴ Ibid,35-38.

¹⁹⁵ Ibid, 38.

¹⁹⁶ Ibid; Consonant (formerly Asylum Aid), ‘Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission’ (October 2008).

D. BARRIERS TO PROVIDING LEGAL ADVICE AND ASSISTANCE

The goal of providing quality, early legal advice, and assistance to every international protection applicant in Ireland, will come against some predetermined challenges and obstacles. This Part will be divided into four sections which will discuss the barriers faced by the legal aid services, the legal representatives and asylum seekers, legal representatives, and Ireland's international protection system. Firstly, the barriers faced by the legal aid service to provide legal advice and assistance will consider the resource implications of providing a high-quality service and the lack of government funding to accumulate the necessary resources. The second section will examine the barriers asylum seekers face to receive legal advice and assistance, challenges in accessing representatives due to the lack of available facilities and deciphering between good quality and poor legal advice and assistance. The third section will review legal representative barriers to providing quality legal advice and assistance. This would encompass the subject of education, experience and training for legal representatives and the low remuneration offered for their services. The fourth section will deliberate the barriers within the state's international protection system including the legal barriers of the state and the lack of transparency in the international protection decision making process.

1. Barriers within the Legal Aid Service

a. Resource implications

Resource implications are a barrier to providing good quality legal advice and assistance for all international protection applicants. LAB does not presently have a dedicated unit dealing with International Protection; the majority of the advice or assistance provided to international protection applicants is provided by the LAB's International Protection and Human Trafficking Unit, based at its Law Centre in Dublin (Smithfield).¹⁹⁷ However, there are just a few full-time solicitors and legal clerks in the unit, and they also deal with other matters besides international protection applications. As per figures given by the Catherine Day report, in 2019 there were 5.75 full time solicitors and 4.8 full time paralegals in the Dublin unit, 1 solicitor and 2 paralegals in Galway and 2 solicitors and 1 paralegal in the Cork unit.¹⁹⁸ The advisory group for the Catherine Day report recommended that the LAB should be "provided with sufficient staff and resources to handle all requests for legal aid in-house".¹⁹⁹

As discussed in the previous Part, better quality first instance decisions will lead to lower resource use at second instance or tribunal level, consequently this would contribute to financial savings.²⁰⁰ The resource implications do not necessarily mean that the international protection system (predominantly LAB) needs a substantial increase in resources, it indicates that the system should relocate or front load their existing resources to the first instance decision level. These required resources (such as staff funding) cannot simply be quantified, as the needs of the system changes frequently based on the influx of applications thus, it is important to periodically review demand and ensure allocated resources suffice.²⁰¹

¹⁹⁷ Legal Aid Board, 'Legal Services in Asylum and Related Matters – Note for Information of Applicants' <<https://www.legalaidboard.ie/en/our-services/legal-aid-services/services-for-international-protection-applicants/services/general-information/legal-services.html>> accessed 11 February 2022.

¹⁹⁸ Catherine Day Report (n.7), p.47 Table 3.3.4.

¹⁹⁹ Ibid, p.46.

²⁰⁰ Also see Caroline O'Connor, 'Direct Discrimination? An Analysis of the Scheme of Direct Provision in Ireland' (2003) Dublin: Free Legal Aid Centre, para 3.249.

²⁰¹ Siobhán Mullally, *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations* (2001) Irish Refugee Council 10.

b. Government funding

The lack of government funding in the international protection system has also affected the beneficial methods that were once used by the agency to be more accessible to both applicants and the wider public. As per figures by the Irish Government Economic and Evaluation Service (IGEES) Unit in the Department of Justice and Equality in 2019,²⁰² €3.4 million (including staff salary costs) was required by the LAB in Ireland, which resulted in 2% of the overall aggregate expenditure of Direct Provision for 2019.²⁰³ Given the importance of the legal decision-making process especially for those in Direct Provision, one would surmise that a higher percentage of total expenditure would target funding and resourcing the legal service assisting applicants. However, this does not seem to be the case in Ireland.

Ireland has operated a confidential and independent RLS, which was established by the LAB to support asylum seekers in the international protection system.²⁰⁴ The RLS held a clear position and was very well established, today however, due to lacking funding and resources, the RLS has lost its individual presence. It no longer has its own website; it is stationed amongst the sea of information and sections of the LAB website making it difficult to access.²⁰⁵ The majority of asylum seekers whose first language is not English, or those who struggle with technology, may find it challenging to obtain the relevant information from the LAB website, thus hindering accessibility to legal advice and assistance. Similarly, the Refugee Documentation Centre (which stands as an independent library and research service under the LAB) was a resourceful information tool for government organisations and private legal practitioners. However, access is restricted to practitioners who are involved with the service of the asylum seeker panel within the LAB.²⁰⁶ The public website where members of the wider public could conduct independent research, has subsequently been taken down, meaning the research and queries service is no longer available to members of the public. All public access research must be conducted in person at the library and materials can no longer be borrowed or loaned from the library.²⁰⁷ These structures that existed were well thought out and were of great benefit when finding reliable information for or about the international protection process or system. Yet, due to the lack of resources, financial or otherwise, these structures have been omitted or cut.

2. Barriers Experienced by Asylum Seekers

a. Poor quality legal advice and assistance

Currently, legal assistance for asylum seekers in Ireland is concentrated on providing legal advice, rather than guaranteeing legal representation at the initial interview, therefore proving insufficient.²⁰⁸ Research by Amnesty International UK, largely based on interviews with rejected asylum seekers, found that most asylum seekers “complained about the poor quality of legal advice and representation at all stages of the asylum

²⁰² Irish Government Economic and Evaluation Service (IGEES) Unit, Department of Justice and Equality, based on data received from relevant stakeholder, May-August 2020 <<https://igees.gov.ie/wp-content/uploads/2020/12/IGEES-Work-Programme-2020.docx>> accessed 11 February 2022.

²⁰³ Catherine Day Report (n.7), p.90, Table 7.1.1.

²⁰⁴ Legal Aid Board, ‘Press Release – LAB 30th Anniversary Conference’ (15 September 2010) pg.4 <<https://www.legalaidboard.ie/en/about-the-board/press-publications/conferences/press-release-legal-aid-board-30th-anniversary-conference.pdf>> accessed 11 February 2022.

²⁰⁵ Legal Aid Board (n 207).

²⁰⁶ Legal Aid Board, ‘Refugee Documentation Centre – Service’ (LAB) <<https://www.legalaidboard.ie/en/lawyers-and-experts/research-information/refugee-documentation-centre-services>> accessed 11 February 2022.

²⁰⁷ Ibid.

²⁰⁸ ECRE/ELENA (n.5).

process”.²⁰⁹ Similarly, in a survey of female detainees at Yarl’s Wood Removal Centre conducted by Legal Action for Women and others UK, half of asylum seekers interviewed stated “bad legal representation had either undermined their cases and directly contributed to their asylum claim having been refused, or was leaving them vulnerable to deportation now”.²¹⁰ This poor quality and paucity of legal representation can adversely affect procedural fairness and access to justice for asylum seekers.²¹¹ Unfortunately very little is stated about this poor-quality representation beyond an acknowledgement of its existence.

When cases of inadequate or insufficient representation occur, there is limited redress available.²¹² It will be difficult to persuade future adjudicators that mistakes made by representatives are a legitimate explanation for noncompliance with procedures.²¹³ According to research by Campbell, much of the insufficient representation originates from communication mistakes, such as neglecting to provide clients with written counsel or preparing a written statement with the client.²¹⁴ Failures to gather proof, explicit scepticism in their clients’ stories, and a lack of contact between legal representatives and asylum seekers are also indicators of poor representation.

An examination by Migration Work UK uncovered major issues with substandard representation, including a lack of legal and case expertise, insufficient interview experience, and a failure to get further evidence.²¹⁵ Ineffective agents like this risk sending their client back to their place of origin, where potentially they will face persecution, torture, or death.²¹⁶

b. Access barriers

Asylum seekers face barriers trying to access legal representatives for numerous reasons. Due to the difficulties in obtaining legal advice and assistance from experienced practitioners, those seeking refuge in Ireland face significant challenges in obtaining a favourable result.²¹⁷ Without the opportunity to access legal advice and assistance, asylum seekers cannot be guaranteed the right to a fair hearing.

International protection applicants in Ireland have the right to register with the RLS, (which is a branch of LAB services) and are allegedly entitled to a solicitor and caseworker.²¹⁸ LAB typically refers cases to different solicitors on their panel due to the shortage of legal professionals within the agency.²¹⁹ The solicitors or firms

²⁰⁹ Amnesty International UK, ‘Get It Right: How Home Office Decision-Making Fails Refugees’ <https://www.amnesty.org.uk/files/get_it_right_0.pdf?3tisZ_5_ZLA4Bc_4TsTKb8B_yQyDwQZA=> accessed 11 February 2022.

²¹⁰ Legal Action for Women, *For Asylum Seekers and their Supporters – A Self-Help Guide Against Detention and Deportation* (Crossroads Books, 2005).

²¹¹ Nick Gill et al (n.100).

²¹² Shannon Careen, ‘Regulating Immigration Legal Service Providers: Inadequate Legal Service Providers: Inadequate Representation and Notario Fraud’ (2009) 78 *Fordham Law Review* 577.

²¹³ Helen MacIntyre, ‘Imposed Dependency: Client Perspectives of Legal Representation in Asylum Claims’ (2009) 23(2) *Journal of Immigration, Asylum and Nationality Law* 181; JUSTICE, ‘Immigration and Asylum Appeals – a Fresh Look’ (2018) <<https://justice.org.uk/our-work/administrative-justice-system/immigration-asylum-determination-reform/>> accessed 11 February 2022.

²¹⁴ John R Campbell (n.160).

²¹⁵ Migration Work, ‘Quality of Legal Services for Asylum Seekers’ (*Solicitors Regulation Authority*, 2016) <www.sra.org.uk/sra/how-we-work/reports/asylum-report/> accessed 11 February 2022.

²¹⁶ Helen MacIntyre (n.213).

²¹⁷ MASI (n.86).

²¹⁸ Department of Justice, ‘Support & services for asylum seekers’ (DOJ 6 June 2019) <<http://www.inis.gov.ie/en/INIS/Pages/asylum-support>> accessed 11 February 2022.

²¹⁹ Catherine Day Report (n.7), p.46.

on the LAB panel specialise in other aspects of the law such as criminal or family law, this slightly disadvantages the applicant from the start.²²⁰ Nevertheless, it would be irrational to expect only legal professionals who specialise in immigration law to assist international protection applicants. However, applicants who have more complex immigration cases or those that need specialised assistance, should be referred to Immigration specialists. The majority of applicants do not receive substantive legal advice before completing their questionnaire, or prior to their substantive interview with the IPO, not because individuals do not want legal advice or assistance, rather, the service is not offered.²²¹ Applicants have stated that they believe they were only given adequate legal advice and representation at the appeal stage of their application rather than before the first instance decision.²²² The Movement of Asylum Seekers in Ireland (MASI) consider “the refusal of the State to invest in proper legal support for people seeking international protection in Ireland, to be understood as a policy decision to keep the numbers of positive decisions and people claiming asylum in the state as low as possible”.²²³ Therefore, radical change is doubtful unless political pressure mounts, such as in the recent ongoing public campaigns surrounding ‘End Direct Provision’ in Ireland.²²⁴

Many asylum seekers may not be able to assimilate the information given to them about how to access legal advice and assistance due to language barriers.²²⁵ LAB information on the provision of legal advice and assistance is simply provided in a leaflet written in English,²²⁶ with a brief synopsis of the asylum process in Ireland is only available in 7 other languages (Arabic, Kurdish, Romanian, Albanian, French, Russian and Somali) on their website, the result, asylum seekers most in need of advice and assistance may not initially seek it, as they are unaware of how to attain it or may find the process overwhelming.²²⁷

Asylum seekers are assigned counsel providers as part of the legal procedure, restricting their capacity to select.²²⁸ Asylum seekers are struggling to comprehend the differences between adviser types, the services they provide, and the protection provided by their regulatory body within this complicated system.²²⁹ Applicants may also choose to consult community groups, friends, fellow asylum seekers, or find companies through word of mouth or referrals. These referrals could impact the access to quality legal advice as asylum seekers could be given poor or unregulated advice.²³⁰ Nevertheless, legal assistance may be offered by organisations which may not have a qualified solicitor or barrister, but via advocates and caseworkers or

²²⁰ Legal Aid Board, ‘Terms and Conditions – Panel of Solicitors’ (LAB) <<https://www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-civil-cases/international-protection/terms-and-conditions/panel-of-solicitors.html>> accessed 11 February 2022.

²²¹ MASI (n.86).

²²² John R Campbell (n.160).

²²³ MASI (n.86), p.8.

²²⁴ Amnesty International, ‘Set the date #EndDirectProvision’ <<https://www.amnesty.ie/end-direct-provision/>> accessed 12 January 2022; Abolish Direct Provision, ‘Abolish Direct Provision Campaign’ <<https://www.directprovision.org/>> accessed 11 February 2022.

²²⁵ Gillian McFadyen, ‘Memory, language and silence: Barriers to refuge within the British asylum system’ (2019) 17(2) *Journal of Immigrant & Refugee Studies* 168-184.

²²⁶ Legal Aid Board (n 205).

²²⁷ Legal Aid Board, ‘Common Legal Problems – Applying for international protection (asylum) in Ireland’ <<https://www.legalaidboard.ie/en/our-services/legal-aid-services/common-legal-problems/applying-for-international-protection-asylum-in-ireland.html>> accessed 11 February 2022.

²²⁸ Felinda Mottino, *Moving Forward: The Role of Legal Counsel in Immigration Court* (Vera Institute of Justice, July 2000) pp.27-32.

²²⁹ Immigration Client Experience Research, April 2013, *IFF Research in Migration Work* (n.214).

²³⁰ *Ibid.*

paralegals.²³¹ However, the Department of Justice, IPO and LAB should be responsible for providing improved information surrounding reputable agencies for professionals.

Research has suggested that asylum seekers struggle to find legal representation independently and if/when they do the process often takes months and may still be unsuccessful.²³² Even after an asylum seeker may have found a suitable legal professional or agency, they may experience challenges in accessing them. This may occur due to the agency's location and the availability and cost of public transport, or alternatively the lack of facilities to participate in remote consultations with legal advisors.²³³ A key example can be illustrated by asylum seekers who currently reside in Direct provision centres located nationwide, who must navigate their way to the LAB based in Dublin.

3. Barriers Experienced by Legal Representatives

a. Education, experience and training for legal representatives

Asylum cases often require significant factual investigation of events and involve the interpretation of immigration law, whilst also having to deal with client's trauma, thus it is important for those who are acting as representatives to be adequately qualified.²³⁴ Providing Asylum legal advice "is not one specialist area of work, it can encompass trafficking, gender persecution, child protection and detention", in which the law is complex and ever changing, legal professionals have to display comprehensive and appropriate knowledge across multiple disciplines.²³⁵

According to UNHCR, legal representatives must have the appropriate knowledge and/or experience to execute the position, yet a formal legal degree or current professional legal accreditation is not mandatory.²³⁶ The representative must either be a member of an established and recognised organisation that provides free/low-cost legal representation to asylum seekers and refugees or must have been authorised by UNHCR to act as a legal representative.²³⁷ Additionally, the representative needs to possess "i) a working understanding of international refugee law; ii) a working understanding of UNHCR procedures; iii) experience in assisting refugee status claimants; iv) a thorough understanding of the Applicants claims; and v) be bound by a code of ethics or professional responsibility".²³⁸ As a minimum, clients of legal services would expect their legal representatives to have a thorough grasp of the applicable law.

International protection applicants, through the LAB, are assigned a caseworker (or in extremely limited circumstances a legal professional) to guide them through the application process. These case workers are not required to have a legal background or qualification.²³⁹ However, both knowledge and experience in the

²³¹ UN High Commissioner for Refugees (UNHCR), 'UNHCR RSD Procedural Standards – Legal Representation in UNHCR RSD Procedures' (2016) <<https://www.refworld.org/docid/56baf2c84.html>> accessed 11 February 2022.

²³² Felinda Mottino (n.228).

²³³ Elaine Loughlin, 'Direct Provision has morphed into a permanent unpalatable problem' *Irish Examiner* (Dublin 23 February 2021) <<https://www.irishexaminer.com/opinion/commentanalysis/arid-40231304.html>> accessed 11 February 2022.

²³⁴ Jacob Beswick, 'Not so straightforward: the need for qualified legal support in refugee family reunion' (2015) British Red Cross.

²³⁵ Migration Work (n 214) p.48.

²³⁶ UNHCR (n 230), para 2.7.3.

²³⁷ UNHCR (n 230), p.3.

²³⁸ *Ibid.*

²³⁹ See Caseworker Job advertisement on recruitment page of LAB, Legal Aid Board, 'Current Vacancies' <<https://www.legalaidboard.ie/en/about-the-board/recruitment/>> accessed 11 February 2022.

field of immigration law should be a requirement for individuals who are assisting international protection applicants in any capacity.²⁴⁰ This requirement would encourage non-legal professionals to complete specialised education on immigration/ asylum law and undertake work experience in the field, which in turn would improve the quality of the assistance provided by staff to international protection applicants.²⁴¹

The role of providing legal assistance cannot be limited to being supplied by qualified lawyers or barristers, as the demand for such support is too vast to be accommodated. There will always be a need for individuals to play certain administrative roles which will provide the qualified solicitors or barristers with additional support.²⁴² Further, it is important to be able to determine the point at which the legal professional gets involved with the case before the first instance decision. A potential methodology would be for the legal professional to supervise the team of paralegals or caseworkers throughout the application process, then applying more direct management on approach to the substantive interview. This way there are additional safeguards for both applicants and paralegal/caseworker, as the legal practitioner can offer further guidance or advice when required.

The continuous development and learning in immigration / asylum law, both within the Irish system and internationally is crucial to the functioning of the International Protection system.²⁴³ Personnel who render assistance whether through case worker, paralegals or legal professional role, should be trained on laws surrounding the international protection procedure and how to complete good quality and well detailed international protection applications.²⁴⁴ Furthermore, quarterly sessions targeting topical legal issues, recent case law and new country of origins information, would assist greatly in maintaining staff knowledge about both Irish and international asylum systems.

b. Low remuneration for legal representation

One of the barriers in providing quality early legal advice and assistance, is the absence of adequate pay for legal practitioners who take on legal aid asylum cases.²⁴⁵ Practitioners under the Private Practitioner Panel, provide legal advice for a predetermined price offered by the LAB.²⁴⁶ Legal practitioners have highlighted the significant difference in the state's legal aid payment rates for asylum cases and other legal circumstances.²⁴⁷ The lower remuneration for asylum cases acts as a deterrent, consequently reducing role desirability for qualified legal practitioners. The working group on the improvements to the protection process in 2019,

²⁴⁰ UNHCR, 'Quality Initiative Project First Report to the Minister- Review of the UK Home Office Refugee Status Determination Procedure' (2007) p.9 <<https://www.unhcr.org/5760178d7.pdf>> accessed 11 February 2022.

²⁴¹ Ibid.

²⁴² Catherine Day Report (n.7), p.46.

²⁴³ National Audit Office (UK), Report Improving the Speed and Quality of Asylum Decisions - Report by the Comptroller and Auditor General HC 535 Session 2003-2004 (23 June 2004) p.2.

²⁴⁴ Staff are supposed to be trained by UNHCR on ongoing basis; Department of Justice and Equality, 'Statement by the Minister regarding the Real Facts about the Asylum and Deportation Systems' (7 June 2005) <www.inis.gov.ie/en/inis/pages/pr07000171> accessed 11 February 2022.

²⁴⁵ European Council on Refugees and Exiles, 'Survey on Legal Aid for Asylum Seekers in Europe' October 2010 p.25 <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Survey-on-Legal-Aid-for-Asylum-Seekers-in-Europe_October-2010.pdf> accessed 11 February 2022; See Senator Lorraine Clifford, 'Seanad Eireann Debate – Civil Legal Aid Bill 2021 276 (31 May 2021) 8' <<https://www.oireachtas.ie/en/debates/debate/seanad/2021-05-31/21/>> accessed 11 February 2022.

²⁴⁶ Legal Aid Board (n.219), schedule 2.

²⁴⁷ Colm Keena, 'New asylum rules make practice less attractive – solicitor' *Irish Times* (30 January 2019) <<https://www.irishtimes.com/news/crime-and-law/new-asylum-rules-make-practice-less-attractive-solicitor-1.3775196>> accessed 11 February 2022.

commented how “applicants have very little access to reliable information, as access to legal advice though the Civil Legal Aid system is heavily circumscribed because of funding restraints”.²⁴⁸ This further asserts the position proposed by MASI signalling that the state's unwillingness to invest in legal aid for those seeking international protection is a deliberate action to keep positive decisions at a low level.²⁴⁹

The figures presented below regarding the fees for services for applications of international protection made after 31st of December 2016, were taken from the terms and conditions section on the LAB's publicly available website.²⁵⁰

Solicitors are paid €300 per applicant and a further €150 for the applicant's spouse, for assisting an applicant in submitting an application for international protection, including advice on reception conditions and labour market access. This fee does not include assistance in completing the questionnaire, only advice. The fee for a spouse is the charge due when one applicant is the spouse or partner of another applicant and both clients are served by the same legal professional or agency. In such an instance, the first applicant will be charged the full fee. An additional €300 per applicant or €150 spouse, includes the legal advice and acquiring of country-of-origin information in preparation for the personal interview with an international protection officer. While on appeal to the tribunal, a solicitor is paid €400 per applicant or €200 spouse, which must be divided between the solicitor and the barrister who attended the hearing. This cost covers the preparation of an appeal notice, legal submissions, and representation before the Tribunal.

In the UK, the legal service commission introduced a set fee for legal providers who render advice and representation for international protection applicants.²⁵¹ There were both advantages and disadvantages to this scheme. The advantage being the scheme moved away from the hourly pay and it only paid remunerations after the completion of the case, therefore forcing legal practitioners to give effective representation.²⁵² The disadvantages can be seen by a pitfall of the scheme, which unconsciously rewards firms who may cherry-pick and take on straightforward and ‘quick’ cases, thus discouraging the uptake of more time-consuming, complex cases.²⁵³ Additionally, the scheme has contributed to the ‘legal desert’, where regional legal practitioners have not taken any immigration and asylum cases although they are in high demand, as they seek ‘easier closed’ cases.²⁵⁴

²⁴⁸ Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers Final Report (June 2015), [Hereinafter McMahon Report] <<http://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>> accessed 11 February 2022.

²⁴⁹ MASI (n.86).

²⁵⁰ Legal Aid Board (n 219), schedule 2.

²⁵¹ See most recently Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020; also see The Graduated Fixed Fee Scheme in Legal Services Commission (2006a) response to a Freedom of Information Request made by ILPA. Reported in Immigration Law Practitioners Association (2006) ‘Response of the Immigration Law Practitioners’ Association to the LSC / DCA consultation paper ‘Legal Aid: a sustainable future’ (2006) ILPA, London.

²⁵² Adeline Trude and Julie Gibbs ‘Review of quality issues in legal advice: measuring and costing quality in asylum work Executive Summary’ (March 2010) Information Centre about Asylum and Refugees (UK) pp.3-5.

²⁵³ Frances Webber and Gareth Perice, *Borderline Justice: The Fight for Refugee and Migrant Rights* (London: Pluto 2012) p.68.

²⁵⁴ Jo Wilding, (2019) ‘Droughts and Deserts: A Report on the Immigration Legal Aid Market’ (2019) <<https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>> accessed 11 February 2022.

4. Barriers within the State's International Protection System

a. Legal barriers

The recast directive provides international protection applicants with safeguards to access both legal advice and assistance during the process.²⁵⁵ The directive is one of five legal instruments underpinning the Common European Asylum System (CEAS), whose goals are to harmonise protection standards by aligning Member States laws; encourage collaboration among Member States; and strengthen solidarity among Member States and between the EU and non-EU nations.²⁵⁶ The directive gives the right for international protection applicants to “consult a legal professional; to be informed of his/her legal position at the decisive moment during the procedure; to be consulted in a language which he/she understands or its reasonable supposed to understand and, in the case of a negative decision, the right to an effective remedy before a court or tribunal”.²⁵⁷

Ireland has chosen to not opt into the recast asylum procedures directive in accordance with Protocol No.21 of the Treaty of the Functioning of the European Union as it impeded the “area of Freedom, Security and Justice”.²⁵⁸ Accordingly, Ireland is only bound to the original council directive, thus creating a barrier to receiving legal advice and assistance for all international protection applicants, as it limits their right in acquiring support.²⁵⁹ Despite Ireland not opting into the directive, the interpretation of article 38 of the Irish constitution strengthened the rights to legal advice and assistance.²⁶⁰ Article 40 of the Irish constitution provides personal rights to all citizens and guarantees that the state will “defend and vindicate the personal rights of citizens”.²⁶¹ This provision should therefore also apply to asylum seekers seeking legal advice and assistance, as per the principle of equal treatment.²⁶²

b. Lack of transparency in decision making

There is a lack of transparency regarding the decision-making process in the international protection system.²⁶³ After the first instance decision, applicants who receive a negative decision can appeal to the Refugee Appeals Tribunal, where their case will be heard from the beginning, ‘de novo’, and the applicant receives legal representation. However, this first instance decision is clouded in mystery. Unlike the Refugee Appeals Tribunal members, the list of decision makers (mainly international protection officers), at first instance, are not publicly available, therefore there is anonymity with their decisions. Additionally, despite UNHCR Handbook standards,²⁶⁴ and the EU Directive on Minimum Guarantees for Asylum Procedures,²⁶⁵ there were no particular qualification criteria, thus International Protection officers were employed based

²⁵⁵ Recast Directive (n.66).

²⁵⁶ European Commission, ‘Common European Asylum System’ (Migration and Home Affairs) <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en> accessed 11 February 2022.

²⁵⁷ Recast Directive (n.66), para 25; art. 19-23.

²⁵⁸ Recast Directive (ibid), para 58.

²⁵⁹ Asylum Procedures Directive (n 14).

²⁶⁰ See *State (Healy) v Donoghue* (1976) IR 325 p.354.

²⁶¹ Irish Constitution, Art. 40.3.1.

²⁶² Irish Constitution, Art.40.1.

²⁶³ Sarah Donnelly, Anna Ledwith, Amanda Morrison, Emma-Louise Steiner, Semiha Elif Yararbaş and LLM Candidates, ‘Introducing Timelines into the Irish International Protection System: A Path Towards Accountability and Transparency’ (2021) p.40.

²⁶⁴ UNHCR Handbook (n.87).

²⁶⁵ Recast Directive (n.66).

on their Leaving Certificate results as a minimum.²⁶⁶ Essentially, the power and responsibility given to the decision makers even at first instance is of immense significance for the asylum seeker, therefore equitable importance should be given to having good quality decision makers as to the provision of good quality legal advice and assistance.

- *Case Study: James Nicholson*

This case study of James Nicholson focuses on the importance of good quality decision-makers, which is crucial for the decision-making process regardless of whether international protection applicants obtain early legal advice or assistance. James Nicholson is a barrister who was a senior member of the Refugee Appeals Tribunal from 2001 to November 2007. He was accused of allegedly rejecting 95% of asylum applications during the period from 1st January 2002 to 30th June 2004, although he heard hundreds of appeals at that time.²⁶⁷ He resigned by letter from the Refugee Appeals Tribunal on the 17th of November 2007 following the negative allegations against him. The investigation proceeded despite this.

Mr Nicholson was the focus of a 15-month court battle in which three asylum applicants claimed he was 'biased' against those appealing their negative international protection decision.²⁶⁸ The tribunal only denied the bias allegations, but nothing was said concerning the alleged rejection figures.²⁶⁹ The case was settled outside court before the relevant official statistical records were uncovered and the asylum seekers' appeals were reassigned to another tribunal member.²⁷⁰ Therefore, the data could not be reviewed in detail and a judgment was not passed on the allegation of ingrained bias. The Supreme Court from their judgment granted permission to the High Court to review data and statistics on the outcomes of cases handled by various members of the Refugee Appeals Tribunal.²⁷¹ The judgment by Denham J stated that the statistical evidence on the outcome or results of decisions by the Refugee Appeal Tribunal is admissible in evidence, as the statistics are "contested fact which is relevant to the issue of law".²⁷²

This case study demonstrates the lack of transparency in the international protection decision making process at first instance, and how this acts as a barrier within the system.²⁷³ This case study raises some interesting questions in relation to the decision makers and the power they wield within the international protection system. It is important to note that the pattern of negative decisions by James Nicholson was only established due to the non-anonymity of tribunal members. The case also concurs with the Department of

²⁶⁶ 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, 28.

²⁶⁷ *Richard Nyembo v The Refugee Appeals Tribunal and James Nicholson* [2007] IESC 25 para 1.

²⁶⁸ *Richard Nyembo v The Refugee Appeals Tribunal and James Nicholson* [2004] 846 JR.

²⁶⁹ 'Members of Refugee Appeal Body Considered taking legal action' *The Irish Times* (Dublin, 4 March 2008) <<https://www.irishtimes.com/news/members-of-refugee-appeal-body-considered-taking-legal-action-1.899515>> accessed 11 February 2022.

²⁷⁰ 'Lawyer accused of bias against refugees quits appeal tribunal' *Independent* (Dublin, 4 March 2008) <<https://www.independent.ie/sport/golf/lawyer-accused-of-bias-against-refugees-quits-appeal-tribunal-26427734.html>> accessed 11 February 2022.

²⁷¹ *Nyembo* (n.267) para 10.

²⁷² *Ibid.*

²⁷³ There is more research needed to examine the lack of transparency in the international protection decision making process at first instance.

Justice trend of settling matters on the steps of the court, rather than receiving a negative decision against them.²⁷⁴

Following the examination of the barriers to providing quality, early legal advice and assistance experienced within legal aid, the international protection system and amongst asylum seekers and legal representatives to providing legal advice and assistance, this Working Paper will now conclude by summarising the key points and findings of this research. Legal representatives' education, experience and training can act as a barrier to providing good quality legal advice and assistance to asylum seekers, as they are expected to be adequately qualified, with an appropriate knowledge of the ever changing, multi-disciplinary legal section that is refugee or immigration law. Asylum seekers face barriers in receiving poor quality legal advice and assistance, due to the lack of clarity around reputable organisations or agencies that provide good quality legal advice and assistance in the State. The international protection system in Ireland faces legal barriers to providing legal advice and assistance as they did not opt into the recast directive which provides additional safeguards for applicants based primarily on sovereignty. The case study of James Nicholson further discusses how it is equally crucial to have good quality decision makers making influential decisions as it is to receive good quality legal advice and assistance. However, national constitutional law provides provisions which strengthen an individual's right to legal advice and assistance in all legal matters. Access to legal advice and assistance is an additional barrier that also affects asylum seekers due to language barriers, transport, and accessibility resources such as broadband.

E. CONCLUSIONS

The purpose of this Working Paper is to examine the importance of early legal advice and assistance for international protection applicants in Ireland, and to critique the current provision in Ireland which does not meet the international standards.

Part B discussed the development of the international protection determination procedure in Ireland from the adaptation of the Refugee Convention to the IPA, and the importance of the six stages of the process within the system. This section also highlighted the existing EU and international legal provisions which provide the entitlement of legal advice and assistance for international protection applicants. These provisions demonstrated its universal relevance within the asylum system. This Part also notes how government efforts to provide legal aid have proved to be beneficial, however, the growing demand within the system for legal aid is not matched by the allocation of additional resources.

Part C concentrated on the importance and several benefits of providing legal advice and assistance for asylum seekers in the international protection system. In addition, Part C also highlights why the current provision of legal advice and assistance for asylum seekers in Ireland is inadequate. Asylum seekers through first-hand interviews expressed how the caseworker assigned to their case did not benefit them, but on appeal having a legal professional made a substantial difference. Additionally, the suggested impact from the involvement of legal practitioners at the appeal stage, signifies the importance of engaging legal professionals from the onset of the application. Lastly, the analysis of the UK pilot projects demonstrated the success of 'frontloading' the asylum process, and the further need for the provision of early legal advice and assistance.

²⁷⁴ In 2019, 368 judicial review applications were submitted to the High Court on immigration, asylum, and citizenship with 135 cases settled out of court by the department, See Anna Sheridan, 'Annual Report on Migration and Asylum 2019: Ireland' pp.15-16 <<https://www.esri.ie/system/files/publications/SUSTAT102.pdf>> accessed 11 February 2022; Courts Service of Ireland (July 2020) Courts Service, *Annual Report 2019*, p.108.

Part D focused on the barriers to providing legal advice and assistance. The legal aid services will need to reallocate or ‘front load’ the asylum procedure, prior to first instance decision, to aid international protection applicants. The barriers discussed are accompanied by suggestions to overcome these shortcomings, yet the lack of resources in the current system seems to be the overarching drawback. Additionally, the international protection system in Ireland faces legal barriers to providing legal advice and assistance, as they did not opt into the recast directive (primarily due to sovereignty), which provides additional safeguards for applicants. However, national constitutional law provides provisions which strengthen an individual’s right to legal advice and assistance in all legal matters, thus these provisions should apply to asylum seekers too. Additionally, the case study of James Nicholson demonstrates how it is equally crucial to have good quality decision makers making influential decisions, as it is to receive good quality legal advice and assistance.

1. Need for Improved Resources

Ireland is a progressive state with respect to the provision of services for asylum seekers. The fact that there are services such as the LAB, the RLS, and the Refugee Documentation Centre, shows there are good structures in place in the State. However, as previously discussed, these structures do not have the resources to perform the role that is required of them thus, the call for additional resources must be addressed first.

Radical change is needed to the current Irish International Protection system of providing legal advice and assistance to asylum seekers. The current method currently in progress in Ireland does not afford asylum seekers a high standard of support as per the international framework.²⁷⁵ Whilst case workers and paralegals hold essential support staff roles, assisting the applicant in application completion and prepping the applicant for their substantive interview, it is essential that the legal practitioner oversees each application and authorises the preparation techniques.²⁷⁶ The findings of this Working Paper demonstrate the strong need for legal representation at the substantive interview for all asylum seekers, as legal practitioners have the advanced legal training to attend interviews, identify ill-treatment and miscarriages of justice due to their experience and knowledge.

Numerous recommendations have been put forward to improve the legal services for international protection applicants in Ireland, however in practice these propositions are neither applied nor implemented, thus no real advancement has occurred within the system.²⁷⁷ These recommendations include, firstly, an increase of resources (mainly funding) to the LAB, in order to increase staffing to provide early legal advice to all applicants.²⁷⁸ Secondly, a development of quality audit reviews of legal services was recommended, to ensure that the legal advice and assistance given (even at the early stage) is up to standard, limiting any provider from delivering poor representations due to remunerations.²⁷⁹ Thirdly, it was recommended that international protection applicants should be informed of their right to seek legal advice and assistance at the earliest stage of their application, essentially this would be before they complete their questionnaire.²⁸⁰ The recommendations set out above are still legitimate guidance which, if implemented, could improve the current international protection system in Ireland.

²⁷⁵ Recast Directive (n.66).

²⁷⁶ Catherine Day Report (n.7), p.46.

²⁷⁷ Catherine Day Report (ibid), McMahon Report (n.248).

²⁷⁸ Caroline O’Connor (n.200), para 3.255.

²⁷⁹ McMahon Report (n.248), para 3.235 & 3.255; Catherine Day Report (n.7), pp.49 & 140.

²⁸⁰ McMahon Report (ibid), 3.255; Catherine Day Report (ibid), para 4.2.2.

The research provided in this Working Paper demonstrates the potential influence early legal advice and assistance or frontloading can have on the Irish international protection system. Frontloading these resources before the first instance decision facilitates the correct decision being made at the earliest stage of the application, consequently saving both appeal costs and the additional time spent on the case by all parties.²⁸¹ Ireland could begin the route to achieving this goal by opting into the EU asylum procedure recast directive, which provides additional safeguards and reinforces the provision of legal advice and assistance to support international protection applicants.

2. Improving the Provision of Legal Advice and Assistance

The provision of legal advice and assistance in Ireland can be significantly improved in several ways. We must recognise that LAB carries the majority of the responsibility to inform asylum seekers of their rights and appoint caseworkers or legal practitioners to their cases. LAB is undoubtedly overwhelmed, due to the lack of staffing and resources. However, there are two specific features drawn from Felinda Mottino, which could significantly improve the overall legal advice and assistance system in Ireland.²⁸² The first feature includes the process of further distributing information for asylum seekers. In Ireland, there are several non-governmental organisations (NGO) which cater for asylum seekers. They work tirelessly to disseminate information by way of videos, presentations, workshops in various languages. This could also be accomplished through other avenues such as local community centres, churches, and charities, where simple information can be given to applicants at a local level. The second feature consists of information booths and hotlines, something that is visual and available for asylum seekers in need of information or assistance.²⁸³ These hotlines can either provide information to those who need it or direct the individual to an organisation which could better assist with their query. The information booths would act in a similar manner but could be set up in hotspots such as the points of entry for asylum seekers i.e., Airports and ports. The new features should be maintained by legal practitioners and/or support staff such as caseworkers or paralegals with the relevant qualifications, and would advance the accessibility of information, legal advice and/ or assistance for international protection applicants.

3. Further Research

Given the constraints of a small-scale study such as this, it is suggested that more research should be conducted in this area of Irish asylum law. Additional studies in this area would benefit from an examination of cases under the present system in accordance with the IPA by contacting solicitors and practitioners in the field. Such investigations might include a more in-depth examination of the description or variety of legal assistance obtained in the first instance, as well as the inclusion of additional evidence following the original hearing.

Furthermore, the primary source for this Working Paper's literature research included non-governmental organisation reports along with international scholarly analysis in this field and in the criminal law sphere which highlights that this area of legal research would benefit from additional scholarly examination and academic discussion.

²⁸¹ Caroline O'Connor (n.200), para 3.256.

²⁸² Felinda Mottino, Memorandum to Advisory Groups Meeting Participants: 'Ideas for Improving Access to Legal Representation,' Vera Institute of Justice, New York (March 1999).

²⁸³ Ibid.

ANNEX I: TERMINOLOGY

The following terms used in this Working Paper are defined for reader reference:

- Asylum Seeker: A person who has applied for refugee status or subsidiary protection (or both) and is awaiting the decision of their application or appealing a negative judgment.²⁸⁴ (Also referred to as an ‘applicant’).
- Caseworkers: Support staff members of the Legal Aid Board.²⁸⁵ They are assigned to several international protection cases, to which they provide legal information to the international protection applicant and guide the applicant in completing the questionnaire.
- Frontloading: The provision of legal aid in the form of legal advice, assistance, and representation at an early stage in the process of applying for international protection.
- Legal Advice: Any oral or written advice given by a qualified legal professional (solicitor or barrister).²⁸⁶ In the asylum sphere, this involves legal advice on international, European, and domestic laws, as well as the person’s particular claim under the law.
- Legal Aid: Legal advice, assistance, and representation by a legal practitioner, funded by the State if the person in need cannot afford to pay for it themselves.²⁸⁷ It is usually, but not always, free. The person in receipt of Legal Aid may be required to contribute to costs. Legal aid may not be available in all areas of law affecting an individual.
- Legal Assistance: The support required to enable applicants to understand and exercise their rights.²⁸⁸ In the refugee setting this includes the guarantee that applications are completely and efficiently processed in the desired State. Beyond legal practitioners, caseworkers, advocates, and paralegals can fulfil this role.
- Legal Practitioners: Accredited, qualified, and practicing legal professionals with the title of Solicitor (where accredited by the Law Society of Ireland) or Barrister (where recognised by the King’s Inns) in Ireland.²⁸⁹ (Also referred to as a ‘legal professional’).
- Legal Representation: A licenced Lawyer or Barrister acting officially on behalf of another person in a legal situation, such as in court proceedings or in other legal matters.²⁹⁰
- Legal Representative: A legal practitioner who represents their client in a legal matter (such as an interview or court).

²⁸⁴ See International Protection Act 2015, s.2(1).

²⁸⁵ Civil Legal Aid Act 1995, s.11.

²⁸⁶ Civil Legal Aid Act 1995, s.25.

²⁸⁷ Civil Legal Aid Act 1995, s.27(1).

²⁸⁸ See *Ochre Ridge v Cork Bonded Warehouses* [2004] IEHC 160 (13 July 2004) para 3 (5).

²⁸⁹ Legal Service Regulation Act 2015, s.2(1); also see Legal Practitioners (Qualification) Act 1929, ss.3 & 4.

²⁹⁰ See IPA 2015, s.2(1)(a).

The difference between Legal Advice and Legal Assistance

The case of *Ochre Ridge v Cork Bonded Warehouses* provides a distinction between legal advice and legal assistance in Irish law.²⁹¹ Although this case relates to legal privilege in the criminal sphere, the terms defined in the judgement apply to refugee law.

Legal advice is the communication between a person and a legal professional with the primary goal of attaining legal advice from such legal professionals.²⁹² Advice does not include conveyancing paperwork, but rather correspondence related to a conveyance for the purpose of obtaining or providing legal advice.²⁹³

Whereas a legal professional's duty of care extends beyond the scope of instructions and compels them to examine the legal consequences of the facts presented to them, legal assistance may involve the giving of legal advice.²⁹⁴

Furthermore, legal assistance can be provided by support staff such as caseworkers or paralegals, whilst legal advice and legal representation should be supplied by a legal practitioner granting client's legal privilege.

The difference between a Caseworker and a Legal Practitioners

Legal practitioners are accredited qualified legal professionals (either Barristers or Solicitors), who can provide legal advice, assistance, and representation to clients.

The role of a caseworker is one of administrative support for legal practitioners. Legal experience nor legal knowledge is required to undertake this role in Ireland. As such caseworkers cannot provide legal advice or be a legal representative.

²⁹¹ *Ochre Ridge* (n.288).

²⁹² *Ibid* para. 3(1).

²⁹³ Also see *Three Rivers District Council v. Governor and Company of the Bank of England (No.5)* [2003] QB 1556.

²⁹⁴ *Ochre Ridge* (n.288) para. 3(5); also see Civil Legal Aid Act 1995, s.25.